



OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
IN COOPERATION WITH THE
INTERNATIONAL BAR ASSOCIATION



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**HUMAN RIGHTS IN THE
ADMINISTRATION OF JUSTICE:
A Manual on Human Rights
for Judges, Prosecutors and Lawyers**



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NOTE

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries.

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FOREWORD

by the
**Office of the United Nations High Commissioner
for Human Rights**

The way in which **justice** is administered in a society is one of the basic indicators of its well-being. As highlighted by the Universal Declaration of Human Rights, “...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”.¹ It is for national legal systems and the administration of justice to ensure that this goal is achieved.

Independent legal professions play a fundamental role in the protection of human rights. They are the guardians of international human rights law, ensuring that it is properly enforced within the judicial process and that individuals whose rights have been violated can find an effective remedy domestically. In order to discharge this responsibility, judges, prosecutors and lawyers need to have access to information on the human rights standards laid down in the main international legal instruments and to the related jurisprudence developed by universal and regional monitoring bodies.

For many years, the **Office of the United Nations High Commissioner for Human Rights** has been supporting projects aimed at promoting human rights among the professions responsible for the administration of justice, projects that have addressed judges, prosecutors and lawyers on all continents. In the framework of the United Nations Decade for Human Rights Education (1995-2004), and in partnership with professional associations, the Office has developed relevant methodological tools.

HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE, composed of a Manual and a Facilitator’s Guide, is the result of a joint endeavour with the **International Bar Association**, a key international legal organization with more than 180 member bar associations and law societies. Its objective is to provide a comprehensive core curriculum on international human rights standards for legal professionals.

Readers of the **Manual** are offered basic information on international human rights law and the jurisprudence of universal and regional bodies and national courts. Each module addresses a specific human rights area. In view of the nature of the legal professions, the Manual should have multiple applications: as training material for collective exercises, as a resource tool for carrying out individual studies, and as a reference source for the interpretation and application of the law.

The Manual is complemented by the **Facilitator’s Guide**, which aims at assisting training managers and resource persons engaged in organizing workshops or courses – from the planning stage to the stage of final evaluation. For each of the Manual’s modules, the Guide includes suggested training aids such as overheads, exercises, case studies and role plays. It is based on an **interactive training methodology** which encourages participants to play an active role, contributing their professional expertise to the joint study on how to apply international human rights standards effectively.

¹Universal Declaration of Human Rights, third preambular paragraph.

The Manual and the Guide should be used with a substantial degree of **flexibility**. While they target a specific audience, it may be necessary to make a selection of the most appropriate material. Presentations, examples, case studies and role plays may need to be tailored and customized to reflect relevant legal systems and address issues of particular interest. To facilitate the adaptation of the Manual and Guide to the needs of readers or course participants, both publications are also available in electronic format.

HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE has been developed for use in all kinds of courses and workshops involving the legal professions and not necessarily only in those organized by OHCHR or IBA. Its use is encouraged in the development of curricula, in pre-service training for future legal professionals and in the continuing education activities of professional associations.

All users are invited to comment on the material and suggest improvements. Feedback will be taken into account in future revisions of the Manual and Guide. Please mail your contribution to the following address:

Manual on Human Rights for Judges, Prosecutors and Lawyers
Office of the United Nations High Commissioner for Human Rights
Palais des Nations
1211 Geneva 10
Switzerland

OHCHR is hopeful that this material and other initiatives based on it will lead many individuals who work as judges, prosecutors and lawyers around the world to be agents of change and to contribute directly to the practical implementation of international human rights standards.

Geneva, September 2002

FOREWORD

by the
International Bar Association

During the past 50 years, the International Bar Association (IBA) has gained recognition as the global representative of both individual lawyers and the Bar Associations and Law Societies that oversee the profession. Its 180 Member Organisations cover all continents and include the American Bar Association, the German Federal Bar, the Japan Federation of Bar Associations, the Law Society of Zimbabwe and the Mexican Bar Association.

The IBA believes in the fundamental right of the world's citizens to have disputes heard and determined by an independent judiciary, and for judges and lawyers to practise freely and without interference.

In 1995 the IBA established the Human Rights Institute (HRI) under the Honorary Presidency of Nelson Mandela to further this work. The Human Rights Institute welcomes members from across the spectrum of legal practice; indeed the vast majority of the most active participants do not practise human rights law in their daily lives but, through membership of the HRI, demonstrate their commitment to supporting the freedom of the legal profession. It is to strengthen this commitment that the present Manual and Facilitator's Guide have been conceived, composed and compiled.

In many countries even traditional legal training tends to ignore the comparative and international dimension, with the result that lawyers and judges often have not been introduced to the remarkable and comprehensive developments of statements of international human rights norms and the decisions and views of the international monitoring bodies and regional courts. The basic problem about international human rights law is not so much its applicability or inapplicability in national systems – the basic problem is how little is known around the world of its provisions!

Yet members of the legal profession and the judiciary have an unstated moral obligation to assist in the development of a civil society based upon the rule of law, and, at a more practical level, lawyers and judges have a professional responsibility to maintain their educational and practical proficiency through regular professional programmes.

The international and regional human rights instruments and their developing jurisprudence reflect international law and principles and are of vital importance as aids to interpretation, and in helping judges to make choices between competing interests.

The Manual seeks to assist practitioners in ensuring they are familiar with human rights jurisprudence and statements, and their practical application. As noted by Justice Bhagwati, the former Chief Justice of India, international human rights norms would remain sterile unless lawyers and judges poured life into them, and infused them with vigour and strength so that they may become vibrant and meaningful for the whole of humanity and their universality a living reality.

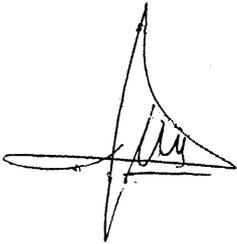
The International Bar Association was pleased to provide practical support to the Office of the High Commissioner for Human Rights by jointly recruiting and financing a Consultant to draft the Manual and Guide and by creating an international committee of distinguished jurists to review and comment on the text.

The Manual will enable judges and lawyers to acquaint themselves with, and deepen their knowledge of, international and regional human rights law and its practical use. The comprehensive Manual and accompanying Facilitator's Guide constitute a detailed legal source of use to lawyers, judges and prosecutors in their everyday work and a structured training programme which can easily be used in all jurisdictions.

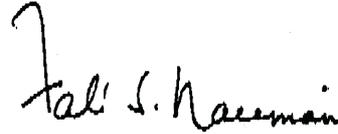
The Human Rights Institute's objectives are to promote and protect the rule of law and human rights. We pursue these aims through trial observations, interventions and fact-finding investigations of legal systems by legal experts. Using our rich resource of experienced lawyers worldwide, we also offer educational help and long-term practical assistance to build or reinforce the structures which support the rule of law.

The publication of the present Manual and Guide will enable the Human Rights Institute to continue its training programme with renewed vigour. We aim to work closely with Bar Associations and Law Societies to introduce them to lawyers, judges and prosecutors worldwide.

We should like to extend our sincere thanks to the Office of the High Commissioner for Human Rights for its unfailing support; to Anna-Lena Svensson-McCarthy for her hard work and professionalism in drafting the Manual and Guide; to members of the IBA's Review Committee for their invaluable input; and finally to Lord Goldsmith QC, Attorney-General for the United Kingdom and former Co-Chair of the IBA's Human Rights Institute, who has encouraged the development of this Manual from its inception.



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August 2002

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ABBREVIATIONS

<i>ACHPR</i>	African Commission on Human and Peoples' Rights
<i>ECOSOC</i>	United Nations Economic and Social Council
<i>ETS</i>	European Treaty Series
<i>Eur. Comm. HR</i>	European Commission of Human Rights
<i>Eur. Court HR</i>	European Court of Human Rights
<i>GAOR</i>	United Nations General Assembly Official Records
<i>I-A Court HR</i>	Inter-American Court of Human Rights
<i>I-A Comm. HR</i>	Inter-American Commission on Human Rights
<i>IBA</i>	International Bar Association
<i>ICJ</i>	International Court of Justice
<i>OAS</i>	Organization of American States
<i>OAU</i>	Organisation of African Unity
<i>UN</i>	United Nations
<i>UNICEF</i>	United Nations Children's Fund

ADDENDUM

Major Recent Developments (2002 – March 2003)

The following information should be added to the chapters indicated. Further updates of relevant developments will be posted on the OHCHR web site (www.ohchr.org).

Chapter 2: *The Major Universal Human Rights Instruments and the Mechanisms for Their Implementation*

The International Criminal Court (pp. 49-50): The International Criminal Court was inaugurated on 11 March 2003 and has its seat in The Hague, the Netherlands. As of 10 March 2003, 89 States had ratified the Court's Statute. For more information about the Court, see www.icc-cpi.int/.

The Convention on the Rights of the Child, 1989, and its two Optional Protocols, 2000 (p. 43): In two meetings held on 10 February 2003, States parties to the Convention on the Rights of the Child expanded the membership of the Committee that monitors compliance with the Convention by electing 13 experts, five to replace members whose terms were expiring and eight new ones, thereby bringing the total number of members to 18. Originally, the Committee on the Rights of the Child had only ten members (art. 43(2) of the Convention).

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (p. 54): On 18 December 2002, the United Nations General Assembly adopted the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The objective of this Optional Protocol "is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment" (art. 1).

Chapter 3: *The Major Regional Human Rights Instruments and the Mechanisms for Their Implementation*

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987 (p. 107): With the entry into force on 1 March 2002 of Protocol No. 1 to this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State of the organization to accede to the Convention. No geographical limits on this power of invitation are foreseen in the Protocol (see www.cpt.coe.int/en/about.htm).

Chapter 4: *Independence and Impartiality of Judges, Prosecutors and Lawyers*

International Law and the Independence of Prosecutors (p. 147): With regard more particularly to prosecutors in Europe, see also Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe to member States on the role of public prosecution in the criminal justice system. This recommendation can be found at <http://cm.coe.int/ta/rec/2000/2000r19.htm>.

Chapter 8: *International Legal Standards for the Protection of Persons Deprived of Their Liberty*

Personal hygiene, food, health and medical services (pp. 345-348): The European Court of Human Rights has rendered an important judgment in a case regarding the continued detention of a prisoner undergoing treatment for cancer. The Court was of the view that the national authorities had not ensured that the applicant concerned was given health care enabling him to avoid treatment, contrary to article 3 of the European Convention on Human Rights. His continued detention therefore constituted a violation of his right to dignity and also caused him suffering in excess of that inevitably associated with a custodial sentence and treatment for cancer (see *Eur. Court HR, Case of Mouïsel v. France, judgment of 14 November 2002*, para. 48).

The case of *Papon v. France* concerned the detention of a man convicted when he was in his late eighties of aiding and abetting crimes against humanity and sentenced to ten years' imprisonment by a French court. In his application to the European Court of Human Rights, the applicant argued that it was contrary to article 3 of the European Convention on Human Rights to keep a man of over 90 years of age in prison and that the conditions of detention in the prison where he was held were not compatible with extreme old age. The Court rejected the complaint as being manifestly ill-founded (see *Eur. Court HR, Case of Papon v. France, decision on the admissibility of 7 June 2001*).

Chapter 12: *Some Other Key Rights: Freedom of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly*

Freedom of association and political parties (p. 614 at pp. 620-626): With regard to the *Refah Partisi (Prosperity Party) and Others v. Turkey*, an appeal was lodged against the judgment given by a chamber of the European Court of Human Rights on 31 July 2001. In its judgment of 13 February 2003, the Grand Chamber of the Court concluded *unanimously* that article 11 of the European Convention on Human Rights had not been violated in this case (see *Eur. Court HR, Case of Refah Partisi (The Welfare Party) and Others v. Turkey, judgment of 13 February 2003*; the judgment can be found on the Court's web site: <http://hudoc.echr.coe.int>).

.....Chapter 1
**INTERNATIONAL
HUMAN RIGHTS LAW AND
THE ROLE OF THE LEGAL
PROFESSIONS: A GENERAL
INTRODUCTION**

Learning Objectives

- *To ensure that participants acquire a basic working knowledge of the origin, purpose and scope of international human rights law;*
- *To familiarize participants with the application of international human rights law at the domestic level and to begin to make them aware of the important role played by the legal professions in this respect.*

Questions

- *Why did you want to join the course?*
- *What is a human right?*
- *Why are human rights important in general?*
- *Why are human rights important in the country where you are professionally active?*
- *How do you, as judges, prosecutors and/or lawyers, see your role as promoters and protectors of human rights in the exercise of your professional duties?*
- *What specific problems, if any, do you face with regard to the protection of human rights in the country/countries where you work?*

1. Introduction

In recent decades, international human rights law has had an ever-growing impact on domestic legal systems throughout the world, and thereby also on the daily work of domestic judges, prosecutors and lawyers. This evolving legal situation, the true dimensions of which could hardly have been foreseen half a century ago, requires each State concerned, and also the relevant legal professions, carefully to consider ways in which effective implementation of the State's legal human rights obligations can best be secured. This may in many instances constitute a challenge to legal practitioners, owing to the conflicting requirements of different laws, lack of access to information, and the need for further training.

The objective of the present Manual is therefore to convey a basic knowledge of, and skills in, the implementation of international human rights law to judges, prosecutors and lawyers – legal professions without which there can be no truly efficient protection of the rights of the individual at the domestic level. To this end, the present chapter will provide a general introductory survey of the basic notions of international human rights law, whilst the remaining fifteen chapters will contain more detailed information and analyses of human rights standards that are of particular relevance to the administration of justice.

2. Origin, Meaning and Scope of International Human Rights Law

2.1 The Charter of the United Nations and the Universal Declaration of Human Rights

Humanity's yearning for respect, tolerance and equality goes a long way back in history, but the curious thing to note is that, although our societies have in many respects made great strides in the technological, political, social and economic fields, contemporary grievances remain very much the same as they were hundreds, even thousands of years ago.

As to the protection of the rights and freedoms of the individual at the *international* level, work began in the nineteenth century to outlaw slavery and to improve the situation of the sick and wounded in times of war.¹ At the end of the First World War, several treaties were concluded with the allied or newly created States for the purpose of providing special protection for minorities.² At about the same time, in 1919, the International Labour Organization (ILO) was founded for the purpose of improving the conditions of workers. Although the initial motivation of the ILO was humanitarian, there were also, inter alia, political reasons for its creation, it being feared

¹ A.H. Robertson, *Human Rights in the World* (Manchester, Manchester University Press, 1972), pp. 15-20.

² *Ibid.*, pp. 20-22. On the history of human rights, see resource list in Handout No. 1 to Chapter 2 of the Manual.

that, unless the conditions of the ever-increasing number of workers were improved, the workers would create social unrest, even revolution, thereby also imperilling the peace and harmony of the world.³

Following the atrocities committed during the Second World War, the acute need to maintain peace and justice for humankind precipitated a search for ways of strengthening international cooperation, including cooperation aimed both at protecting the human person against the arbitrary exercise of State power and at improving standards of living. The foundations of a new international legal order based on certain fundamental purposes and principles were thus laid in San Francisco on 26 June 1945 with the adoption of the Charter of the United Nations. In the Preamble to the Charter, faith is first reaffirmed “in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”. Secondly, the Preamble also, *inter alia*, expresses the determination “to promote social progress and better standards of life in larger freedom”. Thirdly, one of the four purposes of the United Nations is, according to Article 1(3) of the Charter,

“2. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

Other Charter provisions containing references to human rights are: Articles 13(1)(b), 55(c), 62(2), 68, and 76(c). It is of particular significance to point out that, according to Articles 56 and 55(c) read in conjunction, United Nations Member States have a legal obligation “to take joint and separate action in co-operation with the Organization for the achievement of” “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”. This important legal duty conditions Member States’ participation throughout the United Nations human rights programme.

With the adoption by the United Nations General Assembly of the Universal Declaration of Human Rights on 10 December 1948, the rather terse references to “human rights and fundamental freedoms” in the Charter acquired an authoritative interpretation. The Universal Declaration recognizes civil, cultural, economic, political and social rights, and, although it is not a legally binding document *per se*, since it was adopted by a resolution of the General Assembly, the principles contained therein are now considered to be legally binding on States either as customary international law, general principles of law, or as fundamental principles of humanity. In its dictum in the case concerning the hostages in Tehran, the International Court of Justice clearly invoked “the fundamental principles enunciated in the ... Declaration” as being legally binding on Iran in particular with regard to the wrongful deprivation of liberty and the imposition of “physical constraint in conditions of hardship”.⁴

³For the history of the ILO, see the ILO web site: www.ilo.org/public/english/about/history.htm.

⁴See *United States Diplomatic and Consular Staff in Tebran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, p. 42, para. 91.

The devastating experiences of the First and Second World Wars underscored the imperative need both to protect the human person against the arbitrary exercise of State power and to promote social progress and better living standards in larger freedom.

2.2 The ethical dimension of human rights

The very specificity of the concept of “human rights” is that they belong to the individual in his or her quality as a human being, who cannot be deprived of their *substance* in any circumstances; these rights are thus intrinsic to the human condition. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights all give expression to this fundamental ethical basis in their first preambular paragraphs by recognizing “the inherent dignity and ... the equal and inalienable rights of all members of the human family”. Here, then, is an expression of the principle of *universality* of rights, including the right to equal protection before the law and by the law, which, as will be seen in Chapter 13, is a fundamental principle conditioning the entire field of international human rights law.

As to the regional level, the second preambular paragraph to the American Convention on Human Rights also expressly recognizes “that the essential rights of man are not derived from one’s being a national of a certain State, but are based upon attributes of the human personality”. As stated by the Inter-American Court of Human Rights in its Advisory Opinion on *Habeas Corpus in Emergency Situations*, the rights protected by the Convention cannot, per se, be suspended even in emergency situations, because they are “inherent to man”.⁵ It follows, in the view of the Court, that “what may only be suspended or limited” under the Convention is the “full and effective exercise” of the rights contained therein.⁶ Finally, the African Charter on Human and Peoples’ Rights, in its fifth preambular paragraph, also recognizes “that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection”.

Consequently, human rights are owed by States to all individuals within their jurisdiction and in some situations also to groups of individuals. The principle of *universal and inalienable rights of all human beings* is thus solidly anchored in international human rights law.

*Human rights are inherent in all members of the human family.
Human rights are thus **universal** and **inalienable** rights of all
human beings.*

⁵See I-A Court HR, *Habeas Corpus in Emergency Situations* (arts. 27(2), 25(1) and 7(6), Advisory Opinion OC-8/87 of January 30, 1987, Series A, No. 8, para. 18 at p. 37.

⁶*Ibid.*, loc. cit.

*Human beings cannot be deprived of the **substance** of their rights (**inalienability**). Only the **exercise** of some of these rights can be limited in certain circumstances.*

*The fact that human rights originate in the **unique nature** of the human being means that they should be subjected to effective legal protection at the national and international levels.*

2.3 Human rights and their impact on national and international peace, security and development

As already explained, it was the tragedies of the two World Wars that compelled the international community to create a world organization with the purpose of furthering peace and justice, inter alia by encouraging the promotion and protection of human rights and fundamental freedoms. The all-too-evident lesson to be drawn from the Second World War was that, when a State pursues a deliberate policy of denying persons within its territory their fundamental rights, not only is the internal security of that State in jeopardy, but in serious situations there is a spillover effect that imperils the peace and security of other States as well. This hard-won lesson has been confirmed on numerous occasions since in every part of the world. Effective protection of human rights promotes peace and stability at the national level not only by allowing people to enjoy their basic rights and freedoms, but also by providing a basic democratic, cultural, economic, political and social framework within which conflicts can be peacefully resolved. Effective protection of human rights is consequently also an essential precondition for peace and justice at the international level, since it has inbuilt safeguards that offer the population ways of easing social tension at the domestic level before it reaches such proportions as to create a threat on a wider scale.

As a reading of, in particular, Article 1 of the Charter of the United Nations and the first preambular paragraphs of the Universal Declaration and the two International Covenants makes clear, the drafters were well aware of the essential fact that effective human rights protection at the municipal level is the foundation of justice, peace and social and economic development throughout the world.

More recently, the link between, inter alia, the rule of law, effective human rights protection and economic progress has been emphasized by the Secretary-General of the United Nations in his *Millennium Report*, where he emphasized that

“84. It is now widely accepted that economic success depends in considerable measure on the quality of governance a country enjoys. Good governance comprises the rule of law, effective State institutions, transparency and accountability in the management of public affairs, respect for human rights, and the participation of all citizens in the decisions that affect their lives. While there may be debates about the most appropriate forms they should take, there can be no disputing the importance of these principles”.⁷

⁷UN doc. A/54/2000, *We the Peoples: the Role of the United Nations in the Twenty-First Century, Report of the Secretary-General*, para. 84.

Effective protection of human rights and fundamental freedoms is conducive to both domestic and international peace and security.

Effective protection of human rights provides a basic democratic culture enabling conflicts to be resolved peacefully.

Economic progress depends to a large extent on good governance and effective protection of human rights.

2.4 The sources of law

The third preambular paragraph of the Universal Declaration of Human Rights states that

“... it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the *rule of law*” (emphasis added).

This means that, in order to enable the human person fully to enjoy his or her rights, *these rights must be effectively protected by domestic legal systems*. The principle of the rule of law can thus also be described as an overarching principle in the field of human rights protection because, where it does not exist, respect for human rights becomes illusory. It is interesting in this respect to note that, according to article 3 of the Statute of the Council of Europe, “every Member State ... must accept the principle of the rule of law”. This fundamental principle is thus legally binding on the 43 Member States of the organization, a fact that has also influenced the case-law of the European Court of Human Rights.⁸

Consequently, judges, prosecutors and lawyers have a crucial role to fulfil in ensuring that human rights are effectively implemented at the domestic level. This responsibility requires the members of these legal professions to familiarize themselves adequately with both national and international human rights law. Whilst their access to domestic legal sources should pose no major problem, the situation is more complex at the international level, where there are several legal sources and a case-law rich in many respects.

With some modification, the next section will follow the hierarchy of legal sources as they appear in article 38 of the Statute of the International Court of Justice. Although one might disagree with the classification of sources in this provision, it serves as a useful starting point. According to article 38(1) of the Statute, the sources are:

⁸*Eur. Court HR, Golder case, Judgment of 21 February 1975, Series A, No. 18*, para. 34 at p. 17. The Court stated that one “reason why the signatory Governments decided to ‘take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration’ was their profound belief in the rule of law”; it therefore seemed “both natural and in conformity with the principle of good faith ... to bear in mind this widely proclaimed consideration when interpreting the terms of” article 6(1) of the European Convention “according to their context and in the light of the object and purpose of the Convention”. Referring moreover to the references to the rule of law contained in the Statute of the Council of Europe, the Court concluded that “in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts”. The Council of Europe had 43 Member States as of 22 April 2002.

- ❖ “international conventions”;
- ❖ “international custom, as evidence of a general practice accepted as law”;
- ❖ “general principles of law recognized by” the community of nations;⁹
- ❖ “judicial decisions and the teachings of the most highly qualified publicists ... as subsidiary means for the determination of rules of law”.

Without seeking to be exhaustive, the next section will set forth the essential characteristics of the main sources of international human rights law. However, it should be noted at the outset that in international human rights law, judicial decisions, and also quasi-judicial decisions and general comments adopted by monitoring organs, take on special relevance in understanding the extent of the legal obligations of States.

Human rights must be effectively protected by domestic legal systems. Judges, prosecutors and lawyers have a crucial role to fulfil in ensuring that human rights are effectively protected at the domestic level.

*The principal sources of international law are **international conventions, international customary law, and general principles of law.***

2.4.1 International treaties

In the human rights field, the most important tool for judges, prosecutors and lawyers to consult, apart from existing domestic law, is no doubt the *treaty obligations* incumbent on the State within whose jurisdiction they are working. A “treaty” is generally a *legally binding, written agreement concluded between States*,¹⁰ but can also be an agreement between, for instance, the United Nations and a State for specific purposes. Treaties may go by different names, such as *convention, covenant, protocol, or pact*, but the legal effects thereof are the same. At the international level, a State establishes its consent to be bound by a treaty principally through *ratification, acceptance, approval, or accession*;¹¹ only exceptionally is the consent to be bound expressed by *signature*.¹² However, the function of signature of a treaty is often that of authenticating the text, and it creates an obligation on the State concerned “to refrain from acts which would defeat the object and purpose” of the treaty, at least until the moment it has “made its intention clear not to become a party” thereto.¹³

Once a treaty has entered into force and is binding upon the States parties, these must perform the treaty obligations “in good faith” (*pacta sunt servanda*).¹⁴ This implies, inter alia, that a State cannot avoid responsibility under international law by invoking the provisions of its internal laws to justify its failure to perform its international legal obligations. Moreover, in international human rights law, State

⁹ Article 38(1)(c) archaically refers to “civilized nations”.

¹⁰ Article 2(1)(a) of the Vienna Convention on the Law of Treaties.

¹¹ Ibid., article 2(1)(b).

¹² Ibid., article 12.

¹³ Ibid., article 18(a).

¹⁴ Ibid., article 26.

responsibility is **strict** in that States are responsible for violations of their treaty obligations ***even where they were not intentional***.

Human rights treaties are law-making treaties of an objective nature in that they create general norms that are the same for all States parties. These norms have to be applied by a State party irrespective of the state of implementation by other States parties. The traditional principle of *reciprocity* does not, in other words, apply to human rights treaties.¹⁵

The fact that human rights treaties have been concluded for the purpose of ensuring effective protection of the rights of the individual takes on particular importance in the course of the interpretative process. In explaining the meaning of the provisions of a human rights treaty, it is therefore essential for judges to adopt a ***teleological and holistic interpretative approach*** by searching for an interpretation that respects the rights and interests of the individual and is also logical in the context of the treaty as a whole.

Examples of law-making treaties in the human rights field are the two International Covenants on Civil and Political and on Economic, Social and Cultural Rights, which will be considered in further detail below. Suffice it to mention in this regard that the Committees created under the terms of each treaty to monitor its implementation have by now adopted many views and comments which provide valuable interpretative guidance to both national and international lawyers.

Obligations incurred by States under international treaties must be performed in good faith.

*In international human rights law State responsibility is **strict** in that States are responsible for violations of their treaty obligations even where they were not intentional.*

A human rights treaty must be interpreted on the basis of a teleological and holistic approach by searching for an interpretation that respects the rights and interests of the individual and is also logical in the context of the treaty as a whole.

2.4.2 International customary law

To follow the hierarchy of legal sources in article 38(1) of the Statute of the International Court of Justice, judges can in the second place apply “international custom, as evidence of a general practice accepted as law”. International customary legal obligations binding upon States are thus created when there is evidence of both

- ❖ acts amounting to a “settled practice” of States; and
- ❖ a “belief that this practice is rendered obligatory by the existence of a rule of law requiring it” (*opinio juris*).¹⁶

¹⁵*Eur. Comm. HR, Application No. 788/60, Austria v. Italy, decision of 11 January 1961 on the admissibility, 4 Yearbook of the European Convention on Human Rights, p. 140.*

¹⁶*North Sea Continental Shelf cases, Judgment, ICJ Reports 1969, p. 44, para. 77.*

The judge will thus have to assess the existence of one *objective* element consisting of the general practice, and one *subjective* element, namely, that there is a belief among States as to the legally binding nature of this practice.¹⁷

With regard to the question of practice, it follows from the ruling of the International Court of Justice in the *North Sea Continental Shelf* cases that, at least with regard to “the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule”, the passage of time can be relatively short, although

“an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved”.¹⁸

In the subsequent case of *Nicaragua v. the United States of America*, the International Court of Justice appears however to have somewhat softened this rather strict interpretation of the objective element of State practice, whilst at the same time placing a correspondingly greater emphasis on the *opinio juris* in the creation of custom. In its reasoning, which related to the use of force, the Court held, in particular:

“186. It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other’s internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule”.¹⁹

The question now arises as to what legal principles for the protection of the human person might have been considered to form part of customary international law by the International Court of Justice.

In its Advisory Opinion of 1951 on *Reservations to the Convention on Genocide*, the Court importantly held that “the principles underlying the Convention are principles which are recognized ... as binding on States, even without any conventional obligation”.²⁰ Furthermore, it followed from the Preamble to the Convention that it

¹⁷Ibid., loc. cit.

¹⁸Ibid., p. 43, para. 74.

¹⁹*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986*, p. 98, para. 186.

²⁰*Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports 1951*, p. 23.

was of “universal character” both with regard to “the condemnation of genocide and ... the co-operation required ‘in order to liberate mankind from such an odious scourge’”.²¹ Finally, the Court noted that the Convention had been approved by a resolution which was unanimously adopted by the States.²² It is thus beyond doubt that in 1951 the *crime of genocide* was already part of customary international law, applicable to all States.

Later, in the *Barcelona Traction* case, the International Court of Justice significantly made “an essential distinction” 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”.²³ It added that by “their very nature the former are the concern of all States”, and, 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*”.²⁴ In the view of the Court, 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”.²⁵ It added that whilst some “of the corresponding rights of protection have entered into the body of general international law ... ; others are conferred by international instruments of a universal or quasi-universal character”.²⁶

Finally, and as already noted above, in its *dictum* in the hostages in Tehran case, the Court stated that:

“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”.²⁷

It is thus beyond doubt that basic human rights obligations form part of customary international law. Whilst the International Court of Justice has expressly mentioned the crimes of genocide and aggression, as well as the prohibition of racial discrimination, slavery, arbitrary detention and physical hardship as forming part of a universally binding *corpus* of law, it has not limited the scope of the law to these elements.

❖ **General Assembly resolutions:** It may not be an easy task to identify international custom, but resolutions adopted by the United Nations General Assembly can in certain circumstances be regarded as having legal value, albeit not legally binding per se. This is, for instance, the case with the Universal Declaration of Human Rights. Thus, although not a source of law in the strict sense, they can provide *evidence* of customary law. However, this will to a large extent depend on their contents, such as

²¹Ibid., loc. cit.

²²Ibid.

²³*Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970*, p. 32, para. 33.

²⁴Ibid., loc. cit.

²⁵Ibid., p. 32, para. 34.

²⁶Ibid., loc. cit.

²⁷*ICJ Reports 1980*, p. 42, para. 91.

the degree of precision of the norms and undertakings defined therein, and the means foreseen for the control of their application; it will also depend on the number of countries having voted in favour thereof, and the circumstances of their adoption.²⁸ A particularly relevant question in this respect would be whether the resolution concerned has been adopted in isolation or whether it forms part of a series of resolutions on the same subject with a consistent and universal content.

- ❖ **Peremptory norms (*jus cogens*):** It should finally be noted that some legal norms, such as the prohibition of slavery, may be considered to be so fundamental that they are called *peremptory norms* of international law. According to article 53 of the Vienna Convention on the Law of Treaties, a treaty is simply “void if, at the time of its conclusion, it conflicts with a peremptory norm of international law”. According to the same article, such a norm is described as “a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. However, whenever the notion of peremptory norm is being discussed, disputes arise as to its exact contents, and consequently it will not be further dealt with in this Manual.

2.4.3 General principles of law recognized by the community of nations

This third source of law cited by the Statute of the International Court of Justice helps ensure that, in cases where international treaties and customary law might provide an insufficient basis for the Court to take a decision, it will be able to draw on other resources.

A general principle of law, as a source of international human rights law, is a legal proposition so fundamental that it can be found in all major legal systems throughout the world. If there is evidence that, in their domestic law, States adhere to a particular legal principle which provides for a human right or which is essential to the protection thereof, then this illustrates the existence of a *legally binding principle* under international human rights law. Judges and lawyers can thus look to other legal systems to determine whether a particular human rights principle is so often accepted that it can be considered to have become a general principle of international law. Domestic law analogies have thus, for instance, been used in the field of principles governing the judicial process, such as the question of evidence.²⁹

2.4.4 Subsidiary means for the determination of rules of law

As subsidiary means for the determination of rules of law, article 38 of the Statute mentions “judicial decisions and the teachings of the most highly qualified publicists”. As previously mentioned, in the human rights field, judicial decisions are particularly important for a full understanding of the law, and the wealth of international case-law that now exists in this field must be regarded as authoritative evidence of the state of the law. However, neither the International Court of Justice nor

²⁸For some of these elements, see e.g. *Les résolutions dans la formation du droit international du développement*, Colloque des 20 et 21 novembre 1970, L’Institut universitaire de hautes études internationales, Genève, 1971 (Études et travaux, No. 13), pp. 9, 30-31 (intervention by Professor Virally).

²⁹Ian Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press, 1979), 3rd edn., 1979, p. 18.

the international monitoring organs in the human rights field are obliged to follow previous judicial decisions.³⁰ Although this is usually done, it is particularly important for the monitoring organs in the human rights field to retain the flexibility required to adjust earlier decisions to ever-changing social needs, which, at the international level, cannot easily be met through legislation.³¹ Suffice it to add in this context that the reference to “judicial decisions” can also mean judicial decisions taken by domestic courts, and that the higher the court, the greater weight the decision will have. However, when international monitoring organs interpret human rights law, they are likely to do so independently of domestic laws.

As to “the teachings of the most highly qualified publicists”, it must be remembered that article 38 was drafted at a time when international jurisprudence on human rights law was non-existent. Whilst the interpretation and application of this law must principally be based on the legal texts and relevant case-law, writings of “the most highly qualified publicists” can of course in some situations contribute to an improved understanding of the law and its practical implementation. Yet it is advisable to exercise considerable care before relying on legal articles and principles and comments adopted by private bodies outside the framework of the officially established treaty organs, since they may not in all respects correctly reflect the status of the law to be interpreted and applied.

2.5 International human rights law and international humanitarian law: common concerns and basic differences

Although this Manual is aimed at conveying knowledge and skills in human rights law, rather than in international humanitarian law, it is important to say a few words about the relationship between these two closely linked fields of law.

Whilst both human rights law and international humanitarian law are aimed at protecting the individual, international human rights law provides *non-discriminatory treatment to everybody at all times, whether in peacetime or in times of war or other upheaval*. International humanitarian law, on the other hand, is aimed at ensuring a minimum of protection to victims of armed conflicts, such as the sick, injured, shipwrecked and prisoners of war, *by outlawing excessive human suffering and material destruction in the light of military necessity*.³² Although the 1949 Geneva Conventions and the two Protocols Additional thereto adopted in 1977 guarantee certain fundamental rights to the individual in the specifically defined situations of international and internal armed conflicts, neither the *personal*, *temporal* nor *material* fields of applicability of international humanitarian law are as wide as

³⁰As to the International Court of Justice, see article 59 of the Statute.

³¹See e.g. the case in which the European Commission of Human Rights reversed its own earlier decision according to which a legal person, such as a church, could not bring a case under article 9(1) of the European Convention on Human Rights claiming a violation of “the right to freedom of thought, conscience and religion”, *Eur. Comm. HR, Application No. 7805/77, X. and Church of Scientology v. Sweden, decision of 5 May 1979 on the admissibility of the application*, 16 DR, p. 70.

³²*Seguridad del Estado, Derecho Humanitario y Derechos Humanos, Informe Final*, San José, Costa Rica, Comité Internacional de la Cruz Roja/Instituto Interamericano de Derechos Humanos, 1984, p. 7.

those afforded by international human rights law.³³ In that sense, humanitarian law is also less egalitarian in nature, although the principle of non-discrimination is guaranteed with regard to the enjoyment of the rights afforded by this law.³⁴

What it is of primordial importance to stress at this stage is that, in international and non-international armed conflicts, international human rights law and humanitarian law will apply *simultaneously*. As to the modifications to the implementation of human rights guarantees that might be authorized in what is generally called *public emergencies threatening the life of the nation*, these will be briefly referred to in section 2.8 below and in more detail in Chapter 16.

International human rights law is applicable at all times, that is, both in times of peace and in times of turmoil, including armed conflicts, whether of an internal or international character.

*This means that there will be situations when international human rights law and international humanitarian law will be applicable **simultaneously**.*

2.6 Reservations and interpretative declarations to international human rights treaties

In assessing the exact extent of a given State's legal obligations under a human rights treaty, it is necessary to ascertain whether the State has made a *reservation*, or, possibly, an *interpretative declaration* at the time of ratification or accession. The major human rights treaties dealt with in this Manual allow for reservations to be made, although they have somewhat different ways of regulating the subject. In deciding whether a State party has actually made a true reservation, rather than a mere declaration as to its own understanding of the interpretation of a provision or a statement of policy, the Human Rights Committee set up to monitor the implementation of the International Covenant on Civil and Political Rights has stated, in its General Comment No. 24, that it will have regard "to the *intention* of the State, rather than the form of the instrument".³⁵ Whilst this Covenant contains no specific article regulating the question of reservations, the Human Rights Committee has stated that the "absence of a prohibition on reservations does not mean that any reservation is permitted", but that the matter "is governed by international law".³⁶ Basing itself on article 19(3) of the Vienna Convention on the Law of Treaties, the Committee stated

³³J. Patrnoć and B. Jakovljević, *International Humanitarian Law in the Contemporary World*, Sanremo, Italy, International Institute of Humanitarian Law (Collection of Publications 10), 1991, p. 28.

³⁴See e.g. article 3 common to the Four Geneva Conventions of 12 August 1949; article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); and article 2(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

³⁵See General Comment No. 24, in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (hereinafter referred to as *United Nations Compilation of General Comments*), p. 150, para. 3; emphasis added.

³⁶*Ibid.*, p. 151, para. 6.

that “the matter of interpretation and acceptability of reservations” is governed by the “object and purpose test”.³⁷ This means, for instance, that reservations “must be specific and transparent, so that the Committee, those under the jurisdiction of the reserving State and other States parties may be clear as to what obligations of human rights compliance have or have not been undertaken”; similarly a reservation must “not be general, but must refer to a particular provision of the Covenant and indicate in precise terms its scope in relation thereto”.³⁸

The American Convention on Human Rights expressly stipulates in its article 75, that it “shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties”. In its Advisory Opinion on *The Effect of Reservations*, the Inter-American Court of Human Rights stated that article 75 “makes sense” only if understood as enabling “States to make whatever reservations they deem appropriate”, provided that they “are not incompatible with the object and purpose of the treaty”.³⁹ In its Advisory Opinion on *Restrictions to the Death Penalty* it further noted with regard to the rights that cannot be suspended in any circumstances under article 27(2) of the Convention that it “would follow therefrom that a reservation which was designed to enable a State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it”.⁴⁰ The Court accepted, however, that the “situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose”.⁴¹

Like the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples’ Rights is silent on the question of reservations. However, article 64 of the European Convention on Human Rights expressly outlaws reservations of “a general character”, whilst permitting reservations “in respect of any particular provision of the Convention to the extent that any law” in force in the territory of the State at the time of signature or ratification “is not in conformity with the provision” concerned.

In interpreting and applying international treaties, domestic judges, prosecutors and lawyers may thus also have to consider the relevant State’s legal obligations in the light of reservations or interpretative declarations.

The scope of a State’s legal obligations under an international human rights treaty may have to be considered in the light of any existing reservations or interpretative declarations.

³⁷Ibid., loc. cit.

³⁸Ibid., p. 155, para. 19.

³⁹I-A Court HR, *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82 of September 24, 1982, Series A, No.2, p. 18, para. 35.

⁴⁰I-A Court HR, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83 of September 8, 1983, Series A, No. 3, p. 83, para. 61.

⁴¹Ibid., at p. 84.

Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, reservations must be compatible with the object and purpose of the treaty.

The European Convention on Human Rights forbids reservations of a general character. Reservations must relate to a specific provision of the Convention.

2.7 Limitations on the exercise of rights

The *exercise* – albeit not the substance per se – of certain rights, such as the right to freedom of expression, the right to freedom of association and assembly, the right to freedom of movement and the right to respect for one’s private and family life and correspondence, is generally accompanied by certain limitations that can be imposed, for instance, in order to protect the rights and freedoms of others, national security, and public health or morals.⁴² These limitations are the result of carefully weighed interests. What they show is the balance struck between, on the one hand, *individuals’ interest* in maximizing the enjoyment of the right that belongs to them, and, on the other hand, the interest of society in general, that is, *the general interest*, in imposing certain restrictions on the exercise of this right, provided that they are taken *in accordance with the law* and *are necessary in a democratic society* for certain *specific legitimate purposes*. In interpreting and applying these limitations in any given case, it will therefore be necessary to make a careful examination of the *proportionality of the restrictive measure or measures concerned both in general and as applied in the individual case*. Chapter 12 of this Manual provides numerous examples of how these limitations have been applied in specific cases.

Limitations on the exercise of human rights are the result of a careful balance between the individual’s interest and the general interest, and must, in order to be lawful:

- *be defined by law;*
- *be imposed for one or more specific legitimate purposes;*
- *be necessary for one or more of these purposes in a democratic society (proportionality).*

In order to be necessary the limitation, both in general and as applied in the individual case, must respond to a clearly established social need. It is not sufficient that the limitation is desirable or simply does not harm the functioning of the democratic constitutional order.

⁴²See e.g. articles 12(3), 13, 18(3), 19(3), 21, 22(2) of the International Covenant on Civil and Political Rights; articles 11 and 12(2) of the African Charter on Human and Peoples’ Rights; articles 11(2), 12(3), 13(2), 15 and 16(2) of the American Convention on Human Rights; and articles 8(2)-11(2) of the European Convention on Human Rights.

2.8 Derogations from international legal obligations

In interpreting and applying the terms of the three main general human rights treaties in *particularly severe crisis situations when the life of the nation is imperilled*, domestic judges, prosecutors and lawyers will also have to consider the possibility that the State concerned has modified the extent of its international legal obligations by resorting to *temporary* derogations. The question of the administration of criminal justice during states of exception will be dealt with in Chapter 16, and it will therefore suffice in this context to point out that the International Covenant on Civil and Political Rights (art. 4), the American Convention on Human Rights (art. 27) and the European Convention on Human Rights (art. 15) all provide for the possibility for the States parties to resort to derogations in particularly serious emergency situations. However, the African Charter on Human and Peoples' Rights has no corresponding emergency provision, and the absence thereof is seen by the African Commission on Human and Peoples' Rights "as an expression of the principle that the restriction of human rights is not a solution to national difficulties", and that "the legitimate exercise of human rights does not pose dangers to a democratic State governed by the rule of law".⁴³

In the treaties where it exists, the right to derogate is subjected to *strict formal and substantive requirements*, and was never intended to provide Governments with unlimited powers to avoid their treaty obligations. In particular, a *qualified principle of proportionality* applies in that, according to all the aforementioned treaties, the limitations resorted to must be "strictly required by the exigencies of the situation". It is noteworthy, furthermore, that some rights, such as the right to life and the right to freedom from torture, may not in any circumstances be derogated from, and that the list of non-derogable rights found in the second paragraphs of the aforesaid articles is *not* exhaustive. In other words, one cannot argue *a contrario* that, because a right is not expressly listed as non-derogable, the States parties can proceed to extraordinary limitations on its enjoyment.

Since the derogation articles provide for extraordinary limitations on the exercise of human rights, judges, both national and international, have to be conscious of their obligation to interpret these articles by construing them strictly so that individuals' rights are not sapped of their substance. By at all times maximizing the enjoyment of human rights, States are more likely than not to overcome their crisis situations in a positive, constructive and sustainable manner.

Under the International Covenant on Civil and Political Rights and the American and European Conventions on Human Rights, States parties have the right in certain particularly difficult situations to derogate from some of their legal obligations.

The right to derogate is subjected to strict formal and substantive legal requirements.

⁴³See undated decision: ACHPR, *Cases of Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*, No. 48/90, 50/91, 52/91 and 89/93, para. 79; the text used is that found at the following web site: http://www1.umn.edu/humanrts/africa/comcases/48-90_50-91_52-91_89-93.html.

Some fundamental rights may never in any circumstances be derogated from.

The right to derogate must be construed so as not to sap the individual rights of their substance.

Derogations are not permitted under the African Charter on Human and Peoples' Rights.

2.9 International State responsibility for human rights violations

Under international law, States will incur responsibility for not complying with their legal obligations to **respect** and **ensure**, that is, to **guarantee**, the effective enjoyment of the human rights recognized either in a treaty binding on the State concerned or in any other source of law. As explained by the Inter-American Court of Human Rights in the *Velásquez* case, an “impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by” the legal source concerned.⁴⁴ Whilst the Court was in this Judgment explaining the meaning of article 1(1) of the American Convention on Human Rights, it indeed merely stated a general rule of law applicable to international human rights law as a whole.

Agents for whom a State is responsible include such groups and individuals as ministerial civil servants, judges, police officers, prison officials, customs officials, teachers, government-controlled business and other similar groups. This means that States are under an obligation to **prevent, investigate, punish**, and, whenever possible, **restore rights** that have been violated and/or to **provide compensation**.⁴⁵

International human rights law also sometimes has an important **third-party effect** in that States may be responsible for not having taken reasonable action to **prevent private individuals or groups** from carrying out acts that violate human rights, or to **provide adequate protection against such violations under domestic law**.⁴⁶ As held by the European Court of Human Rights with regard to the right to respect for one’s private and family life in article 8 of the European Convention on Human Rights, for instance, this provision

⁴⁴I-A Court HR, *Velásquez Rodríguez case, Judgment of July 29, 1988, Series C, No. 4*, p. 151, para. 164.

⁴⁵See e.g. *ibid.*, p. 152, para. 166. As to obligations to provide effective protection of the right to life under article 6 of the International Covenant on Civil and Political Rights, see e.g. General Comment No. 6, in *United Nations Compilation of General Comments*, pp. 114-116.

⁴⁶See as to the American Convention on Human Rights, I-A Court HR, *Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C, No. 4*, pp. 155-156, paras. 176-177; and as to the International Covenant on Civil and Political Rights, UN doc. GAOR, A/47/40, Report HRC, p. 201, para. 2. At the European level, see e.g. Eur. Court HR, *Case of A. v. the United Kingdom, Judgment of 23 September 1998, Reports 1998-VI*, at p. 2692 et seq.

“is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (...). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”⁴⁷

The States parties to the European Convention will thus have to provide “practical and effective protection” in their domestic law “where fundamental values and essential aspects of private life are at stake”, such as, for instance, in order to protect persons against sexual abuse,⁴⁸ or in cases of corporal punishment by family members that constitutes a violation of article 3 of the Convention.⁴⁹

With regard to the duty to *secure* for everyone within its jurisdiction the right to life, the European Court has held that it “involves a primary duty” to put “in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of such provisions”, and, further, that this duty

“also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual(...)”.⁵⁰

These rulings are significant in that they extend the scope of States’ international legal obligations beyond the strict public sphere into the field of private life, thereby allowing for a more adequate and effective protection against various forms of human rights violations, such as physical and mental abuse of children, women and the mentally handicapped.

A State will however only incur international responsibility for a human rights violation if it has failed to provide the alleged victim with an adequate and effective remedy through the workings of its own courts or administrative authorities. The requirement at the international level that all *effective* domestic remedies must have been exhausted before an alleged victim’s complaints can be considered by an international monitoring body of a judicial or quasi-judicial character has been introduced precisely in order to allow the State itself to remedy the wrongs committed. This also means that the establishment of the various international machineries for the protection of the human person is in fact “subsidiary” to the available domestic systems for safeguarding the individual, since they “become involved only through contentious proceedings and once all domestic remedies have been exhausted”.⁵¹

⁴⁷ Eur. Court HR, *Case of X. and Y. v. the Netherlands*, Judgment of 26 September 1985, Series A, No. 91, p. 11, para. 23.

⁴⁸ Ibid., p. 14, para. 30 and p. 13, para. 27.

⁴⁹ Eur. Court HR, *Case of A. v. the United Kingdom*, Judgment of 23 September 1998, Reports 1998-VI, concerning the responsibility of the United Kingdom for beating of child by stepfather.

⁵⁰ Eur. Court HR, *Case of Mahmut Kaya v. Turkey*, Judgment of 28 March 2000, para. 85. The text used is that found on the Court’s web site: <http://hudoc.echr.coe.int/hudoc/>

⁵¹ Statement with regard to the European Convention on Human Rights, Eur. Court HR, *Case of Handyside*, Judgment of 7 December 1976, Series A, Vol. 24, p. 22, para. 48.

States' responsibility to provide protection and redress for victims of abuses of power will be dealt with in some detail in Chapter 15 of this Manual.

*Whenever bound by international human rights law, States have a **strict** legal obligation to guarantee the effective protection of human rights to all persons within their jurisdiction.*

*States' legal duty to protect human rights implies an obligation to **prevent, investigate and punish** human rights violations, as well as to restore rights whenever possible or **provide compensation**.*

*States may also have a legal duty not only to provide protection against human rights violations committed by public authorities, but also to ensure the existence of adequate protection in their domestic law against human rights violations committed between **private individuals**.*

3. Business Corporations and Human Rights

In recent years there has been wide discussion of the question whether, and to what extent, entities other than States, such as business corporations, could and should be held legally responsible for not complying with rules of international human rights law in the exercise of their various activities. Whilst it is clear from the preceding sub-section that States themselves may have a duty to ensure that their domestic law also offers adequate remedies against serious human rights violations that may be committed by private individuals, this reasoning would appear to be equally applicable to the activities of business corporations. However, this is not, of course, the same as saying that these corporations are *themselves* incurring international legal responsibility for any wrongful acts.

The discussion at the international level on the legal responsibility of business corporations to guarantee human rights offers a wealth of ideas concerning, inter alia, standards to protect workers from abuses or the environment from unnecessary damage and destruction. However, the development of the law in this important area is still very much in its infancy, and the arguments put forward at this stage belong primarily to the field of *lex ferenda*.

Since the aim of this Manual is to explain the legal duties of States themselves under international law, no further consideration will be devoted to the possible legal responsibilities of business corporations to protect human rights. However, judges, prosecutors and lawyers may well be confronted with these problems in the exercise of their professional duties at the domestic level. In addition to any duties business corporations may have to protect individual rights and the environment under domestic law, it might therefore be useful for members of the legal professions to be aware of the fact that discussions are taking place at the international level and that

there is, as a minimum, an ethical duty under international law for corporations to run their businesses in such a manner as to respect basic human rights.⁵²

States may have an international legal obligation to ensure adequate protection in their domestic law against human rights violations committed by business corporations.

Business corporations may themselves have legal obligations in the field of human rights derived from domestic law.

At the international level business corporations are considered to have, as a minimum, an ethical responsibility to respect fundamental human rights.

4. International Human Rights Law at the Domestic Level

4.1 Incorporating international law into domestic legal systems

As previously noted, and as provided in article 27 of the Vienna Convention on the Law of Treaties, a State “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. On the other hand, States are free to choose their own modalities for effectively implementing their international legal obligations, and for bringing national law into compliance with these obligations. Since domestic legal systems differ considerably in this respect, albeit also having some similarities, it will be for each domestic judge, prosecutor and lawyer concerned to keep himself or herself informed as to the manner of incorporation of the State’s international legal obligations into national law. Below, a mere general account will be given of the various ways in which a State can modify its municipal law so as to bring it into conformity with its international legal obligations.

- ❖ First, according to the *monist* theory, of which there are in fact several divergent versions,⁵³ international law and domestic law can in general terms be described as forming one legal system. This means that once a State has ratified a treaty for the protection of the human person, for instance, the terms of that treaty *automatically* become binding rules of domestic law.

⁵²Suggested reading on the question of business corporations and human rights: Michael Addo, *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague, Kluwer Law International, 1999); and Alan Dignam and David Allen, *Company Law and the Human Rights Act 1998* (London, Butterworth, 2000).

⁵³See Ian Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press, 3rd edn., 1979), p. 34.

- ❖ Secondly, according to the *dualist* theory, municipal law and international law are different legal systems. Municipal law is supreme, and for municipal judges to be competent to apply international treaty rules, for instance, these have to be *specifically adopted or transposed* into domestic law. It follows that a human rights treaty ratified by the State concerned cannot in principle be invoked by local judges unless the treaty is incorporated into municipal law, a process which normally requires an Act of Parliament.

However, these theories have been criticized for not reflecting the conduct of national and international organs, and they are gradually losing ground. For legal practitioners it is therefore more important to emphasize practice rather than theory.⁵⁴ Changes in the role and in domestic perception and understanding of international law in general, and of international human rights law in particular, have led to an increased use of such law in domestic courts. One of the purposes of this Manual is therefore to prepare judges, prosecutors and lawyers to adapt and contribute to these fundamental changes. The following is a list of some of the principal means through which international human rights norms can be contained in municipal law or otherwise applied by domestic courts and other competent authorities:

- ❖ **Constitutions:** Many constitutions actually contain numerous human rights provisions, which may follow the text of, for instance, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights or the regional human rights conventions. The use of such common language enables judges, prosecutors and lawyers to draw upon the jurisprudence of, in particular, international courts and other monitoring organs in interpreting the meaning of their own constitutional or other provisions;
- ❖ **Other national legislation:** Many States adopt specific legislation either to clarify or elaborate on their constitutional provisions, or in order to adapt their domestic laws to their international legal obligations. When transforming international law into municipal law, the same legal terms are often used, thus allowing the legal professions to draw inspiration from international jurisprudence or the jurisprudence of other States;
- ❖ **Incorporation:** It is also common for States to incorporate international human rights treaties into their domestic law by enacting a national law. This is for instance the case with the European Convention on Human Rights in the United Kingdom, where that Convention was incorporated into British law by virtue of the *Human Rights Act 1998*, which entered into force on 2 October 2000;
- ❖ **Automatic applicability:** In some States treaties take precedence over domestic law and are thus automatically applicable in domestic courts as soon as they have been ratified by the State concerned;
- ❖ **Interpretation of common law:** In interpreting common-law principles, judges may be governed by international human rights law and international jurisprudence interpreting that law;

⁵⁴As to monism and dualism Higgins states that of “course, whichever view you take, there is still the problem of which system prevails when there is a clash between the two”; and that “in the real world the answer often depends upon the tribunal answering it (whether it is a tribunal of international or domestic law) and upon the question asked”; in her view different “courts do address that problem differently”, see Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, Clarendon Press, 1994), p. 205.

- ❖ ***When there is a legal vacuum:*** In some countries there may be an absence of national legislation with regard, inter alia, to human rights; but, depending on the circumstances, judges and lawyers may be able to rely on international human rights law as well as relevant international case-law – or domestic case-law from other countries – in order to apply some basic legal principles for the protection of the human person.

Numerous efforts have been made in recent years – both through the technical assistance programmes of the United Nations, and through various training programmes provided by regional organizations such as the Organization of American States, the Council of Europe and the Organization for Security and Cooperation in Europe – to help States adjust their laws to their international legal obligations, and also to train the legal professions so as to enable them to make human rights a living reality within their specific jurisdictions. Numerous independent human rights institutes and non-governmental organizations (NGOs) also have extensive training programmes for the various legal professions.

States may not invoke their internal law to justify violations of international law, but are free to choose the modalities for implementing that law.

4.2 The application of international human rights law in domestic courts: some practical examples

A growing number of domestic courts in both common-law and civil-law countries now regularly interpret and apply international human rights standards. The following cases show how such standards can influence decisions taken by domestic courts.

Germany: In a case involving an American pianist belonging to the Church of Scientology and the Government of Baden-Württemberg, the Administrative Court of Appeal of Baden-Württemberg considered the grounds of appeal of the plaintiff in the light not only of the German Basic Law but also of article 9 of the European Convention on Human Rights and articles 18 and 26 of the International Covenant on Civil and Political Rights.

The complaint originated in negotiations between an agent acting on behalf of the Government and the pianist, regarding the latter's participation in a concert to be held in connection with the presentation to the public of the framework programme for the World Athletics Championship. The negotiations were broken off when it became known that the pianist concerned was a member of the Church of Scientology. In a written reply to a question put by the Parliament of Baden-Württemberg, the Ministry of Culture and Sport, acting in concertation with the Ministry of the Family, Women, Education and Art, explained that the promotion by the State of cultural events must be questioned when the persons performing are active and self-avowed members of the Church of Scientology or other similar groups; for this reason they had declined to engage the pianist as originally envisaged. The pianist argued that his right to freedom

of religion had been violated by the written reply from the Ministries. However, the Administrative Court of Appeal concluded that the protection afforded by article 9 of the European Convention and article 18 of the International Covenant had not been infringed. As to the alleged violation of article 26 of the International Covenant, the Court likewise found that it had not been violated, since the ministerial reply did not result in discriminatory treatment of the pianist on the basis of his beliefs or religious convictions, the reply being limited to the announcement of a specific procedure to be followed in the future with regard to the allocation of grants made available for the organization of events by third persons/agents. For this reason, and considering that the plaintiff in this case was not himself a recipient of any grant, it was not necessary to clarify whether he could base himself *inter alia* on the protection afforded by article 26 of the International Covenant, were an application for a grant to be rejected on the abovementioned ground.⁵⁵

New Zealand: The 1994 *Simpson v. Attorney General* case, one of the most famous human rights cases in New Zealand, originated in an allegedly unreasonable search of the plaintiff's home which, it was claimed, violated the New Zealand Bill of Rights Act 1990. In its decision, the Court of Appeal emphasized that the purposes of the Bill of Rights were to

“affirm, protect, and promote human rights and fundamental freedoms in New Zealand and to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. From these purposes, it was implicit that effective remedies should be available to any person whose Bill of Rights guarantees were alleged to have been violated”.⁵⁶

When there had “been an infringement of the rights of an innocent person”, “monetary compensation was”, in the view of the Court, “an appropriate and proper, indeed the only effective, remedy”.⁵⁷ As observed by the Court, that “was consistent with a rights-centred approach to the Bill of Rights and international jurisprudence on remedies for human rights violations”, and reference was in this respect, *inter alia*, made to the jurisprudence on remedies of both the Human Rights Committee and the Inter-American Court of Human Rights.⁵⁸

United Kingdom: The most prominent case decided in recent years in which international human rights law played an important role is the case of *Pinochet*, which was decided by the House of Lords on 24 March 1999, and which originated in a request that the Chilean Senator – and former Head of the Chilean State – be extradited from the United Kingdom to Spain to be tried for crimes of torture and conspiracy to torture, hostage-taking and conspiracy to take hostages, as well as conspiracy to commit murder – acts committed whilst he was still in power. The obligations to which the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment gave rise, were incorporated into United Kingdom law by Section 134 of the Criminal Justice Act 1988, which entered into force on 29 September 1988. The

⁵⁵Urteil vom 15. Oktober 1996, Verwaltungsgerichtshof Baden-Württemberg, 10 S 1765/96, in particular, pp. 11-16: as to article 26 of the International Covenant, see p. 16.

⁵⁶*Simpson v. Attorney General* (1994) 1 HRNZ at 42-43.

⁵⁷*Ibid.*, at 43.

⁵⁸*Ibid.*, loc. cit.

Convention against Torture as such was ratified on 8 December 1988. By virtue of these changes, torture, wherever it takes place in the world, became a triable criminal offence in the United Kingdom. The question before the House of Lords on second appeal turned on whether there were any extraditable offences and, in the affirmative, whether Senator Pinochet was immune from trial for committing those crimes.⁵⁹ The question of double criminality became an important issue, with a majority of the Lords being of the view that Senator Pinochet could be extradited only on charges concerning acts which were criminal in the United Kingdom *when they took place*. A majority of the law Lords concluded that State immunity in respect of torture had been excluded by the Convention against Torture, and that the offences of torture and conspiracy to torture committed after 8 December 1988 were extraditable, with a minority of the House of Lords holding that English courts had extraterritorial jurisdiction as from 29 September 1988 when Section 134 of the Criminal Justice Act 1988 entered into force.

This decision allowed the United Kingdom Home Secretary to go ahead with the proceedings relating to the relevant parts of the Spanish request for Senator Pinochet's extradition. However, on 2 March 2000, after medical experts had concluded that the former Head of State of Chile was unfit to stand trial, the Home Secretary decided that he would not be extradited to Spain but was free to leave Britain. In spite of its final outcome, this case is a landmark in the international law of human rights in that it confirmed the erosion of the notion of State immunity for international crimes as a result of the entry into force of the Convention against Torture.

South Africa: The example of South Africa is significant in that, after the collapse of the apartheid regime, it drafted a constitution which was heavily influenced by international human rights standards and which contains, in its Chapter 2, a detailed Bill of Rights, which includes a wide range of rights, such as the right to equality, the right to freedom and security of the person, the freedoms of expression, assembly and association, political rights, environmental rights, the right to property, the right of access to adequate housing, the right to health care services, sufficient food and water, social security, the rights of the child, the right to basic education, the right of access to courts and the rights of arrested, detained and accused persons.

International human rights law has had a considerable impact on the development of law at the domestic level and is now frequently invoked and applied by domestic courts.

⁵⁹See definition of question by Lord Brown Wilkinson, *House of Lords, Judgment of 24 March 1999 – Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)*; this Judgment is found on the following web site: <http://www.publications.parliament.uk>.

5. The Role of the Legal Professions in the Implementation of Human Rights

As a consequence of legal developments over the last few decades, human rights have ceased to be a “fringe activity”, instead becoming “an area of law which is fundamental to everyone and which permeates all legal activity, economic and social, in public law and in private”.⁶⁰ In a particularly interesting recent development, the “pervasive importance of human rights law” to corporations and business lawyers has also been recognized.⁶¹ Yet, whilst the influence of international human rights law on many dimensions of domestic law is thus steadily gaining ground, its true potential still remains to be explored.⁶²

It is the professional role and duty of judges, prosecutors and lawyers throughout the world to explore this potential, and at all times to use their respective competences to ensure that a *just rule of law* prevails, including respect for the rights of the individual. Whilst this entire Manual focuses on providing knowledge and guidance to the legal professions in their daily work, Chapter 4 will focus on the specific rules and principles conditioning the work of judges, prosecutors and lawyers. These rules and principles have to be consistently and meticulously applied, since judges, prosecutors and lawyers perhaps have the single most important role to play in applying national and international human rights law. Their work constitutes the chief pillar of the effective legal protection of human rights, without which the noble principles aimed at protecting the individual against the abuse of power are likely to be sapped of much or even all of their significance.

6. Concluding Remarks

The present chapter has provided a synopsis of the modern development of the international protection of the human person, which originated in a devastated world’s yearning for *peaceful, secure* and *just* domestic and international legal orders. Further, it has explained some of the basic legal notions relevant to international human rights law and offered a description, however general, of the role to be played by the legal professions within their respective fields of competence in order to be able effectively to use the legal tools available to protect the human person against abuses of power. We shall now turn to a succinct examination of the terms and functioning of the major existing universal and regional human rights conventions.

⁶⁰See editorial of Lord Goldsmith QC and Nicholas R. Cowdery QC, “The Role of the Lawyer in Human Rights”, in *HRI News* (Newsletter of the IBA Human Rights Institute), vol. 4, No. 2, 1999, p. 1.

⁶¹*Ibid.*, loc. cit. See also Nicholas R. Cowdery QC, “Human Rights in Commercial Practice – an IBA Perspective”, *ibid.*, pp. 16-18, and Stephen Bottomley, “Corporations and Human Rights”, *ibid.*, pp. 19-22.

⁶²See reference to speech of Justice Kirby, *ibid.*, p. 10.

.....Chapter 2
**THE MAJOR UNIVERSAL
HUMAN RIGHTS
INSTRUMENTS AND THE
MECHANISMS FOR THEIR
IMPLEMENTATION.....**

Learning Objectives

- *To familiarize participants with the major universal human rights treaties and their modes of implementation and to highlight the contents of some other relevant legal instruments;*
- *To provide a basic understanding of how these legal resources can be used by legal practitioners, principally at the domestic level but also to some extent at the international level.*

Questions

- *Have you, in the exercise of your professional activities as judges, prosecutors, or lawyers, ever been faced with an accused person, defendant, respondent or client alleging violations of his or her rights?*
- *What was your response?*
- *Were you aware that international human rights law might provide guidance in solving the problem?*
- *Were you aware that the alleged victim might ultimately bring his or her grievances to the attention of an international monitoring organ?*
- *If not, would such an awareness have changed your manner of responding to the alleged violations of his or her human rights?*
- *Have you ever brought a case against your country before an international organ on behalf of an alleged victim of a human rights violation?*
- *If so, what was the outcome of the case?*
- *What was your experience generally of making such a complaint?*

1. Introduction

1.1 Scope of the chapter

This chapter will provide some basic information about the extent of the *substantive protection* and the *mechanisms for controlling the implementation* of some of the major human rights treaties that exist at the universal level. Given that the number of these treaties has grown steadily in recent decades, it will only be possible, within this limited framework, to deal with those conventions that are of general scope in that they recognize a long list of rights, as well as a few conventions that have been adopted with the specific object of focusing on particularly invidious practices such as genocide, torture, racial discrimination and discrimination against women. This choice has been made on the grounds that these are the treaties that judges, prosecutors and practising lawyers are most likely to have to interpret and apply in the course of the daily exercise of their legal responsibilities.

The chapter will thus first deal with the major treaties concluded within the framework of the United Nations. Second, it will deal briefly with some of the main resolutions adopted by the United Nations General Assembly, since, although they are not legally binding per se, their contents have, as a very minimum, a significant politico-moral value which constitutes an important source of guidance and inspiration to national judges, prosecutors and lawyers. Next, brief reference will be made to some instruments adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders as well as the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO). Lastly, this chapter will provide some basic information about the United Nations extra-conventional mechanisms for human rights monitoring, which apply to all Members States of the United Nations on the basis of their general legal undertaking “to take joint and separate action in co-operation with the Organization for the achievement of the [purpose of promoting] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion” (Art. 56 of the Charter of the United Nations read in conjunction with Art. 55(c)).

1.2 The international treaty-based control mechanisms

Each of the treaties dealt with in this chapter has a different system for its implementation, ranging from general and specific *reporting procedures* to quasi-judicial and judicial mechanisms involving the *adjudication of complaints* brought by individuals or groups of individuals, and, in some instances, even by other States. These various procedures can in many respects be said to be complementary, and, although they have slightly different immediate purposes, the overall goal of human rights protection is identical in each case.

Broadly speaking, the reporting procedures have the function of making regular and systematic inventories of progress made in the implementation of the treaty obligations, with the aim of creating a dialogue between the relevant international

monitoring organ and the State party concerned for the purpose of assisting the latter in introducing the adjustments to domestic law and practice required by its international treaty obligations. These reports are examined and discussed in public and in the presence of representatives of the State party. While the aim of this dialogue is of course to arrive at a **general** amelioration of the human rights situation obtaining in the country concerned, there is no possibility for **individual relief** in case of violations. There is also an ever-growing tendency for non-governmental organizations (NGOs) to be involved in the work of the various committees. These organizations are important sources of information regarding the human rights situation in the countries under examination, and they often have specialized knowledge of the legal issues dealt with in the committees. They can therefore make useful indirect contributions to the discussions.

In preparing their periodic reports to the various international monitoring organs, the States parties are obliged to provide in-depth information not only about the formal state of the law within their jurisdiction, but also about the manner of its practical application. When preparing these reports, the States parties may well also need the assistance of members of the various legal professions.¹

As to the quasi-judicial and strictly judicial procedures, these are only set in motion by a complaint (communication, petition) filed by an individual or, under some treaties, a group of individuals, or even States parties. Their specific aim is to **remedy** possible human rights violations in the **particular case** brought before the tribunals or committees with the ultimate aim, where need be, of inducing States to modify their law so as to bring it into conformity with their international legal obligations. Numerous changes in domestic law have now taken place in many countries as a result of international legal procedures, be they universal or regional.

However, it is essential to stress that **international procedures can never be considered to be a substitute for efficient legal procedures at the domestic level**. Human rights are made a true reality at the domestic level by the domestic authorities, and, as emphasized in Chapter 1, the international complaints procedures are subsidiary to the available domestic systems for safeguarding the individual: they provide a remedy of last resort, when the internal mechanisms for ensuring an efficient protection of human rights standards have failed.

The international treaty-based control mechanisms in the human rights field consist of reporting procedures and the adjudication of individual or inter-State complaints.

International procedures for the protection of human rights and freedoms are subsidiary to existing procedures in the national legal system of every State.

International procedures can never be considered to be a substitute for efficient domestic legal procedures for the protection of human rights.

¹As to how to draft these reports, see *Manual on Human Rights Reporting*, published by the United Nations, the United Nations Institute for Training and Research (UNITAR) and the United Nations Centre for Human Rights, 464 pp. (hereinafter referred to as *Manual on Human Rights Reporting*).

1.3 Civil and political rights, and economic, social and cultural rights

As will be shown in further detail in Chapter 14 of this Manual, the interdependence of civil, cultural, economic, political and social rights has been emphasized by the United Nations ever since its inception. However, it is important at the outset to put to rest a frequently invoked distinction between civil and political rights, on the one hand, and economic, social and cultural rights on the other. According to this distinction, all that States basically have to do in order to respect civil and political rights is to *refrain* from killing, enforced disappearance, torture and other such practices; whereas in order to implement the other group of rights they have to undertake forceful *positive* actions.

However, as has already been pointed out in Chapter 1, and as will be further demonstrated in other chapters of this Manual, there are indeed many situations which impose on States *positive obligations* to comply with their international legal duties in the field of civil and political rights as well.

When one examines, from a purely practical point of view, the reasons why in many countries worldwide people are still being killed and subjected to other forms of unlawful treatment, it becomes abundantly clear that it is precisely because States have not taken the resolutely positive actions required in order to put an end to these practices that human rights violations persist. Rarely, if ever, do such practices go away by themselves, and for States to adopt a position of inaction is thus not an adequate and sufficient means of ensuring that they comply with their international legal obligations. States also have to undertake significant efforts both to organize free and fair elections at regular intervals and to set up and maintain an efficient, independent and impartial judiciary.

This imperative need for positive action to secure compliance with international human rights obligations is an important factor to be borne in mind at all times by judges, prosecutors and lawyers in the exercise of their professional responsibilities.

In order effectively to respect and ensure civil and political rights, it may not be sufficient for States simply to do nothing. States may have to take strong positive action in order to comply with their legal obligations in this field.

2. The Major United Nations Human Rights Treaties and their Implementation

2.1 The International Covenant on Civil and Political Rights, 1966, and its two Protocols, 1966 and 1989

The International Covenant on Civil and Political Rights and the Optional Protocol recognizing “the competence of the Committee to receive and consider communications from individuals” were both adopted by the General Assembly in 1966 and entered into force on 23 March 1976. The Covenant established an expert body, the Human Rights Committee, which has authority: (1) to review reports from the States parties; (2) to adopt General Comments on the meaning of the provisions of the Covenant; (3) under certain conditions to deal with inter-State communications; and lastly (4), to receive individual communications under the Optional Protocol.²

On 8 February 2002 there were 148 States parties to the Covenant and 101 States parties to the First Optional Protocol.³ As of 27 July 2001, 47 States had made the declaration under article 41(1) of the Covenant whereby they recognize inter-State communications. This particular article entered into force on 28 March 1979.

In 1989, the General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. This Protocol entered into force on 11 July 1991 and as of 8 February 2002 had 46 States parties.

2.1.1 The undertakings of the States parties

Under article 2 of the International Covenant on Civil and Political Rights, each State party “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ... Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁴ As emphasized by the Human Rights Committee in its General Comment No. 3, the Covenant is not, consequently, “confined to the *respect* of human rights, but ... States parties have also undertaken to *ensure* the enjoyment of these rights to *all* individuals under their jurisdiction”, an undertaking that in principle “relates to all rights set forth in the

²For more information about the International Covenant on Civil and Political Rights and its reporting procedure, see Fausto Pocar, “The International Covenant on Civil and Political Rights”, in *Manual on Human Rights Reporting*, pp. 131-235.

³For an update of ratifications see *Status of Ratifications of the Principal International Human Rights Treaties* at the following UN web site: www.unhchr.ch.

⁴It should be noted that, as is indicated by the words “such as”, and as will be further explained in Chapter 13 of this Manual, this list of prohibited grounds of discrimination is not exhaustive.

Covenant”.⁵ The legal duty to **ensure** their enjoyment implies an obligation to take positive steps to see to it

- ❖ first, that domestic laws are modified when necessary in order to comply with the State’s international legal obligations; and
- ❖ second, that these laws are indeed effectively implemented in practice by all public organs and officials, such as the courts (including administrative tribunals), prosecutors, police officers, prison officials, schools, the military, hospitals and the like.

Upon ratification of a treaty aimed at the protection of human rights and fundamental freedoms, States have a legal duty to modify their legislation so as to have it conform to their new international obligations.

States have also to continue to ensure that their legal obligations are effectively implemented by all relevant organs, including all courts of law.

2.1.2 The rights recognized

Being a treaty of a legislative nature, the International Covenant on Civil and Political Rights guarantees a long list of rights and freedoms, not all of which fall within the themes covered by this Manual and which will not, therefore, be dealt with in detail. However, any existing General Comments adopted by the Human Rights Committee relating to specific articles will be referred to in footnotes; these comments provide information about the Committee’s understanding of the articles concerned. Moreover, the second volume of the Committee’s annual reports to the General Assembly contains **Views** and **decisions** adopted by the Committee under the Optional Protocol, which include indispensable information for judges, prosecutors and lawyers regarding the interpretation of the terms of the Covenant.⁶

⁵General Comment No. 3 (Article 2) in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (hereinafter referred to as *United Nations Compilation of General Comments*), p. 112, para. 1; emphasis added. The texts of the General Comments are also published in the Human Rights Committee’s annual reports; their text can also be found at the following UN web site: www.unhchr.ch.

⁶In the earlier years of the Committee’s existence, its annual reports to the General Assembly consisted of a single volume, containing both an account of the discussions of the periodic reports and the Views and decisions adopted under the Optional Protocol.

The right to self-determination

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights contain a common article 1(1) proclaiming the right of all peoples to self-determination, by virtue of which they “freely determine their political status and freely pursue their economic, social and cultural development”. Furthermore, common article 1(2) provides that “all peoples may, for their own ends, freely dispose of their natural wealth and resources” and that “in no case may a people be deprived of its own means of subsistence”. The right to self-determination in the widest sense is consequently considered to be a precondition for the full enjoyment of civil, cultural, economic, political and social rights. This common article can also be read in the light of the Declaration on the Granting of Independence to Colonial Countries and Peoples, which was adopted by the United Nations General Assembly at the height of the decolonization process in 1960 and which equated “the subjection of peoples to alien subjugation, domination and exploitation” to a denial of human rights and a violation of the Charter of the United Nations (operative paragraph 1).

The following is a list of the extensive rights guaranteed by the International Covenant on Civil and Political Rights:

- ❖ the right to life – art. 6;⁷
- ❖ the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, including a prohibition on being subjected to medical or scientific experimentation without one’s free consent – art. 7;⁸
- ❖ the right to freedom from slavery, the slave-trade and servitude – art. 8(1) and (2);
- ❖ the right to freedom from forced and compulsory labour – art. 8(3);
- ❖ the right to liberty and security of person, including freedom from arbitrary arrest and detention – art 9;⁹
- ❖ the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person – art. 10;¹⁰
- ❖ prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation – art. 11;
- ❖ liberty of movement and freedom to choose one’s residence – art. 12(1);
- ❖ the right to be free to leave any country, including one’s own – art. 12(2);
- ❖ the right not to be arbitrarily deprived of the right to enter one’s own country – art. 12(4);

⁷General Comment No. 6, in *United Nations Compilation of General Comments*, pp. 114-116 and General Comment No. 14, *ibid.*, pp. 126-127.

⁸General Comment No. 7, *ibid.*, pp. 116-117, which is replaced and further developed by General Comment No. 20, *ibid.*, pp. 139-141.

⁹General Comment No. 8, *ibid.*, pp. 117-118.

¹⁰General Comment No. 9, *ibid.*, pp. 118-119, which is replaced and further developed by General Comment No. 21, *ibid.*, pp. 141-143.

- ❖ certain legal safeguards against unlawful expulsions of aliens lawfully in the territory of a State party – art. 13;¹¹
- ❖ the right to a fair hearing in criminal and civil cases by an independent and impartial tribunal – art. 14;¹²
- ❖ freedom from *ex post facto* laws and the retroactive application of heavier penalties than those that could be imposed when the crime was committed – art. 15;
- ❖ the right to recognition as a person before the law – art. 16;
- ❖ the right not to be subjected to arbitrary or unlawful interference with one’s privacy, family, home or correspondence or to unlawful attacks on one’s honour and reputation – art. 17;¹³
- ❖ the right to freedom of thought, conscience and religion – art. 18;¹⁴
- ❖ the right to freedom of opinion and of expression – art. 19;¹⁵
- ❖ prohibition of war propaganda and of advocacy of national, racial, or religious hatred constituting incitement to discrimination, hostility or violence – art. 20;¹⁶
- ❖ the right to peaceful assembly – art. 21;
- ❖ the right to freedom of association – art. 22;
- ❖ the right to marry freely, to found a family and to equal rights and responsibilities of spouses as to marriage, during marriage and at its dissolution – art. 23;¹⁷
- ❖ the right of the child to special protection without discrimination; the right to be registered upon birth and the right to a nationality – art. 24;¹⁸
- ❖ the right to popular participation in public affairs; the right to vote in periodic elections by universal and equal suffrage and secret ballot, as well as the right to have access to public service – art. 25;¹⁹
- ❖ the right to equality before the law and the equal protection of the law – art. 26;²⁰
- ❖ the right of minorities to enjoy their own culture, religion and language – art. 27.²¹

2.1.3 Permissible limitations on the exercise of rights

Some of the rights listed above, such as the right to freedom of movement (art. 12(3)), the right to manifest one’s religion or beliefs (art. 18(3)), the exercise of the rights to freedom of expression (art. 19(3)), to peaceful assembly (art. 21), and to freedom of association (art. 22(2)), can be limited for certain specifically defined

¹¹General Comment No. 15, *ibid.*, pp. 127-129.

¹²General Comment No. 13, *ibid.*, pp. 122-126.

¹³General Comment No. 16, *ibid.*, pp. 129-131.

¹⁴General Comment No. 22, *ibid.*, pp. 144-146.

¹⁵General Comment No. 10, *ibid.*, pp. 119-120.

¹⁶General Comment No. 11, *ibid.*, pp. 120-121.

¹⁷General Comment No. 19, *ibid.*, pp. 137-138.

¹⁸General Comment No. 17, *ibid.*, pp. 132-134.

¹⁹General Comment No. 25, *ibid.*, pp. 157-162.

²⁰On the question of non-discrimination in general see, in particular, General Comment No. 18, *ibid.*, pp. 134-137. As to the duty of the States parties to ensure the equal rights of men and women, see also General Comment No. 4, *ibid.*, p. 113, which has been replaced by General Comment No. 28 (Article 3 – Equality of rights between men and women), *ibid.*, pp. 168-174.

²¹General Comment No. 23, *ibid.*, pp. 147-150.

objectives, such as national security, public order, public health and morals, or respect for the fundamental rights of others.

However, the limitations can only be lawfully imposed if they *are provided or prescribed by law and are also necessary in a democratic society for one or more of the legitimate purposes defined in the provisions concerned*. It is true that the reference to “a democratic society” is only to be found in articles 21 and 22(2) concerning the limitations that can be imposed respectively on the exercise of the right to peaceful assembly and the right to freedom of association, whilst it is absent from the limitation provisions regarding the right to freedom of movement, the right to freedom to manifest one’s religion or beliefs and the right to freedom of expression. However, it follows from an interpretation of these provisions in the light of the wider context of the Covenant itself, as well as its object and purpose, that this notion forms an intrinsic part of all limitation provisions concerned and will consequently condition their interpretation.²²

As pointed out in Chapter 1, the limitation provisions reflect carefully weighed individual and general interests which have also to be balanced against each other when the limitations are applied in a specific case. This means not only that the laws per se that provide for the possibility of limitations on the exercise of rights must be *proportionate to the stated legitimate aim*, but also that the criterion of proportionality must be respected *when applied to a specific individual*.

The subsidiarity of the international system for the protection of human rights means, however, that it falls in the first instance to the domestic authorities to assess both the legitimate need for any restrictions on the exercise of human rights and also their necessity/proportionality. The additional international supervision of the measures taken comes into play only in connection with the examination of the States parties’ reports or individual communications submitted under the First Optional Protocol.

The criteria to look for in order to determine whether the exercise of a right has been lawfully limited are:

- *the principle of legality, in that the restrictive measure must be based in law;*
- *the principle of a legitimate aim in a democratic society; restrictions on the exercise of human rights cannot be lawfully justified under the Covenant for reasons not expressly contained therein or for purposes alien to the effective protection of human rights;*
- *the principle of proportionality, in that the interference with the exercise of the individual’s right must be necessary for the legitimate purpose or purposes; it follows that it is not sufficient that the measure is simply reasonable or possibly advisable: it must be necessary.*

²²See Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception – With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs* (The Hague/Boston/London, Martinus Nijhoff Publishers, 1998), pp. 112-114, in particular the reasoning on p. 113.

2.1.4 Permissible derogations from legal obligations

The question of derogations from international legal obligations in the human rights field will be given a more thorough treatment in Chapter 16 of this Manual, but it may be useful at this early stage briefly to outline the strict conditions that govern the right of the States parties to resort to derogations from their legal obligations under article 4 of the Covenant:

- ❖ ***the condition of a “public emergency which threatens the life of the nation”:*** the State party envisaging a derogation must be facing a situation of exceptional threat that jeopardizes the nation’s life, thus excluding minor or even more serious disturbances that do not affect the functioning of the State’s democratic institutions or people’s lives in general;
- ❖ ***the condition of official proclamation:*** the existence of a public emergency which threatens the life of the nation must be “officially proclaimed” (art. 4(1)); as was explained during the drafting of article 4, the purpose thereof was “to prevent States from derogating arbitrarily from their obligations under the Covenant when such an action was not warranted by events”;²³
- ❖ ***the condition of non-derogability of certain obligations:*** article 4(2) of the Covenant enumerates some rights from which no derogation can ever be made even in the direst of situations. These rights are: the right to life (art. 6), the right to freedom from torture or cruel, inhuman or degrading treatment or punishment (art. 7), the right to freedom from slavery, the slave-trade and servitude (art. 8(1) and (2)), the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (art. 11), the prohibition of *ex post facto* laws (art. 15), the right to legal personality (art. 16) and, lastly, the right to freedom of thought, conscience and religion (art. 18). However, it follows from the work of the Human Rights Committee that it is not possible to conclude *a contrario* that, because a specific right is not listed in article 4(2), it can necessarily be derogated from. Consequently, some rights may not be derogated from because they are considered to be “inherent to the Covenant as a whole”; one such example is the right to judicial remedies in connection with arrests and detentions as set out in article 9(3) and (4);²⁴ others may also be non-derogable because they are indispensable to the effective enjoyment of the rights that are explicitly listed in article 4(2), such as the right to a fair trial for persons threatened with the death penalty.²⁵ The Committee has further held under the Optional Protocol that “the right to be tried by an independent and impartial tribunal is an ***absolute right that may suffer no exception***”;²⁶

²³UN doc. E/CN.4/SR.195, p. 16, para. 82; explanation given by Mr. Cassin of France.

²⁴See in particular the reply of the Human Rights Committee to the request by the Sub-Commission on Prevention of Discrimination and Protection of Minorities that the Committee consider a draft protocol for the purpose of strengthening the right to a fair trial, UN doc. GAOR, A/49/40(vol. I), pp. 4-5, paras. 22-25.

²⁵Cf. article 6(2) which provides that the death penalty cannot be imposed “contrary to the provisions of the present Covenant”; as to the case-law, see e.g. *Communication No. 16/1977, D. Monguya Mbenge v. Zaire (views adopted on 25 March 1983)*, GAOR, A/38/40, p. 139, para. 17. The requirement concerns “both the substantive and the procedural law in the application of which the death penalty was imposed”.

²⁶*Communication No. 263/1987, M. González del Río v. Peru (views adopted on 28 October 1992, at the 46th session)*, GAOR, A/48/40 (vol. II), p. 20, para. 5.2; emphasis added.

- ❖ ***the condition of strict necessity***: this condition means that the State party can only take measures derogating from its “obligations under the ... Covenant to the extent strictly required by the exigencies of the situation”; as compared to the ordinary limitation provisions dealt with above, the condition of strict necessity compels a narrow construction of the principle of proportionality, in that the legislative measures taken must *as such* be strictly required by the exigencies of the emergency situation; and, secondly, any ***individual*** measure taken on the basis of that legislation must likewise be strictly proportionate. It is thus necessary to consider whether the measures concerned are strictly required in order to deal with the emergency situation. The Committee has emphasized in general that “measures taken under article 4 are of an exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened”;²⁷
- ❖ ***the condition of consistency with other international legal obligations***: on the basis of this condition, the Human Rights Committee is, in principle, authorized to examine whether measures of derogation might be unlawful as being inconsistent with other international treaties, such as, for instance, other treaties for the protection of the individual or even international humanitarian law or customary international law;
- ❖ ***the condition of non-discrimination***: the measures of derogation may not “involve discrimination solely on the ground of race, colour, sex, language, religion or social origin” (art. 4(1) in fine). This is an important condition since it is particularly in emergency situations that there is a risk of imposing discriminatory measures which have no objective and reasonable justification;
- ❖ ***the condition of international notification***: in order to avail itself of the right of derogation, a State party must, lastly, also fulfil the conditions set out in article 4(3) of the Covenant, by immediately submitting a notification of derogation to the other States parties through the Secretary-General. In this notification it must describe “the provisions from which it has derogated and ... the reasons by which it was actuated”. A second notification must be submitted “on the date on which it terminates such derogation”.

General Comment No. 29, which was adopted by the Human Rights Committee in July 2001, provides more details as to the interpretation of the various conditions laid down in article 4 of the Covenant. This Comment will be dealt with in Chapter 16, which will provide a more comprehensive analysis of States’ right to derogate from their international human rights obligations in certain exceptional situations.

In certain exceptional situations amounting to a threat to the life of the nation, the States parties to the International Covenant on Civil and Political Rights may derogate from their legal obligations incurred thereunder to the extent “strictly required by the exigencies of the situation”. Such derogations must also comply with the principles of non-derogable rights, non-discrimination, consistency with the State’s other international obligations and the principle of international notification.

²⁷ General Comment No. 5, in *United Nations Compilation of General Comments*, p. 114, para. 3.

2.1.5 The implementation mechanisms

The implementation of the Covenant is monitored by the Human Rights Committee, which consists of eighteen members serving in their individual capacity (art. 28). The monitoring takes three forms, namely, the submission of periodic reports, inter-State communications, and individual communications:

- ❖ ***the reporting procedure:*** according to article 40 of the Covenant, the States parties “undertake to submit reports on the measures they have adopted which give effect to the rights” recognized therein and “on the progress made in the enjoyment of those rights”, first within one year of the entry into force of the Covenant for the States parties concerned, and thereafter, whenever the Committee so requests, that is to say, every five years. The reports “shall indicate the factors and difficulties, if any, affecting the implementation of the ... Covenant”, and the Committee has developed careful guidelines aimed both at facilitating the task of the States parties and rendering the reports more efficient. In July 1999 the Committee adopted consolidated guidelines for the submission of the reports of the States parties;²⁸
- ❖ ***inter-State communications:*** as noted in section 2.1, States parties to the Covenant may at any time declare under article 41 that they recognize “the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant”; in other words, the possibility of bringing inter-State communications is only valid as between States parties having made this kind of declaration. During the initial stage of the proceedings, the communication is only brought to the attention of one State party by another, and it is only if the matter is not settled to the satisfaction of both States parties within a period of six months that either State party has the right to bring the matter before the Committee itself (art. 41(1)(a) and (b)). The Committee has to follow a procedure prescribed in article 41(1)(c)-(h), but, since it was never used during the first 25 years of the Committee’s existence, it will not be dealt with further here;
- ❖ ***individual communications:*** under article 1 of the Optional Protocol, a State Party thereto “recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant”. However, according to article 2 of the Optional Protocol, individuals claiming violations of their rights must first exhaust all remedies available to them at the domestic level; further, the Committee shall consider inadmissible any communication which is anonymous, or which it considers to amount to an abuse of the right of submission of communications or to be incompatible with the provisions of the Covenant (art. 3). If the communication raises a serious issue under the Covenant, the Committee submits it to the State party concerned, which has the possibility to submit its written explanations within a period of six months. The procedure before the Committee is therefore exclusively written and the discussions in the Committee on the communications take place behind closed doors (arts. 4-5). At the end of its consideration of a communication, the Committee adopts its “Views” thereon, which are sent both to the State party and to the individual concerned (art. 5(4)).

²⁸See UN doc. CCPR/C/66/GUI.

Numerous communications have been submitted under the Optional Protocol and have in some cases led to changes in domestic legislation.

The implementation mechanisms of the International Covenant on Civil and Political Rights are:

- *the reporting procedure (art. 40);*
- *inter-State communications (art. 41); and*
- *individual communications (art. 1, Optional Protocol).*

2.2 The International Covenant on Economic, Social and Cultural Rights, 1966

The International Covenant on Economic, Social and Cultural Rights was adopted by the United Nations General Assembly in 1966, and entered into force on 3 January 1976. On 8 February 2002 there were 145 States parties to the Covenant. The Covenant establishes a reporting procedure on the measures the States parties have adopted and the progress made in achieving the observance of the rights contained in the Covenant (art. 16). The United Nations Economic and Social Council is formally entrusted under the Covenant with the task of monitoring compliance by the States parties with their legal obligations incurred under the Covenant; but since 1987 this task has been carried out by the Committee on Economic, Social and Cultural Rights, which consequently is not, strictly speaking, a treaty organ like the Human Rights Committee.²⁹

Why are there two International Covenants?

Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were first elaborated by the United Nations Commission on Human Rights and were contained in one document until it was decided, after much debate, to separate them and draft two covenants that were to be adopted simultaneously. The reason for this split was the more complex nature of economic, social and cultural rights, which required particularly careful drafting and implementation mechanisms adapted to the specific nature of those rights. In view of States' differing levels of development, the International Covenant on Economic, Social and Cultural Rights had also to provide for the possibility of progressive implementation, although this was never intended to mean that no immediate obligations would be incurred thereunder.³⁰

²⁹For more information about the International Covenant on Economic, Social and Cultural Rights and the reporting procedure, see Philip Alston, "The International Covenant on Economic, Social and Cultural Rights", in *Manual on Human Rights Reporting*, pp. 57-129.

³⁰For more details on the debates in this respect, see Chapter 14, subsection 2.2.

2.2.1 The undertakings of the States parties

Each State party to the International Covenant on Economic, Social and Cultural Rights “undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the ... Covenant by all appropriate means, including particularly the adoption of legislative measures” (art. 2(1)). Although the Covenant thus “provides for progressive realization and acknowledges the constraints due to limits of available resources”, the Committee emphasized in General Comment No. 3 that “it also imposes various obligations which are of immediate effect”. In the view of the Committee, two of these are of particular importance, namely: first, the undertaking in article 2(2) “to guarantee that the rights enunciated in the ... Covenant will be exercised without discrimination” on certain specific grounds; and second, the undertaking in article 2(1) “to take steps”, which in itself, is not qualified or limited by other considerations”.³¹ In other words, “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”.³²

2.2.2 The rights recognized

The following rights are recognized in the International Covenant on Economic, Social and Cultural Rights. Wherever the Committee has adopted General Comments relevant to the understanding of these rights, they will be referred to in a footnote.

- ❖ the right to work, including the right to gain one’s living by work freely chosen or accepted – art. 6;
- ❖ the right to enjoy just and favourable conditions of work, including fair remuneration for work of equal value without distinction of any kind – art. 7;
- ❖ the right to form trade unions and join the trade union of one’s choice – art. 8;
- ❖ the right to social security, including social insurance – art. 9;
- ❖ protection and assistance to the family; marriage to be freely entered into; maternity protection; protection and assistance to children and young persons – art. 10;
- ❖ right to an adequate standard of living, including adequate food,³³ clothing and housing,³⁴ and to the continuous improvement of living conditions – art. 11;
- ❖ the right to the highest attainable standard of physical and mental health – art. 12;
- ❖ the right to education – art. 13;³⁵

³¹See General Comment No. 3 (The nature of States parties’ obligations (art. 2, para. 1), in *United Nations Compilation of General Comments*, p. 18, paras. 1 and 2.

³²*Ibid.*, p. 18, para. 2.

³³General Comment No. 12 (The right to adequate food – art. 11), *ibid.*, pp. 66-74.

³⁴General Comment No. 4 (The right to adequate housing – art. 11(1)), *ibid.*, pp. 22-27, and see also General Comment No. 7 (The right to adequate housing – art. 11(1): forced evictions), *ibid.*, pp. 49-54.

³⁵General Comment No. 13 (The right to education – art. 13), *ibid.*, pp. 74-89.

- ❖ the undertaking to develop detailed plans of action where compulsory primary education is not yet secured – art. 14;³⁶
- ❖ the right to take part in cultural life, to enjoy the benefits of scientific progress and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author – art. 15.

2.2.3 Permissible limitations on rights

The International Covenant on Economic, Social and Cultural Rights contains a general limitation in article 4, whereby the State may subject the enjoyment of the rights guaranteed by the Covenant “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”. Furthermore, limitations relating to the exercise of specific rights are also contained in article 8(1)(a) and (c), where the exercise of the right to form and join trade unions, as well as the right of trade unions to function freely, may be subjected to no restrictions other than “those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others”. From the *travaux préparatoires* relating to article 4 it is clear that it was considered important to include the condition that limitations had to be compatible with a democratic society, that is to say, “a society based on respect for the rights and freedoms of others”;³⁷ otherwise, it was suggested, the text might instead “very well serve the ends of dictatorship”.³⁸

Unlike the International Covenant on Civil and Political Rights, *the International Covenant on Economic, Social and Cultural Rights does not contain any provision permitting derogations from the legal obligations incurred thereunder*. It is therefore logical that none of the rights contained in this Covenant has been made specifically non-derogable. However, as noted by a member of the Committee on Economic, Social and Cultural Rights, “the specific requirements that must be met in order to justify the imposition of limitations in accordance with article 4 will be difficult to satisfy in most cases”.³⁹ In particular, for a limitation to be compatible with article 4, it would have to be “determined by law”, “compatible with the nature of these rights”, and solely designed to promote “the general welfare in a democratic society”.⁴⁰

³⁶General Comment No. 11 (Plans of action for primary education – art. 14), *ibid.*, pp. 63-66.

³⁷See UN doc. E/CN.4/SR.235, p. 9, statement by Mr. Ciasullo of Uruguay.

³⁸See *ibid.*, p. 20 and also p. 11, statement by Mr. Eustathiades of Greece.

³⁹See Philip Alston, “The International Covenant on Economic, Social and Cultural Rights”, in *Manual on Human Rights Reporting*, p. 74.

⁴⁰*Ibid.*, loc. cit.

The enjoyment of the rights guaranteed by the International Covenant on Economic, Social and Cultural Rights may be subjected only to such limitations as are:

- *determined by law;*
- *compatible with the nature of these rights; and*
- *aimed at promoting the general welfare in a democratic society.*

The International Covenant on Economic, Social and Cultural Rights contains no provision allowing for derogations from the legal obligations incurred thereunder.

2.2.4 The implementation mechanism

Under article 16 of the Covenant, the States parties undertake to submit “reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized” therein, and it is the United Nations Economic and Social Council that is formally entrusted with monitoring compliance with the terms thereof (art. 16(2)(a)). However, since the early arrangements for examining the periodic reports were not satisfactory, the Council created, in 1985, the Committee on Economic, Social and Cultural Rights as an organ of independent experts parallel to the Human Rights Committee set up under the International Covenant on Civil and Political Rights.⁴¹ The Committee consists of eighteen members who serve in their individual capacity.

As is the case with the Human Rights Committee, the reports submitted by the States parties are considered in public meetings and in the presence of representatives of the State party concerned. The discussion “is designed to achieve a constructive and mutually rewarding dialogue” so that the Committee members can get a fuller picture of the situation prevailing in the country concerned, thereby enabling them to make “the comments they believe most appropriate for the most effective implementation of the obligations contained in the Covenant”.⁴²

Following an invitation by the Economic and Social Council, the Committee on Economic, Social and Cultural Rights began adopting General Comments “with a view to assisting the States parties in fulfilling their reporting obligations”.⁴³ The General Comments are based on the experience gained by the Committee through the reporting procedure, and draw the attention of the States parties to insufficiencies revealed, and also suggest improvements to that procedure. Lastly, the General Comments are aimed at stimulating the activities of the States parties as well as of the international organizations and specialized agencies concerned to achieve “progressively and effectively the full realization of the rights recognized in the Covenant”.⁴⁴

⁴¹Ibid., p. 117. See also pp. 118-119. For the terms of the resolution creating the Committee, see ECOSOC res. 1985/17 of 28 May 1985.

⁴²Ibid., p. 121.

⁴³See UN doc. E/2000/22 (E/C.12/1999/11), p. 22, para. 49.

⁴⁴Ibid., p. 22, para. 51.

So far, attempts at drafting an additional protocol for the purpose of creating an individual complaints procedure have proved unsuccessful.

The implementation mechanism under the International Covenant on Economic, Social and Cultural Rights consists exclusively of a reporting system.

2.3 The Convention on the Rights of the Child, 1989, and its two Optional Protocols, 2000

Although children are also protected by the general treaties for the protection of the human being, it was considered important to elaborate a convention dealing specifically with children's particular needs. After ten years of work, the Convention on the Rights of the Child was adopted by the General Assembly in 1989 and entered into force on 2 September 1990. On 8 February 2002 there were 191 States parties to the Convention. Within just a few years of its adoption the Convention had been almost universally ratified, and has begun to have an important impact on the decisions of domestic courts. The guiding principle throughout this Convention is that "in all actions concerning children ... *the best interests of the child shall be a primary consideration*" (art. 3(1); emphasis added).⁴⁵

The Convention establishes a Committee on the Rights of the Child "for the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the ... Convention" (art. 43(1)).

On 25 May 2000, the General Assembly further adopted two Optional Protocols to the Convention, namely, the Optional Protocol on the sale of children, child prostitution and child pornography, and the Optional Protocol on the involvement of children in armed conflict. The first Optional Protocol entered into force on 18 January 2002, that is, three months after the deposit of the tenth instrument of ratification or accession (art. 14(1)), while the second Optional Protocol entered into force on 13 February 2002 after the same conditions had been fulfilled (art. 10(1)).⁴⁶ As of 8 February 2002 these Protocols had respectively 17 and 14 ratifications.

2.3.1 The undertakings of the States parties

As in the two International Covenants, the States parties to the Convention on the Rights of the Child generally undertake to "respect and ensure the rights set forth in the ... Convention to each child within their jurisdiction without discrimination of any kind" (art. 2(1)), and to "take all appropriate measures to ensure that the child is

⁴⁵For an extensive explanation of the meaning of the terms of the Convention, see *Implementation Handbook for the Convention on the Rights of the Child*, prepared for UNICEF by Rachel Hodgkin and Peter Newell, UNICEF, 1998, 681 pp. (hereinafter referred to as *UNICEF Implementation Handbook*).

⁴⁶See text and date of entry into force of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography: <http://www.unhchr.ch/html/menu2/dopchild.htm> and, as to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict: <http://www.unhchr.ch/html/menu2/6/protocolchild.htm>

protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members” (art. 2(2)). As in all human rights treaties dealt with in this Manual, the principle of non-discrimination is also a fundamental principle with regard to the rights of the child and it conditions the interpretation and application of all the rights and freedoms contained in the Convention. In its General Guidelines Regarding the Form and Contents of Periodic Reports, adopted in October 1996, the Committee on the Rights of the Child gave detailed instructions to the States parties as to required contents of the periodic reports with regard to each specific legal obligation, such as the right to non-discrimination and the specific rights dealt with below.⁴⁷

*The States parties to the Convention on the Rights of the Child must **respect and ensure** the rights guaranteed thereby without discrimination of any kind.*

*The guiding principle throughout the Convention is that the **best interests of the child** must be a primary consideration.*

2.3.2 The rights recognized

The Convention recognizes a long and detailed list of rights that must be respected and ensured to the child at all times, that is to say, to “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (art. 1). However, the rights guaranteed will here be reflected only in general terms:

- ❖ the child’s right to life and maximum survival and development – art. 6;
- ❖ the child’s right to registration at birth, to a name, a nationality, and, to the extent possible, “to know and be cared for by his or her parents” – art. 7;
- ❖ the child’s right to an identity, including nationality, name and family relations – art. 8;
- ❖ the right of the child not to be separated from his or her parents against their will unless “such separation is necessary for the best interests of the child” – art. 9(1);
- ❖ the duty of States to facilitate family reunification by permitting travel into or out of their territories – art. 10;
- ❖ duty to combat illicit transfer and non-return of children abroad – art. 11;
- ❖ duty to respect the views of the child and the right of the child “to be heard in any judicial and administrative proceedings affecting” itself – art. 12;
- ❖ the child’s right to freedom of expression – art. 13;
- ❖ the child’s right to freedom of thought, conscience and religion – art. 14;
- ❖ the child’s right to freedom of association and to freedom of peaceful assembly – art. 15;

⁴⁷ *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties under Article 44, Paragraph 1(b) of the Convention*, adopted by the Committee on the Rights of the Child at its 343rd meeting (thirteenth session) on 11 October 1996, published in *UNICEF Implementation Handbook*, pp. 604-618.

- ❖ the child’s right to legal protection against arbitrary and unlawful interference with his or her privacy, family, home or correspondence and the right not to be subjected to “unlawful attacks” on his or her honour or reputation – art. 16;
- ❖ the child’s right of “access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health” – art. 17;
- ❖ recognition of the principle that both parents have common and primary responsibility for the upbringing and development of the child and that the “best interests of the child will be their basic concern” – art. 18(1);
- ❖ the child’s right to protection against all forms of violence and abuse – art. 19;
- ❖ the child’s right to special protection and assistance when deprived of his or her family – art. 20;
- ❖ whenever adoption is recognized or permitted, States parties “shall ensure that the best interests of the child shall be the paramount consideration” – art. 21;
- ❖ rights of refugee children – art. 22;
- ❖ rights of the mentally or physically disabled child – art. 23;
- ❖ right of the child to the “highest attainable standard of health” and to health services – art. 24;
- ❖ the right of the child placed in care to “periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement” – art. 25;
- ❖ the child’s right to benefit from social security, including social insurance – art. 26;
- ❖ the child’s right to an adequate standard of living – art. 27;
- ❖ the child’s right to education (art. 28) and the aims of that education (art. 29);⁴⁸
- ❖ the right of children belonging to ethnic, religious or linguistic minorities, as well as the right of children of indigenous origin, to enjoy their own culture, religion and language – art. 30;
- ❖ the child’s right to rest and leisure – art. 31;
- ❖ the child’s right to protection against economic exploitation and hazardous work – art. 32;
- ❖ the child’s right to protection against the illicit use of drugs and psychotropic substances – art. 33;
- ❖ the child’s right to protection “from all forms of sexual exploitation and sexual abuse” – art. 34;
- ❖ the prevention of the abduction and sale of, or traffic in, children – art. 35;
- ❖ the child’s right to protection against all other forms of exploitation prejudicial to any aspects of its welfare – art. 36;
- ❖ the right to freedom from torture or other cruel, inhuman or degrading treatment or punishment, including capital punishment – art. 37(a);

⁴⁸During its twenty-third session held in January 2000, “the Committee decided to engage in the drafting process of a general comment on article 29 of the Convention (aims of education), in view of the forthcoming World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance”; see UN doc. CRC/C/94, *Report on the twenty-third session of the Committee on the Rights of the Child*, p. 103, para. 480.

- ❖ the child's right not to be deprived of his or her liberty arbitrarily and unlawfully – art. 37(b);
- ❖ the child's right to humane treatment whilst deprived of his or her liberty – art. 37(c);
- ❖ the child's right to legal safeguards in connection with deprivation of liberty – art. 37(d);
- ❖ the child's right in armed conflicts to respect for the relevant rules of international humanitarian law – art. 38(1);
- ❖ the child's right to appropriate measures to promote physical and psychological recovery and social integration in case of any form of neglect, exploitation or abuse – art. 39;
- ❖ principles of juvenile justice – art. 40.

As can be seen, these rights not only cover the more traditional human rights standards found, for instance, in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, but they have also been expanded and refined and are drafted so as to respond specifically to the varying needs of the many young people who continue to suffer various forms of hardship.

According to article 1 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, the “States Parties shall prohibit the sale of children, child prostitution and child pornography as provided by the ... Protocol”. Article 2 of the Protocol explains the notions of “sale of children”, “child prostitution” and “child pornography”, while article 3 lists the acts which must, as a minimum, be “fully covered” by the States parties' criminal law. Other provisions provide details as to the duty of the States parties to establish jurisdiction over the relevant offences, and to provide assistance in connection with investigations or criminal or extradition proceedings, seizure and confiscation, international cooperation, and in other areas (arts. 4-11).

The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict raises the age for direct participation in hostilities to 18 years, and imposes on the States parties an obligation to “ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces” (arts. 1 and 2). According to article 3 of the Protocol the States parties shall also “raise the minimum age for the voluntary recruitment of persons into their national armed forces” from that of 15 years of age which is authorized in article 38(3) of the Convention itself; those States which allow the voluntary recruitment of persons under 18 years of age, shall inter alia ensure that “such recruitment is genuinely voluntary” and “carried out with the informed consent of the person's parents or legal guardians” (art. 3(a) and (b)).

2.3.3 Permissible limitations on the exercise of rights

The Convention on the Rights of the Child contains no general limitation provision and only three articles provide for the right to impose limitations on the exercise of rights, namely, the exercise of the right to freedom of expression (art. 13(2)), the right to freedom to manifest one's religion and beliefs (art. 14(3)), and the right to

the freedoms of association and peaceful assembly (art. 15(2)). In all these provisions the limitative measures must be based in law and be necessary for the stated purposes. Only in relation to the exercise of the right to freedom of association and assembly is it expressly stated that the measures concerned must also be “necessary in a democratic society”.

Although the Convention contains few limitation provisions, many of the undertakings of the States parties are linked to the term “appropriate”, which is, of course, open to interpretation. However, it is an interpretation that must in all circumstances be conditioned by “the best interests of the child”. Another factor that may have to be taken into consideration by States in this connection is the balance between the interests of the child itself and “the rights and duties” of his or her parents (cf. arts. 3(3) and 5).

Lastly, the Convention on the Rights of the Child contains no derogation provision, and it can therefore be concluded that the Convention was intended to be applied in its entirety even in exceptional crisis situations.

The Convention on the Rights of the Child contains no general limitation provision. Specific limitation provisions are linked only to the exercise of the freedom of expression, the freedom to manifest one’s religion and belief and the freedoms of association and peaceful assembly.

In general, the interpretation of the terms of the Convention must primarily aim at the best interests of the child but should take into account the rights and duties of his or her parents.

2.3.4 The implementation mechanism

The system of implementation of the Convention on the Rights of the Child (arts. 42-45) is similar to the reporting procedures under the two International Covenants and it will therefore suffice to refer here to what has already been stated above. Like the other Committees, the Committee on the Rights of the Child has also issued Guidelines for reports to be submitted by States parties under the Convention.⁴⁹

2.4 The Convention on the Prevention and Punishment of the Crime of Genocide, 1948

The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly on 9 December 1948 and entered into force on 12 January 1951. As of 26 April 2002 it had 135 States parties. The Convention does not create any *specific* implementation mechanism, but, as will be seen below, leaves the implementation to the Contracting Parties themselves.

⁴⁹See *supra*, note 47.

2.4.1 The undertakings of the States parties

“The Contracting Parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to *prevent* and to *punish*” (art. I; emphasis added). To this end, they also “undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the ... Convention and, in particular, to provide effective penalties for persons guilty of genocide” or of conspiracy to commit, incitement or attempt to commit, or complicity in, the crime of genocide (art. V read in conjunction with art. III).

The fact that the Contracting Parties “confirm” in article I of the Convention that genocide is “a crime under international law” is evidence that they considered the principles underlying the Convention to be already binding on them under international customary law. As noted in Chapter 1 of this Manual, this was also the view expressed by the International Court of Justice in its 1951 Advisory Opinion on *Reservations to the Convention on Genocide*, in which it held that “the principles underlying the Convention are principles which are recognized ... as binding on States, even without any conventional obligation”.⁵⁰ However, the reliance in the Convention on national courts to repress an international crime proves that, in 1948, many problems remained to be solved with regard to the question of international criminal jurisdiction;⁵¹ and it was not until the indiscriminate killings in parts of the former Yugoslavia and in Rwanda in the 1990s that the concept of universal jurisdiction over international crime began to become a true reality (see further subsection 2.4.3).

2.4.2 The legal scope of the Convention

The legal scope of the Convention is limited to the prevention and punishment of the crime of genocide which is defined in article II as meaning “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”.

The following acts are punishable: genocide, conspiracy to commit, direct or indirect incitement and attempt to commit genocide, as well as complicity in genocide (art. III). Moreover, persons committing any of these acts are punishable “whether they are constitutionally responsible rulers, public officials or private individuals” (art. IV).

⁵⁰See *supra*, Chapter 1, section 2.4.2.

⁵¹Ian Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press), 3rd edn., pp. 562-563.

The Genocide Convention was thus an important confirmation of the principle spelled out in the Nuremberg Charter that in some cases individuals have international responsibility under international law which transcends partisan national interests and obligations of obedience.

2.4.3 International crimes: recent legal developments

The principle of individual criminal responsibility for particularly serious acts was given new life when the Security Council decided, by resolution 808 (1993), “that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”. By resolution 827 (1993), the Security Council next approved the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).

As amended in 1998, the Statute empowers the Tribunal to prosecute grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, genocide, and crimes against humanity, namely, murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, as well as “other inhumane acts” – a legal definition of crime that allows the Tribunal to consider also other kinds of large-scale human rights abuses not specifically listed in the Statute (arts. 1-5). The International Tribunal and the national courts have concurrent jurisdiction over the relevant crimes, although the former “shall have primacy over” the latter (art. 9 of the ICTY Statute).

In order to deal with the serious violations of humanitarian law committed in Rwanda between 1 January and 31 December 1994, the Security Council similarly created the International Criminal Tribunal for Rwanda (ICTR) by resolution 955 (1994). The Statute of the Tribunal was adopted by that same resolution. The Tribunal has the power to prosecute persons having committed the following crimes: genocide, crimes against humanity of the same kind as those listed above with regard to the ICTY, as well as violations of article 3 common to the Geneva Conventions of 1949 and of Additional Protocol II (arts. 2-4 of the ICTR Statute). It may also deal with the prosecution of these crimes committed by Rwandan citizens in the territory of neighbouring States (art. 7 of the Statute).

The difference between the prosecution powers of the two Tribunals is due to the fact that the war in the former Yugoslavia was considered to be an armed conflict of an international character, whilst the crisis situation in Rwanda was principally a non-international armed conflict.

Lastly, on 17 July 1998, the Rome Statute of the International Criminal Court was adopted by the United Nations Conference of Plenipotentiaries by a non-recorded vote of 120 to 7 with 21 abstentions.⁵² The establishment of this international, permanent and independent judicial body was to end impunity for acts of genocide, crimes against humanity, war crimes and, on certain conditions, the crime of aggression (art. 5 of the Statute). The Court will be competent to try natural persons irrespective of

⁵²See the following web site: <http://www.icj.org/icc/iccdoc/mficc.htm>, p. 1. For the text of the Rome Statute of the International Criminal Court, see UN doc. A/CONF.183/9.

their official capacity, but will not have jurisdiction over legal persons such as States and corporations (arts. 25 and 27). Further, as with the monitoring organs set up under the general human rights treaties, the International Criminal Court is subsidiary in nature, since, according to article 17 of its Statute, it will prosecute crimes only in cases where the State concerned is unwilling or unable genuinely to carry out the investigation or prosecution provided for in article 17(1)(a) and (b). It is for the International Court itself to determine, on the basis of specific criteria, the “unwillingness” or “inability” of a State to investigate or prosecute in a particular case (art. 17(2) and (3)). The International Criminal Court, or, ICC as it is generally known, will come into existence after 60 States have ratified the Statute (art. 126). As of 11 April 2002, the Statute had been ratified by 66 States and it entered into force on 1 July 2002.⁵³

The Convention on the Prevention and Punishment of the Crime of Genocide aims at the prevention and punishment of genocide, including conspiracy to commit, incitement and attempt to commit, or complicity in, the crime of genocide. The principles underlying the Convention are, however, binding on all States irrespective of any conventional obligation. The new International Criminal Court provides the first international, permanent and independent judicial body for the purpose of ending impunity for acts of genocide, crimes against humanity, war crimes and, on certain conditions, the crime of aggression.

2.5 The International Convention on the Elimination of All Forms of Racial Discrimination, 1965

The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the United Nations General Assembly on 21 December 1965 and entered into force on 4 January 1969. As of 8 April 2002 it had 161 States parties. The Convention established a Committee on the Elimination of Racial Discrimination which monitors the implementation of the Convention. The Committee adopts, when necessary, General Recommendations concerning specific articles or issues of special interest. These recommendations will be referred to whenever relevant.

2.5.1 The undertakings of the States parties

For the purposes of the Convention, “the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of *public life*” (art. 1(1); emphasis added). However, “special measures taken for the *sole* purpose of securing adequate advancement of certain racial or ethnic groups or

⁵³See UN web site www.un.org/law/icc/index/html.

individuals ... in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided [that they do not] lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved” (art. 1(4); emphasis added).⁵⁴

The States parties to the Convention “condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races” (art. 2(1)). To this end, they undertake, in particular,

- ❖ “to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation” – art. 2(1)(a);
- ❖ “not to sponsor, defend or support racial discrimination by any persons or organizations” – art. 2(1)(b);
- ❖ to “take effective measures to review” public policies at all levels and to amend legislation which has “the effect of creating or perpetuating racial discrimination wherever it exists” – art. 2(1)(c);
- ❖ to “prohibit and bring to an end, by all appropriate means, ... racial discrimination by any persons, group or organization” – art. 2(1)(d);
- ❖ “to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division” – art. 2(1)(e).

The States parties shall further “assure to everyone within their jurisdiction effective protection and remedies” against acts violating a person’s human rights contrary to the Convention, as well as the right to seek from domestic tribunals “just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination” (art. 6).

Lastly, they undertake, in particular, “to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination...” (art. 7).

2.5.2 The field of non-discrimination protected

The States parties undertake not only to prohibit and eliminate racial discrimination, but also “to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights” (art. 5):

- ❖ the right to equal treatment before the tribunals and all other organs administering justice – art. 5(a);
- ❖ the right to security of person – art. 5(b);

⁵⁴For the reporting obligations of the States parties under these provisions, see General Recommendation XXIV concerning article 1 of the Convention, in UN doc. GAOR, A/54/18, Annex V, p. 103.

- ❖ political rights, such as the right to participate in elections, to take part in the Government and in the conduct of public affairs and to have equal access to public service – art. 5(c);
- ❖ other civil rights, such as the right to freedom of movement and residence, the right to leave any country, including one’s own, and to return to one’s own country, the right to nationality, the right to marriage and choice of spouse, the right to own property alone as well as in association with others, the right to inherit, the right to freedom of thought, conscience and religion, the right to freedom of opinion and expression, the right to peaceful assembly and association – art. 5(d);
- ❖ economic, social and cultural rights, and in particular the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration, the right to form and join trade unions, the right to housing, the right to public health, medical care, social security and social services, the right to education and training, the right to equal participation in cultural activities – art. 5(e); and
- ❖ the “right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks” – art. 5(f).

As pointed out by the Committee itself in General Recommendation XX, the enumeration of political, civil, economic, social and cultural rights in article 5 is not exhaustive and the right not to be subjected to racial discrimination in the enjoyment of rights may be invoked also in the exercise of rights not expressly mentioned therein. In other words, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, article 5, “does not of itself create [human rights,] but assumes the existence and recognition of these rights”, such as those derived from the Charter of the United Nations, the Universal Declaration of Human Rights and the International Covenants on human rights. This also means that, whenever the States parties impose restrictions on the exercise of the rights enumerated in article 5, they “must ensure that neither in purpose nor effect is the restriction incompatible with article 1 of the Convention as an integral part of international human rights standards”.⁵⁵ It follows, consequently, that the limitations authorized under other human rights treaties are indirectly included in article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, and that, conversely, the notion of racial discrimination as defined in article 1 of this Convention is inherent in the international law of human rights as such.

Although, according to article 1 of the Convention, the prohibition of racial discrimination relates to fields “of public life”, the Committee on the Elimination of Racial Discrimination has explained that “to the extent that private institutions influence the exercise of rights or the availability of opportunities, the State party must ensure that the result has neither the purpose nor the effect of creating or perpetuating racial discrimination”.⁵⁶

⁵⁵ *United Nations Compilation of General Comments*, pp. 188-189, paras. 1 and 2.

⁵⁶ *Ibid.*, p. 189, para. 5.

2.5.3 The implementation mechanism

The Convention created the Committee on the Elimination of Racial Discrimination, which consists of eighteen members serving in their personal capacity (art. 8) and has the task of monitoring the implementation of the terms of the Convention. Like the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination has a three-pronged implementation mechanism consisting of periodic reports, inter-State communications and communications from individuals, which will be briefly described below. Furthermore, the Committee adopts, when necessary, General Recommendations concerning specific articles or issues of special interest. Below is a general description of the monitoring mechanisms:

- ❖ **the reporting procedure:** the States parties undertake to submit, within one year of the entry into force of the Convention for the State concerned, an initial report, and, thereafter, every two years or whenever the Committee so requests, a report on the legislative, judicial, administrative or other measures taken to give effect to the provisions of the Convention (art. 9(1)). Like the other Committees, the Committee on the Elimination of Racial Discrimination has adopted special guidelines on the form and contents of the reports submitted by the States parties;
- ❖ **inter-State complaints:** any State party which considers that another State party is not giving effect to the provisions of the Convention “may bring the matter to the attention of the Committee” (art. 11(1)). Unlike the case of the International Covenant on Civil and Political Rights, no special declaration is needed to recognize this competence of the Committee to receive inter-State communications; the Committee will however only deal with the matter if it has not first been settled to the satisfaction of both parties. Where the Committee is seized of the case, the Convention foresees the appointment of an ad hoc Conciliation Commission, which shall make its good offices “available to the States concerned with a view to an amicable solution of the matter on the basis of respect for” the Convention (art. 12(1)(a)). When the Commission has considered the matter, it shall submit to the Chairman of the Committee “a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute” (art. 13(1)). The States parties can accept or reject the recommendations of the Conciliation Commission (art. 13(2));
- ❖ **individual communications:** a State party may also at any time declare that it considers the Committee competent “to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention” (art. 14(1)). Article 14 entered into force on 3 December 1982, and, as of 17 August 2001, 34 of the States parties had made such a declaration.⁵⁷

⁵⁷UN doc. GAOR, A/56/18, p. 10, para. 2.

*The International Convention on the Elimination of All Forms of Racial Discrimination prohibits such discrimination in the enjoyment of human rights in all fields of **public life**.*

States parties must however also ensure that, whenever private institutions influence the exercise of rights or the availability of opportunities, the result has neither the purpose nor the effect of creating or perpetuating racial discrimination.

The Convention is implemented at the international level through: (1) a reporting procedure; (2) inter-State complaints; and (3) individual communications.

2.6 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

Although outlawed by all the major human rights treaties, the widespread practice of torture was considered to require more detailed legal regulation and more efficient implementation machinery. It was therefore decided to draft a Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted by the United Nations General Assembly on 10 December 1984. It entered into force on 26 June 1987, and, as of 8 April 2002, there were 128 States parties to the Convention. The Convention created an expert body, the Committee against Torture, to supervise the implementation of the obligations of the States parties.

2.6.1 The undertakings of the States parties

According to the Convention, “the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. However, “it does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions” (art. 1).

Next, the Convention requires that “each State Party shall take effective legislative, administrative, judicial or other measures to **prevent** acts of torture in any territory under its jurisdiction” (art. 2(1); emphasis added). It further specifies that “**no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture**” (art. 2(2); emphasis added). This is simply a restatement of already existing international human rights law, given that the right to freedom from torture is made non-derogable in the major relevant treaties, including the International Covenant on Civil and Political Rights.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment makes it clear that “an order from a superior officer or a public authority may not be invoked as a justification of torture” (art. 2(3)). In other words, the principle of individual responsibility for acts of torture is clearly established.

2.6.2 The legal scope of the Convention

The following provisions of the Convention detail the responsibilities of the States parties to prevent, punish, and remedy acts of torture. However, only some of the legal obligations will be outlined here, and in general terms:

- ❖ “no State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture” – art. 3(1);
- ❖ “each State Party shall ensure that all acts of torture are offences under its criminal law” and the same shall apply to attempts to commit torture and acts that constitute “complicity or participation in torture”. It shall, moreover, “make these offences punishable by appropriate penalties which take into account their grave nature” – art. 4(1) and (2);
- ❖ the States parties shall take the measures necessary to exercise their jurisdiction over the preceding offences and to submit the person alleged to have committed acts contrary to article 4 of the Convention to the “competent authorities for the purpose of prosecution” (arts. 5-7) and they shall moreover “afford one another the greatest measure of assistance in connection with criminal proceedings brought” in respect of any of these offences – art. 9;
- ❖ “the offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties”, which also “undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them” – art. 8;
- ❖ the States parties shall further “ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment” – art. 10(1);
- ❖ for purposes of *prevention* of torture, the States parties “shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form” of deprivation of liberty – art. 11;
- ❖ “each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed ... ” – art. 12;
- ❖ each State party shall further ensure that any alleged victim of torture “has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities” – art. 13;
- ❖ “each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible” – art. 14;

- ❖ “each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made” – art. 15; and finally,
- ❖ each State party also undertakes “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1” of the Convention – art. 16.

As is clear from this general description of the legal obligations incurred under this Convention, the question of torture and other cruel, inhuman or degrading treatment or punishment and the State’s actual response thereto is highly relevant to judges, prosecutors and lawyers, who must at all times be prepared to look for signs of the existence of such unlawful acts.

2.6.3 The implementation mechanism

The Committee against Torture, the independent ten-member expert body (art. 17(1)) set up to supervise the implementation of the Convention has, like all the other treaty Committees dealt with in this chapter, the task of considering the periodic reports submitted by the States parties, but can also, when the States parties have made declarations to this effect, receive and consider communications from States parties and individuals. Whilst, as will be seen below, the Convention authorizes the Committee to visit a country where torture is practised only with the consent of the State party concerned, efforts have been made since 1991 to draft an optional protocol to the Convention which would establish a preventive system of regular visits to places of detention. Although the participants in the World Conference on Human Rights unanimously called for the early adoption of this optional protocol,⁵⁸ no agreement has yet been reached on the contents thereof.⁵⁹ In general terms, the monitoring procedures can be described as follows:

- ❖ ***the reporting procedure:*** the States parties are under an obligation to submit reports on the measures they have taken to give effect to their undertakings under the Convention within one year after its entry into force and thereafter every four years or when the Committee so requests (art. 19(1)). In order to facilitate the elaboration of the reports, the Committee has adopted general guidelines on the form and content of both the initial and periodic reports;⁶⁰
- ❖ ***activities of the Committee under article 20:*** this article is specific to the Convention against Torture and provides that, “if the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State party”, it “shall invite that State Party to co-operate in the examination of the information and to this end to

⁵⁸UN doc. A/CONF.157/23, *Vienna Declaration and Programme of Action*, p. 22, para. 61.

⁵⁹See resolution E/CN.4/RES/2000/35 adopted by the Commission on Human Rights on 20 April 2000 on *Draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; an open-ended Working Group is attempting to draft the protocol.

⁶⁰UN docs. CAT/C/4/Rev.2 (as to the initial reports) and CAT/C/14/Rev.1 (as to the periodic reports). For more information about the initial reporting procedure under this Convention, see also Joseph Voyame, “The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, in *Manual on Human Rights Reporting*, pp. 309-332.

submit observations with regard to the information concerned” (art. 20(1)). However, the States parties may, when signing or ratifying the Convention or when acceding to it, declare that they do *not* recognize this competence of the Committee (art. 28(1)). As of 18 May 2001 a total of nine States parties had made such a declaration.⁶¹ The documents and proceedings relating to the Committee’s functions under this article are confidential, although “the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report” to the States parties and to the General Assembly (art. 20(5));⁶²

- ❖ ***inter-State communications***: as of 18 May 2001, 43 States parties had declared that they recognize the competence of the Committee to receive and consider communications to the effect that a State party claims that another State party is not fulfilling its obligations under the Convention (art. 21(1)).⁶³ The Committee will consider the communication only if the matter has not been settled to the satisfaction of both States parties. The procedure is confidential and the Committee “shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention”. To this end it can set up an ad hoc conciliation commission. If no friendly solution is reached in the case, the Committee shall draw up a report which shall merely contain a “brief statement of the facts” of the case (art. 21(1));
- ❖ ***individual communications***: lastly, the Committee may receive communications from individuals claiming to be victims of a violation of the Convention if the State party concerned has expressly recognized its competence to do so (art. 22(1)). As of 18 May 2001, 40 States parties had made a declaration to this effect.⁶⁴ The Committee shall however consider inadmissible any communication which is anonymous, or which it considers to be an abuse of the right of submission of communications or which is incompatible with the terms of the Convention (art. 22(2)). Before considering a communication the Committee must also, *inter alia*, ascertain that the individual has exhausted all available domestic remedies, unless the application of remedies is unreasonably prolonged or is unlikely to bring effective relief to the alleged victim (art. 22(5)(b)). Whilst the documents and proceedings relating to individual communications are confidential, the views of the Committee are communicated to the parties and also made available to the public. The same also generally holds true with regard to the Committee’s decisions whereby it declares communications inadmissible.⁶⁵ Many of the Committee’s views and decisions are contained in its annual report to the General Assembly.

⁶¹UN doc. GAOR, A/56/44, Annex II, p. 79.

⁶²UN doc. GAOR, A/54/44, p. 24, para. 231.

⁶³UN doc. GAOR, A/56/44, Annex III, pp. 80-81.

⁶⁴Ibid., loc. cit.

⁶⁵UN doc. GAOR, A/54/44, p. 25, para. 236.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment confirms the well-established rule in international law that no circumstances whatever, not even wars or other public emergencies, can justify recourse to torture or other forms of ill-treatment.

An order from a superior cannot be invoked as a justification of torture.

The Convention is implemented at the international level through: (1) a reporting procedure; (2) the Committee's special activities under article 20; (3) inter-State communications; and (4) individual communications.

2.7 The Convention on the Elimination of All Forms of Discrimination against Women, 1979, and its Protocol, 1999

The Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly on 18 December 1979 and entered into force on 3 September 1981. As of 8 April 2002 it had 168 States parties. The Convention establishes an independent expert body, the Committee on the Elimination of Discrimination against Women, to monitor the implementation of the Convention. On 6 October 1999 the General Assembly further adopted, without a vote, an Optional Protocol to the Convention, thereby making it possible for the Committee, inter alia, to receive and consider communications from women or groups of women who consider themselves to be victims of gender discrimination within the jurisdiction of those States that have ratified or acceded to the Protocol. This Protocol entered into force on 22 December 2000, and as of 8 April 2002 had 30 States parties.

2.7.1 The undertakings of the States parties

For the purposes of the Convention the term “discrimination against women” means “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil *or any other field*” (art. 1; emphasis added). The prohibition on discrimination against women is thus not limited to the traditional categories of human rights, but goes beyond them to other fields where discrimination might occur. Furthermore, it is not limited to the public field but also extends to areas of private life.

It is noteworthy, however, that “temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention”; however, such measures “shall be discontinued when the objectives of equality of opportunity and treatment have been achieved” (art. 4).

The States parties “agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake”, in particular (art. 2):

- ❖ to embody the principle of equality of men and women in their national laws and to ensure the practical realization of this principle;
- ❖ “to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”;
- ❖ to establish effective legal protection of the equal rights of women through national tribunals or other public institutions;
- ❖ “to refrain from engaging in any act or practice of discrimination against women”;
- ❖ “to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise”; and
- ❖ “to repeal all national penal provisions which constitute discrimination against women ”.

The subsequent articles provide further details as to the undertakings of the States parties to eliminate discrimination against women, which, inter alia, comprise the following obligations:

- ❖ “to modify the social and cultural patterns of conduct of men and women ... which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (art. 5(a));
- ❖ “to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases” (art. 5(b));
- ❖ to take all appropriate measures to suppress all forms of traffic in women and exploitation of prostitution of women (art. 6), eliminate discrimination against women in political and public life (arts. 7 and 8⁶⁶), in the fields of education (art. 10), employment (art. 11) and health care (art. 12); in the areas of economic and social life (art. 13); as well as against women in rural areas (art. 14(2)).

2.7.2 The specific legal scope of the Convention

Whilst many articles in the Convention are framed as general legal obligations on the States parties to “take appropriate measures” to eliminate discrimination against women, some at the same time specify the particular rights which must be ensured on a basis of equality of men and women. Thus, for instance:

- ❖ with regard to education, women have the right, inter alia, to the same conditions for career and vocational training and the same opportunities for scholarships and other grants – art. 10;

⁶⁶General Recommendation No. 8 (Implementation of article 8), in *United Nations Compilation of General Comments*, p. 206.

- ❖ the right to work, to the same employment opportunities, to free choice of profession and employment, to equal remuneration,⁶⁷ to social security and to protection of health – art. 11;
- ❖ the right to family benefits, to bank loans, mortgages and other forms of financial credit and to participate in recreational facilities, sports and all aspects of cultural life – art. 13;
- ❖ the right of rural women to participate in the elaboration and implementation of development plans, to have access to adequate health care facilities, to benefit directly from social security programmes, to obtain all types of training and education, to organize self-help groups, to participate in all community activities, to have access to agricultural credit and loans, and to enjoy adequate living conditions – art. 14.

Lastly, the Convention specifically imposes a duty on the States parties to “accord to women equality with men before the law” as well as identical legal capacity in civil matters (art. 15(1) and (2)); and also obliges States parties to ensure them, on a basis of equality of men and women, a number of rights relating to marriage and the family (art. 16).

The Convention on the Elimination of All Forms of Discrimination against Women thus covers all major fields of active life in society and can also serve as a useful tool for judges, prosecutors and lawyers in examining questions of equality between men and women under national legislation.

2.7.3 The implementation mechanisms

The monitoring mechanisms established under the Convention and its 1999 Protocol can briefly be described as follows:

- ❖ *the reporting procedure*: the Convention per se has an implementation mechanism that is less developed than those created by the treaties dealt with above in that it is limited to a *reporting procedure*, with the States parties undertaking to send a report to the Committee on the Elimination of Discrimination against Women, indicating the factors and difficulties they encounter in fulfilling their obligations under the Convention, within one year after the entry into force of the Convention, and thereafter every four years, or when the Committee so requests (art. 18). The Committee has adopted guidelines for the submission of periodic reports with the object of assisting the States parties in complying with their treaty obligations, and, as of June 1999, it had also adopted 24 General Recommendations under article 21 of the Convention;⁶⁸ the recommendations can concern either specific provisions of the Convention or what are called “cross-cutting” themes.⁶⁹ The work of the Committee on the Elimination of Discrimination against Women has been rendered more difficult by the fact that the Convention limits its meeting time to a

⁶⁷General Recommendation No. 13 (Equal remuneration for work of equal value), *ibid.*, p. 210.

⁶⁸For more information as to the reporting procedure under this Convention, see Zagorka Ilic, “The Convention on the Elimination of All Forms of Discrimination against Women”, in *Manual on Human Rights Reporting*, pp. 265-308. For the guidelines, see UN doc. CEDAW/C/7/Rev.3, *Guidelines for Preparation of Reports by States Parties*.

⁶⁹For a list of the General Recommendations adopted by the Committee, see the UN web site: <http://www.un.org/womenwatch/daw/cedaw/recommendations.htm>.

maximum of two weeks annually (art. 20), whilst the meeting times of other treaty bodies have not been limited by the respective treaties. In its General Recommendation No. 22, the Committee thus proposed that the States parties amend article 20 “so as to allow it to meet annually for such duration as is necessary for the effective performance of its functions under the Convention”;⁷⁰

- ❖ **individual communications:** Since the entry into force on 22 December 2000 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee has been competent to consider petitions from individual women or groups of women having exhausted all their domestic remedies. Petitions can also be submitted on behalf of individuals or groups of individuals, with their consent, unless it can be shown why consent was not received (art. 2). The Optional Protocol also entitles the Committee to conduct confidential enquiries into grave or systematic violations of the Convention (art. 8).

The Convention on the Elimination of All Forms of Discrimination against Women has provided a legal framework that has stimulated work in favour of increased equality between women and men in many parts of the world.

The Convention on the Elimination of All Forms of Discrimination against Women provides a comprehensive legal framework for the elimination of discrimination against women in their enjoyment of human rights and fundamental freedoms in both the public and the private fields. At the international level the Convention is implemented through (1) a reporting procedure and (2) a system of individual communications.

3. Other Instruments Adopted by the United Nations General Assembly

This section will highlight a few of the most relevant resolutions adopted by the General Assembly in the field of human rights, many of which will be dealt with specifically in some detail in other chapters of this Manual. As explained in Chapter 1, resolutions adopted by the General Assembly do not, as such, constitute legally binding obligations, but, depending on the circumstances of their adoption, they can provide useful evidence of customary international law.⁷¹ As a minimum, resolutions adopted by the General Assembly carry strong moral and political force and can be regarded as setting forth principles broadly accepted within the international community.⁷² Consequently, they can also provide important guidance to the domestic legal

⁷⁰See General Recommendation No. 22 (Amending article 20), *United Nations Compilation of General Comments*, pp. 232-233.

⁷¹See further *supra*, Chapter 1, section 2.4.2.

⁷²See *Human Rights: A Basic Handbook for UN Staff*, United Nations, Office of the United Nations High Commissioner for Human Rights/United Nations Staff College Project, p. 5.

professions, in situations, for instance, where either international or domestic law is not sufficiently clear on a particular issue.

The following resolutions are among those that are of particular significance for judges, prosecutors and lawyers in the exercise of their professional responsibilities. *However, it is advisable to exercise care in seeking guidance, particularly from some of the older resolutions, since States may have become bound by stricter legal standards, either under their own domestic law, or under international conventions.* As will be seen, many of these resolutions deal with the treatment of persons deprived of their liberty, including juveniles, and aim at eradicating torture and other kinds of inhuman treatment.

3.1 The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief proclaims “the right to freedom of thought, conscience and religion”, and includes, inter alia, the freedom to have a religion or whatever belief of one’s choice, and to manifest this religion or belief either individually or in community with others (art. 1). It further provides that “no one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief” (art. 2(1)). States “shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief” and shall “make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination” (art. 4).

3.2 The Basic Principles for the Treatment of Prisoners, 1990

According to the Basic Principles for the Treatment of Prisoners, 1990, “all prisoners shall be treated with the respect due to their inherent dignity and value as human beings”, and shall not be subjected to discrimination on various grounds (Principles 1 and 2). “Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party”, the rights set out in other United Nations covenants (Principle 5). Prisoners shall have the right to take part in cultural activities and education and be enabled to undertake “meaningful remunerated employment” (Principles 6 and 8). The Basic Principles also provide that efforts should be undertaken and encouraged to abolish solitary confinement as a punishment (Principle 7).

3.3 The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988, is a comprehensive statement of 39 principles, which cannot be invoked to restrict the rights of persons deprived of their liberty recognized by other national or international sources of law on the ground that they are not contained in this Body of Principles (Principle 3 and General Clause). The Body of Principles emphasizes, in particular, questions of effective control of all forms of detention including judicial or other review of the continued detention. It further provides details as to conditions of arrest, the notification of arrest or transfer to a different place of detention to the family or other persons, the right of a person deprived of his or her liberty to communicate with family and legal counsel, interrogations, impartial visits to places of detention to supervise the observance of laws and regulations and, for instance, the question of remedies to challenge both the lawfulness of the deprivation of liberty and the treatment to which the person has been subjected whilst deprived of his or her liberty.

3.4 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990, emphasize that imprisonment for juveniles “should be used as a last resort” (Rule 1), and provide extensive guidance with regard to the rights of juveniles within the justice system, for instance, in connection with arrest or detention and when they are awaiting trial. They also regulate the management of juvenile facilities, inter alia with regard to record keeping, the physical environment and accommodation, education, vocational training and work, recreation, religion, medical care, limitations of physical restraint and the use of force, disciplinary procedures, as well as inspection and complaints.

3.5 The Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982

The Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982, is a brief set of six principles which emphasize the duty of all health personnel charged with the medical care of prisoners and detainees to provide them with the same protection of their physical and mental care as is afforded to those who are not deprived of their

liberty (Principle 1). It is thus “a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment” (Principle 2). It is also a contravention of medical ethics, inter alia, for physicians, to “apply their knowledge and skills ... to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees” (Principle 4(a)) and “to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria” as being necessary for certain specifically identified purposes (Principle 5).

3.6 The Code of Conduct for Law Enforcement Officials, 1979

The Code of Conduct for Law Enforcement Officials, 1979, is aimed at all officers who exercise police powers, especially the powers of arrest and detention (art. 1 with Commentary). “In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons” (art. 2). In particular, they “may use force only when strictly necessary and to the extent required for the performance of their duty” (art. 3) and may not “inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment”. Furthermore, such acts cannot be justified by superior orders or exceptional circumstances such as a state of war or other public emergencies (art. 5). Lastly, among other obligations, “law enforcement officials shall not commit any act of corruption” and “shall rigorously oppose and combat all such acts” (art. 7).

3.7 The United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), 1990

The United Nations Standard Minimum Rules for Non-custodial Measures, 1990, also called The Tokyo Rules, “provide a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment”, and are “intended to promote greater community involvement in the management of criminal justice” and “to promote among offenders a sense of responsibility towards society” (General Principles 1.1 and 1.2). The Rules cover all stages from pre-trial, through the trial, sentencing and post-sentencing stages, and further deal, inter alia, with the implementation of non-custodial measures (Principles 5-14).

3.8 The United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), 1990

The United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990, also called the Riyadh Guidelines, aim at the prevention of juvenile delinquency by pursuing “a child-centred orientation” whereby “young persons should have an active role and partnership within society and should not be considered as mere objects of socialization or control” (Fundamental Principle 3). The Guidelines, which should be interpreted and implemented within the framework of other existing relevant international standards such as the International Covenants and the Convention on the Rights of the Child, deal with questions of general prevention (Guideline 9), socialization processes (Guidelines 10-44), social policy (Guidelines 45-51), legislation and juvenile justice administration (Guidelines 52-59), and research, policy development and coordination (Guidelines 60-66).

3.9 The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985

The Standard Minimum Rules for the Administration of Juvenile Justice 1985, also called the Beijing Rules, set forth detailed principles on the treatment of juveniles in the administration of justice, together with commentaries thereon. The rules deal with the age of criminal responsibility, the aims of juvenile justice, the rights of juveniles, the protection of privacy, investigation and prosecution, adjudication and disposition, non-institutional and institutional treatment, and also with research, planning, policy formulation and evaluation.

3.10 The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985

The first part of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, contains rules on access to justice and fair treatment of victims of “acts or omissions that are in violation of criminal laws operative within the Member States, including those laws proscribing criminal abuse of power” (Principles 4 and 1 read together). It further regulates the right to restitution, compensation and assistance for victims of crime (Principles 8-17). Lastly, it deals with the situation of victims of “acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights” (Principle 18). In this respect “States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support” (Principle 19).

3.11 The Declaration on the Protection of All Persons from Enforced Disappearance, 1992

The Declaration on the Protection of All Persons from Enforced Disappearance, 1992, provides that “no State shall practise, permit or tolerate enforced disappearances” (art. 2(1)) and that “each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction” (art. 3). It further provides that “no order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance” and that “any person receiving such an order or instruction shall have the right and duty not to obey it” (art. 6(1)). Furthermore, “the right to a prompt and effective *judicial* remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required to prevent enforced disappearances under all circumstances”, including situations where the State is facing “a threat of war, a state of war, internal political instability or any other public emergency” (art. 9(1) read in conjunction with art. 7; emphasis added). Such crisis situations cannot in any circumstances be invoked to justify disappearances (art. 7).

3.12 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 (“The Declaration on Human Rights Defenders”), 1998

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, 1998, the so-called Declaration on Human Rights Defenders, was elaborated over a 13-year period, and is of particular significance in that it underscores the right of everyone, “individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels” (art. 1). It underlines States’ “prime responsibility and duty to protect, promote and implement all human rights” (art. 2), and *inter alia* defines existing norms concerning the right “to participate in peaceful activities against violations of human rights and fundamental freedoms” (art. 12(1)). Each person has, moreover, a right “to be *protected effectively under national law* in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment” of those rights and freedoms (Art. 12(3); emphasis added). By resolution 2000/61, the United Nations Commission on Human Rights decided to request the Secretary-General to appoint a special representative to “report on the situation of human rights defenders in all parts of the world and on possible means to enhance their protection in full compliance with the Declaration” (operative paragraph 3).

4. Instruments adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders

Interpretative guidance as to the meaning of international legal standards can also be sought in the following non-binding instruments which were adopted by the various United Nations Congresses on the Prevention of Crime and the Treatment of Offenders:

- ❖ Standard Minimum Rules for the Treatment of Prisoners, 1955;
- ❖ Basic Principles on the Independence of the Judiciary, 1985;
- ❖ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990;
- ❖ Basic Principles on the Role of Lawyers, 1990; and
- ❖ Guidelines on the Role of Prosecutors, 1990.

However, since these instruments will be examined in some depth in other chapters of this Manual, they will not be dealt with further in this chapter.

5. United Nations Extra-Conventional Mechanisms for Human Rights Monitoring

In addition to the international treaty mechanisms, the United Nations has established what are referred to as “special procedures” to deal with especially serious human rights violations and to review petitions from individuals and NGOs. These procedures, which are established within the framework of the United Nations Commission on Human Rights, are aimed at establishing constructive cooperation with the Governments concerned in order to redress violations of human rights. There are basically two categories, namely, the thematic and country procedures on the one hand, and the 1503 procedure on the other.

5.1 Special procedures I: Thematic and country mandates⁷³

Over the past few decades the United Nations Commission on Human Rights and the Economic and Social Council have established a number of *extra-conventional mechanisms or special procedures*, which are created neither by the Charter of the United Nations nor by a treaty. These extra-conventional mechanisms, which also monitor the enforcement of human rights standards, have been entrusted to *working groups of experts acting in their individual capacity or individuals designated as special rapporteurs, special representatives or independent experts*.

The mandate and tenure of the working groups, special rapporteurs, independent experts or special representatives of the Secretary-General depend on the decision of the Commission on Human Rights or of the Economic and Social Council. In general, however, their mandate is to examine, monitor and publicly report either on the human rights situation in a specific country or territory – the so-called *country mandates* – or on specific types of human rights violations worldwide – the *thematic mechanisms or mandates*.

These mechanisms are of paramount importance for monitoring universal human rights standards and address many of the most serious human rights violations in the world, such as extrajudicial, summary or arbitrary executions, enforced or involuntary disappearances, arbitrary detention, internally displaced persons, the independence of judges and lawyers, violence against women, the sale of children, the right to development, adequate housing, education, and human rights defenders.

The *central objective* of all these special procedures is to improve the implementation of international human rights standards at the national level. However, each special procedure has its own specific mandate, which has sometimes also evolved according to specific circumstances and needs.

These mechanisms base their activities on allegations of human rights violations received from various sources, such as the victims or their relatives and local or international NGOs. Information of this kind may be submitted in various forms, such as letters and faxes, and may concern individual cases, as well as details of situations of alleged human rights violations.

These special mechanisms submit well-founded cases of human rights violations to the Governments concerned for clarification. The results are subsequently reflected in the public reports submitted by the mechanisms to the Commission on Human Rights and other competent United Nations organs. Moreover, whenever the information received attests to the imminence of a serious human rights violation, such as an extrajudicial execution or involuntary disappearance, the thematic or country-specific mechanisms may address an urgent message to the Governments concerned requesting clarifications on the case and appealing to the Government to take the necessary steps to guarantee the rights of the alleged victim. They may also

⁷³The information in this section has been drawn partly from *Human Rights: A Basic Handbook for UN Staff*, United Nations, Office of the High Commissioner for Human Rights/United Nations Staff College Project, pp. 49-53.

request an immediate visit to the country concerned.⁷⁴ The purpose of these appeals is to strengthen human rights protection in situations giving rise to immediate concern; and, as emphasized in a report on the rationalization of the work of the Commission, adopted by consensus by the Commission itself during its fifty-sixth session, “Governments to which urgent appeals are addressed should understand the gravity of the concern that underlies these appeals and should respond as quickly as possible”.⁷⁵ These appeals are intended to be *preventive* in character and do not prejudge the final conclusion in the case concerned. Cases that are not clarified are made public through the report of the special mechanisms to the Commission on Human Rights or to other competent United Nations bodies.

5.2 Special procedures II: The 1503 complaints procedure

In response to the large number of communications submitted to the United Nations each year alleging the existence of gross and systematic violations of human rights, the Economic and Social Council has adopted a procedure for dealing with such communications. This is known as the 1503 procedure, pursuant to the adoption of resolution 1503 of 27 May 1970. However, although based on individual petitions and more comprehensive submissions by NGOs, it does not deal with individual cases but *seeks to identify situations of grave violations of human rights affecting large numbers of people*.

As from the year 2000, this confidential procedure, which originally comprised three stages, will be composed of a two-stage procedure involving, in the first place, a Working Group on Communications comprising five independent members of the Sub-Commission on the Promotion and Protection of Human Rights, as well as a Working Group on Situations consisting of five members of the Commission on Human Rights nominated by the regional groups. The Commission itself then holds two closed sessions to consider the recommendations of the Working Groups on Situations.⁷⁶ The 1503 dossier remains confidential at all times, unless the Government concerned has indicated that it wishes it to be made public. Otherwise, only the names of the countries having been examined under the 1503 procedure, and of the countries no longer being dealt with thereunder, are made public by the Chairperson of the Commission.⁷⁷

⁷⁴See UN doc. E/CN.4/2000/112, *Report of the Intersessional Open-ended Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights*, p. 8, para. 26.

⁷⁵*Ibid.*, p. 9, para. 28.

⁷⁶For further details on the 1503 procedure as modified, see *ibid.*, pp. 11-12, paras. 35-41.

⁷⁷*Ibid.*, p. 12, para. 41.

*In addition to the international treaty-based mechanisms, the United Nations has established **special procedures** aimed at dealing with particularly serious human rights violations. These procedures are aimed at creating cooperation with the Governments concerned for the purpose of redressing such violations.*

These procedures consist of thematic and country procedures involving working groups and special rapporteurs, special representatives or independent experts. They also include the 1503 complaints procedure, which seeks to identify situations of grave violations of human rights affecting large numbers of people.

6. Concluding Remarks

As can be seen from the basic information contained in this chapter, international human rights treaties and numerous resolutions adopted by the various organs of the United Nations contain detailed standards for the protection of the human person, including a variety of monitoring mechanisms to improve the efficiency of the actual implementation of these standards at the domestic level. The examples to be given in subsequent chapters will show that these legal instruments have in fact contributed to important legal developments for the purposes of enhancing the protection of individuals. Naturally, the universal human rights standards presented in this chapter, as interpreted by the competent monitoring organs, also provide indispensable guidance to the domestic legal professions in their own work to protect individuals at all times against various encroachments upon their rights.

Moreover, these universal standards are complemented by regional standards adopted in Africa, the Americas and Europe. These various universal and regional legal standards often coexist at the domestic level, and, depending on the issues involved, domestic judges may have to consider both sets of rules and principles.

Finally, it is important to bear in mind that neither the universal nor the regional law for the protection of the human person is static, but that they evolve in step with the new human needs that continue to emerge in society. Since this adaptation is often effected by means of interpretation, it is indispensable for judges, prosecutors and lawyers to keep themselves continuously informed about these legal developments so as to be able to contribute to maximizing the protection of the individual at the domestic level.

.....Chapter 3
**THE MAJOR REGIONAL
HUMAN RIGHTS
INSTRUMENTS AND THE
MECHANISMS FOR THEIR
IMPLEMENTATION.....**

Learning Objectives

- *To familiarize participants with the major regional human rights instruments and their different modes of implementation;*
- *To provide a basic understanding of how these legal resources can be used by legal practitioners, principally at the domestic level but also to some extent at the regional level, for the purpose of bringing complaints before the monitoring organs.*

Questions

- *Have you, in the exercise of your professional activities as judges, prosecutors or lawyers, ever been faced with an accused person, defendant, respondent or client alleging violations of his or her rights under regional human rights law?*
- *If so, how did you respond?*
- *Were you aware that regional law for the protection of human rights could provide guidance for solving the problem concerned?*
- *Were you aware that the alleged victim might ultimately bring his or her grievances to the attention of the regional commissions or courts?*
- *If not, would such an awareness have changed your manner of responding to the alleged violations of his or her human rights?*
- *Have you ever brought a case against your country, or some other country, before a regional organ on behalf of an alleged victim of a human rights violation?*
- *If so, what was the outcome of the case?*
- *What was your experience generally of making such a complaint?*
- *Have you any experience of both the universal and regional systems? If so, what differences did you perceive?*

1. Introduction

Beginning with the adoption of the European Convention on Human Rights in 1950, the trend to elaborate regional standards continued with the adoption of the American Convention on Human Rights in 1967, which was subsequently followed by the African Charter on Human and Peoples' Rights, adopted in 1981. Various other regional treaties have been elaborated in an effort to render the protection not only of civil and political rights, but also of economic, social and cultural rights, more efficient. In this chapter a presentation will be given of some of the major regional human rights treaties existing in Africa, the Americas and Europe. However, given that these systems for the protection of the human person have been dealt with in depth elsewhere, the present Manual will limit itself to describing their major features.

2. African Human Rights Treaties and their Implementation

2.1 The African Charter on Human and Peoples' Rights, 1981

The adoption of the African Charter on Human and Peoples' Rights in 1981 was the beginning of a new era in the field of human rights in Africa.¹ It entered into force on 21 October 1986, and as of 29 April 2002 had 53 States parties.

Although strongly inspired by the Universal Declaration of Human Rights, the two International Covenants on human rights and the regional human rights conventions, the African Charter reflects a high degree of specificity due in particular to the African conception of the term "right" and the place it accords to the responsibilities of human beings.² The Charter contains a long list of rights, covering a wide spectrum not only of civil and political rights, but also of economic, social and cultural rights.

The African Charter further created the African Commission on Human and Peoples' Rights, "to promote human and peoples' rights and ensure their protection in Africa" (art. 30). In 1998, the Protocol to the Charter on the Establishment of an African Court of Human Rights was also adopted, but, as of 30 April 2002, this Protocol had not yet entered into force, having secured only 5 of the required 15 ratifications. Lastly, work on the elaboration of an additional protocol concerning the rights of women in Africa is in progress within the framework of the African Commission on Human and Peoples' Rights, the Commission being assisted in this task by the Office of the United Nations High Commissioner for Human Rights.³

¹Fatsah Ouguergouz, *La Charte africaine des droits de l'homme et des peuples – Une approche juridique des droits de l'homme entre tradition et modernité* (Paris, Presses Universitaires de France, 1993 (Publications de l'Institut universitaire de hautes études internationales, Genève)), p. xxv.

²Keba Mbaye, *Les droits de l'homme en Afrique* (Paris, Editions A. Pedone/Commission Internationale de Juristes, 1992), p. 161.

³See Mutoy Mubiala, "Le Projet du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits de la Femme en Afrique", in *Human Rights*, Spring 2000 (OUNHCHR review), pp. 23-27.

2.1.1 The undertakings of the States parties

The States parties to the Charter “shall recognize the rights, duties and freedoms enshrined [therein] and shall undertake to adopt legislative or other measures to give effect to them” (art. 1).

It is further provided that they “shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter, and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood” (art. 25). Moreover, the States parties “shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the ... Charter” (art. 26). These two latter provisions thus emphasize the need for education, information and *an independent administration of justice* in order to ensure the effective protection of human rights.

Lastly, several provisions of the Charter are also couched in the form of duties of the States parties to ensure certain rights, such as, for instance, the “promotion and protection of morals and traditional values recognized by the community”(art. 17(3)) and the right to development (art. 22(2)).

2.1.2 The individual and collective rights recognized

The African Charter on Human and Peoples’ Rights recognizes the following civil, political, economic, social and cultural rights of *individual* human beings, in particular:

- ❖ the right to freedom from discrimination on any grounds in the enjoyment of the rights and freedoms guaranteed in the Charter – art. 2;
- ❖ the right to equality before the law and to equal protection of the law – art. 3;
- ❖ the right to respect for one’s life and personal integrity – art. 4;
- ❖ the right to respect for one’s inherent dignity as a human being, including freedom from slavery, the slave trade, torture, cruel, inhuman or degrading punishment and treatment – art. 5;
- ❖ the right to liberty and to the security of one’s person; freedom from arbitrary arrest or detention – art. 6;
- ❖ the right to have one’s cause heard, and “the right to an appeal to competent national organs against acts of violating” one’s human rights; the right to be presumed innocent until proved guilty by a competent court or tribunal; the right to defence; and the right to be tried within a reasonable time by an impartial tribunal; freedom from ex post facto laws – art. 7;
- ❖ freedom of conscience, the profession and free practice of religion – art. 8;
- ❖ the right to receive information and the right to express and disseminate one’s opinions “within the law” – art. 9;
- ❖ the right to freedom of association (art. 10) and the right to assemble freely with others – art. 11;

- ❖ the right to freedom of movement and residence within the borders of a State; the right to leave any country including one's own and to return to one's country; the right to asylum in case of persecution; prohibition of mass expulsions – art. 12;
- ❖ the right to participate freely in the government of one's country, either directly or through freely chosen representatives; the right to equal access to the public service of one's country and to access to public property and services – art. 13;
- ❖ the right to property – art. 14;
- ❖ the right to work and the right to equal pay for equal work – art. 15;
- ❖ the right to enjoy the best attainable state of physical and mental health – art. 16;
- ❖ the right to education, and freely to take part in the cultural life of one's country – art. 17;
- ❖ the right of the family, the aged and the disabled to special measures of protection – art. 18.

Next, the African Charter recognizes the following rights of *peoples*, namely:

- ❖ the right of peoples to equality – art. 19;
- ❖ the right to existence of all peoples, including the right to self-determination; the right of all peoples to assistance in their liberation struggle against foreign domination, “be it political, economic or cultural” – art. 20;
- ❖ the right of all peoples freely to dispose of their wealth and natural resources – art. 21;
- ❖ the right of all peoples to their economic, social and cultural development – art. 22;
- ❖ the right of all peoples to national and international peace and security – art. 23;
- ❖ the right of all peoples “to a general satisfactory environment favourable to their development” – art. 24.

2.1.3 The individual duties

Without providing any details, article 27(1) deals with individual duties toward certain *groups* by stipulating, in general terms only, that “every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community”. Next, article 28 concerns the individual's duty towards *other individuals*, providing that “every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance”. Lastly, article 29 enumerates several other specific individual duties, such as the duties:

- ❖ to preserve the harmonious development of the family – art. 29(1);
- ❖ to serve one's national community – art. 29(2);
- ❖ not to compromise the security of the State – art. 29(3);
- ❖ to preserve and strengthen the social and national solidarity – art. 29(4);
- ❖ to preserve and strengthen the national independence and territorial integrity of one's country – art. 29(5);
- ❖ to work to the best of one's abilities and competence, and to pay taxes – art. 29(6);

- ❖ to preserve and strengthen positive African cultural values – art. 29(7); and, finally,
- ❖ the duty to contribute to the best of one’s abilities to the promotion and achievement of African unity – art. 29(8).

2.1.4 Permissible limitations on the exercise of rights

The exercise of many of the rights and freedoms guaranteed by the African Charter is conditioned by limitation provisions, which in some cases indicate specific aims for which limitations might be imposed, but which in others simply refer back to the conditions laid down in national law. Article 12(2) thus provides that the right to leave any country including one’s own, and to return to one’s own country, “may only be subject to restrictions provided for by law for the protection of national security, law and order, public health or morality”. However, everyone has the right to free association “provided that he abides by the law” (art. 10), without there being any indication as to the grounds the national law can legitimately invoke to limit that freedom of association.

2.1.5 Derogations from legal obligations

Unlike the International Covenant on Civil and Political Rights and the American and European Conventions on Human Rights, the African Charter does not provide for any right of derogation for the States parties in public emergencies. As indicated in Chapter 1, and, as will be further shown in Chapter 16, this absence has been interpreted by the African Commission on Human and Peoples’ Rights to mean that derogations are not permissible under the African Charter.⁴

*The African Charter on Human and Peoples’ Rights is specific in that it protects not only rights of **individual human beings** but also rights of **peoples**.*

The Charter also emphasizes the individual’s duties towards certain groups and other individuals.

*While some provisions of the African Charter allow for **limitations** to be imposed on the exercise of the rights guaranteed, **no derogations are ever allowed** from the obligations incurred under this treaty.*

2.1.6 The implementation mechanism

The African Commission on Human and Peoples’ Rights consists of eleven members serving in their individual capacity (art. 31). It has the twofold function, first, of *promoting* human and peoples’ rights, and, second, of *protecting* these rights (art. 30), including the right to receive communications both from States and from other sources.

⁴ACHPR, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, No. 74/92, decision taken at the 18th ordinary session, October, 1995, para. 21; for the text see the following web site: <http://www1.umn.edu/humanrts/africa/comcases/74-92.html>.

As to the function of promoting human and peoples' rights, the Commission shall, in the first place, in particular, collect documents, undertake studies and researches on African problems, organize conferences, encourage domestic human rights institutions, and, "should the case arise, give its views or make recommendations to Governments"; second, it shall "formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights"; lastly, it shall cooperate with other African and international institutions concerned with the promotion and protection of these rights (art. 45(1)).

With regard to the Commission's function of ensuring "the protection of human and peoples' rights under conditions laid down by the ... Charter" (art. 45(2)), the Commission not only has competence to receive communications from States and other sources, but is also authorized to "interpret all the provisions of the ... Charter at the request of a State Party, an institution of the OAU or an African Organization recognized by the OAU" (art. 45(3)).

- ❖ ***inter-State communications***: if a State party "has good reasons to believe that another State Party to this Charter has violated the provisions" thereof, "it may draw, by written communication, the attention of that State to the matter" (art. 47). The State to which the communication is addressed has three months from the receipt of the communication to submit a written explanation. If the matter has not been "settled to the satisfaction of the two States involved through bilateral negotiation or by any other peaceful procedure", either State can bring it to the attention of the Commission (art. 48). Notwithstanding these provisions, a State party can refer the matter directly to the Commission (art. 49). However, the Commission can only deal with the matter after all domestic remedies have been exhausted in the case, "unless ... the procedure of achieving these remedies would be unduly prolonged" (art. 50). The States concerned may be represented before the Commission and submit written and oral statements (art. 51(2)). When in possession of all necessary information and "after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights", the Commission shall prepare a report "stating the facts and its findings", which shall be sent to the States concerned and to the Assembly of Heads of State and Government (art. 52). In transmitting its report, the Commission may make to the aforesaid Assembly "such recommendations as it deems useful" (art. 53).
- ❖ ***communications from sources other than those of States parties***: the Charter does not specify whether the Commission is competent to deal with *individual* complaints, as such, but merely provides that, before each session of the Commission, its Secretary "shall make a list of the communications other than those of States Parties ... and transmit them to the members of the Commission, who shall indicate which communication should be considered by the Commission" (art. 55(1)). However, certain criteria have to be fulfilled before the Commission can consider the case. Thus: (1) the communication must indicate the author; (2) it must be compatible both with the Charter of the OAU and with the African Charter on Human and Peoples' Rights; (3) it must not be written "in disparaging or insulting language"; (4) it must not be "based exclusively on news disseminated through the mass media"; (5) it must be submitted only after all domestic remedies have been exhausted, "unless it is obvious that this procedure is unduly prolonged"; (6) it must be submitted "within a reasonable period from the time local remedies are

exhausted”; and, finally (7) the communications must not “deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations”, the Charter of the OAU or the African Charter on Human and Peoples’ Rights (art. 56). There is no specific provision in the Charter allowing individuals or groups of individuals to appear in person before the Commission. Before a substantive consideration is made of a communication, it must be brought to the attention of the State concerned (art. 57). Subsequently, “when it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples’ rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases”; the latter may then request the Commission “to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations” (art. 58(1) and (2)). Lastly, the Charter provides a procedure for emergency cases which shall be submitted by the Commission to the Chairman of the Assembly, “who may request an in-depth study” (art. 58(3)).

- ❖ **periodic reports:** the States parties to the Charter also undertake to submit, every two years, “a report on the legislative or other measures taken with a view to giving effect to” the terms of the Charter (art. 62). Although the Charter provides no explicit procedure for the examination of these periodic reports, the African Commission on Human and Peoples’ Rights has proceeded to examine these reports in public sessions.⁵

The African Commission on Human and Peoples’ Rights is, in particular, competent to:

- **promote** human rights by collecting documents, undertaking studies, disseminating information, making recommendations, formulating rules and principles and cooperating with other institutions;
- **ensure the protection** of human and peoples’ rights by receiving (a) inter-State communications; (b) communications other than those of the States parties; and (c) periodic reports from the States parties.

2.2 The African Charter on the Rights and Welfare of the Child, 1990

The African Charter on the Rights and Welfare of the Child⁶ was adopted in 1990, and entered into force on 29 November 1999. As of 31 May 2000, it had 20 ratifications. The Charter spells out a long list of rights of the child and establishes an African Committee of Experts on the Rights and Welfare of the Child.

⁵See e.g. as to report of Ghana, *The African Commission on Human and Peoples’ Rights Examination of State Reports, 14th Session, December 1993: Ghana*, to be found on the following web site: <http://www1.umn.edu/humanrts/achpr/sess14-complete.htm>.

⁶OAU doc. CAB/LEG/24.9/49 (1990).

2.2.1 The undertakings of the States parties

The States parties “shall recognize the rights, freedoms and duties enshrined in [the] Charter and shall undertake to take the necessary steps, in accordance with their constitutional processes and with the provisions of the ... Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions” thereof (art. 1(1)). It is noteworthy that “any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the ... Charter shall to the extent of such inconsistency be discouraged” (art. 1(3)).

2.2.2 The rights recognized

For the purposes of the African Charter on the Rights and Welfare of the Child, a child means every human being below the age of 18 (art. 2), and, in all actions concerning the child undertaken by any person or authority, *the best interests of the child* shall be the primary consideration (art. 4(1)). The Charter further guarantees the following rights and principles, in particular:

- ❖ the principle of non-discrimination – art. 3;
- ❖ the right to survival and development, including the right to life and prohibition of the death penalty – art. 5;
- ❖ the right to a name and a nationality – art. 6;
- ❖ the right to freedom of expression – art. 7;
- ❖ the right to freedom of association and of peaceful assembly – art. 8;
- ❖ the right to freedom of thought, conscience and religion – art. 9;
- ❖ the right to protection of one’s privacy, family, home and correspondence – art. 10;
- ❖ the right to education – art. 11;
- ❖ the right to leisure, recreation and cultural activities – art. 12;
- ❖ the right to special protection of handicapped children – art. 13;
- ❖ the right to health and health services – art. 14;
- ❖ the right to protection against economic exploitation and hazardous work – art. 15;
- ❖ the right to protection against child abuse and torture – art. 16;
- ❖ the administration of juvenile justice: the right to special treatment of young offenders – art. 17;
- ❖ the right to protection of the family unit – art. 18;
- ❖ the right to parental care and protection -. art. 19;
- ❖ parental responsibilities – art. 20; and
- ❖ the right to protection against harmful social and cultural practices – art. 21.

The African Charter further contains provisions concerning:

- ❖ armed conflicts – art. 22;
- ❖ refugee children – art. 23;
- ❖ adoption – art. 24;
- ❖ separation from parents – art. 25;

- ❖ protection against apartheid and discrimination – art. 26;
- ❖ sexual exploitation – art. 27;
- ❖ drug abuse – art. 28;
- ❖ the sale, trafficking and abduction of children – art. 29; as well as
- ❖ the children of imprisoned mothers – art. 30.

2.2.3 The child's duties

According to article 31 of the Charter, “every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community”. Such responsibilities include the duty to work for the cohesion of the family, to serve the national community, to preserve and strengthen social and national solidarity and to contribute to the promotion of African unity.

2.2.4 The implementation mechanism

An African Committee of Experts on the Rights and Welfare of the Child shall be established within the Organization in order to promote and protect the rights and welfare of the child (art. 32). It shall consist of eleven independent and impartial members serving in their individual capacity (art. 33).

The Committee shall, in the first place, promote and protect the rights enshrined in the Charter and, second, monitor the implementation and ensure protection of the rights concerned (art. 42). In carrying out the first part of its mandate, it shall, in particular, collect and document information, organize meetings, make recommendations to Governments, formulate rules and principles aimed at enhancing the protection of the rights and welfare of the African child, and cooperate with other African regional and international institutions in the same field (art. 42(a)). It may interpret the terms of the Charter at the request, inter alia, of a State party or institution of the OAU (art. 42(c)). With respect to monitoring of implementation of the Charter, the latter provides for the following two procedures:

- ❖ **the reporting procedure:** every State party undertakes to submit reports on the measures it has adopted to give effect to the provisions of the Charter within two years of the entry into force of the Charter, and thereafter every three years (art. 43(1)). The Charter does not specify how the Committee shall examine these reports;
- ❖ **the complaints procedure:** the Committee may receive communications from any person, group or non-governmental organization (NGO) recognized either by the OAU, a Member State or the United Nations relating to any matter covered by the Charter (art. 44).

Lastly, the Committee may resort to any “appropriate method” of investigating any matter falling within the ambit of the Charter. It shall further submit regular reports on its activities to the Ordinary Session of the Assembly of Heads of State and Government every two years, a report that shall be published after having been considered by the Assembly (art. 45).

*The African Charter on the Rights and Welfare of the Child protects numerous rights which have to be interpreted and applied **in the best interest of the child.***

*The African Committee of Experts on the Rights and Welfare of the Child shall **promote** and **protect** the rights of the child.*

The implementation mechanism consists of (a) a reporting procedure, and (b) a complaints procedure.

3. American Human Rights Treaties and their Implementation

3.1 The American Convention on Human Rights, 1969, and its Protocols of 1988 and 1990

The American Convention on Human Rights, 1969,⁷ also commonly called the Pact of San José, Costa Rica, since it was adopted in that capital city, entered into force on 18 July 1978 and, as of 9 April 2002, had 24 States parties, following the denunciation of the treaty by Trinidad and Tobago on 26 May 1998.⁸ The Convention reinforced the Inter-American Commission on Human Rights, which since 1960 had existed as “an autonomous entity of the Organization of American States”.⁹ It became a treaty-based organ which, together with the Inter-American Court of Human Rights, “shall have competence with respect to matters relating to the fulfilment of the commitments made by the States Parties” to the Convention (art. 33).

In 1988, the General Assembly of the OAS further adopted the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also called the Protocol of San Salvador.¹⁰ This Protocol develops the provisions of article 26 of the Convention whereby the States parties in general terms “undertake to adopt measures, both internally and through international co-operation, ... with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires”. This Protocol entered into force on 16 November 1999 and, as of 9 April 2002, had 12 States parties.¹¹

⁷OAS Treaty Series, No. 36.

⁸See the following OAS web site: <http://www.oas.org/juridico/english/Sigs/b-32.html>.

⁹OAS doc. OEA/Ser.L/V/II.83, doc. 14, corr. 1, March 12, 1993, *Annual Report of the Inter-American Commission on Human Rights 1992-1993*, p. 5.

¹⁰OAS Treaty Series, No. 69.

¹¹See: <http://www.oas.org/juridico/english/Sigs/a-52.html>.

Lastly, in 1990 the General Assembly also adopted the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, which entered into force on 28 August 1991.¹² The States parties to this Protocol “shall not apply the death penalty in their territory to any person subject to their jurisdiction” (art. 1). No reservations may be made to this Protocol, although States parties may declare at the time of ratification or accession “that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature” (art. 2(1)). As of 9 April 2002 this Protocol had 8 States parties.¹³

3.1.1 The undertakings of the States parties

The States parties to the American Convention on Human Rights “undertake to respect the rights and freedoms recognized [therein] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination” on certain cited grounds (art. 1). These undertakings have been interpreted by the Inter-American Court of Human Rights in particular in the case of *Velásquez*, which concerned the disappearance and likely death of Mr. Velásquez. In the view of the Court the obligation to respect the rights and freedoms recognized in the Convention implies that

“the exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State”.¹⁴

The obligation to “ensure ... the free and full exercise of those rights and freedoms” thus

“implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must *prevent, investigate and punish* any violation of the rights recognized by the Convention and, moreover, if possible attempt to *restore the right violated* and *provide compensation* as warranted for damages resulting from the violation”.¹⁵

The Court added, however, that

“the obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation — it also requires the Government to conduct itself so as to effectively ensure the free and full exercise of human rights”.¹⁶

¹²OAS Treaty Series, No. 73.

¹³See <http://www.oas.org/juridico/english/Sigs/a-53.html>.

¹⁴*I-A Court HR, Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4*, p. 151, para. 165.

¹⁵*Ibid.*, p. 152, para. 166; emphasis added.

¹⁶*Ibid.*, para. 167.

As to the issue of *prevention*, the Court specified that

“the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.¹⁷

This legal duty to prevent human rights violations would moreover include “all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages”.¹⁸

As defined by the Inter-American Court of Human Rights, the legal duty of the States parties to the Convention to “respect” and to “ensure” is multi-faceted and goes to the very heart of the entire State structure, including the particular conduct of the Governments themselves. A more comprehensive analysis of States’ duties to prevent, investigate, punish and remedy human rights violations is contained in Chapter 15 of this Manual.

The legal obligation to “ensure” the rights and freedoms contained in the American Convention on Human Rights means that the States parties must prevent, investigate and punish human rights violations and that they must, if possible, restore the rights violated, and provide compensation as warranted for damages.

3.1.2 The rights recognized

As to the civil and political rights guaranteed by the Convention, they comprise the following:

- ❖ the right to juridical personality – art. 3;
- ❖ the right to life, including careful regulation of the death penalty from an abolitionist perspective – art. 4;
- ❖ the right to humane treatment, including freedom from torture and cruel, inhuman or degrading treatment or punishment – art. 5;
- ❖ freedom from slavery, servitude, forced and compulsory labour – art. 6;
- ❖ the right to personal liberty and security, including freedom from arbitrary arrest or detention – art. 7;
- ❖ the right to a fair trial – art. 8;
- ❖ the right to freedom from ex post facto laws – art. 9;
- ❖ the right to compensation in the event of a miscarriage of justice – art. 10;

¹⁷Ibid., p. 155, para. 174.

¹⁸Ibid., para. 175.

- ❖ the right to privacy – art. 11;
- ❖ the right to freedom of conscience and religion – art. 12;
- ❖ the right to freedom of thought and expression – art. 13;
- ❖ the right of reply in case of dissemination of inaccurate and offensive statements – art. 14;
- ❖ the right to peaceful assembly – art. 15;
- ❖ the right to freedom of association – art. 16;
- ❖ the right to marry freely and to found a family – art. 17;
- ❖ the right to a name – art. 18;
- ❖ the rights of the child – art. 19;
- ❖ the right to a nationality – art. 20;
- ❖ the right to property – art. 21;
- ❖ the right to freedom of movement and residence – art. 22;
- ❖ the right to participate in government – art. 23;
- ❖ the right to equality before the law and equal protection of the law – art. 24;
- ❖ the right to judicial protection – art. 25.

Apart from recognizing these civil and political rights, the American Convention on Human Rights also contains an article whereby the States parties in general terms “undertake to adopt measures, both internally and through international co-operation, ... with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires” (art. 26). As the title to this article indicates, it is more concerned with the “Progressive development” of these rights than with their immediate enforcement through judicial means. However, with the entry into force of the Additional Protocol to the Convention in the Area of Economic, Social and Cultural Rights, these rights have been given a more detailed legal definition, although the “full observance” thereof is still to be achieved “progressively” (art. 1). The Additional Protocol recognizes the following economic, social and cultural rights:

- ❖ the principle of non-discrimination in the exercise of the rights set forth in the Protocol – art. 3;
- ❖ the right to work – art. 6;
- ❖ the right to just, equitable and satisfactory conditions of work – art. 7;
- ❖ trade union rights – art. 8;
- ❖ the right to social security – art. 9;
- ❖ the right to health – art. 10;
- ❖ the right to a healthy environment – art. 11;
- ❖ the right to food – art. 12;
- ❖ the right to education – art. 13;
- ❖ the right to the benefits of culture – art. 14;

- ❖ the right to the formation and protection of families – art. 15;
- ❖ the rights of children – art. 16;
- ❖ the right of the elderly to protection – art. 17;
- ❖ the right of the handicapped to protection – art. 18.

3.1.3 Permissible limitations on the exercise of rights¹⁹

The *exercise* of the following rights may be subjected to limitations if *necessary* for specifically enumerated purposes: the right to manifest one’s religion and beliefs (art. 12(3)); the right to freedom of thought and expression (art. 13(2)); the right to the freedoms of assembly and of association (arts. 15, 16(2) and (3)); and the right to freedom of movement and residence, including the right to leave any country, including one’s own (art. 22(3)). Grounds which may justify limitations on the exercise of rights are, among others, the protection of public safety, health, morals, (public) order, national security or the rights and freedoms of others (the legitimate reasons vary depending on the right protected). In addition, the law may, on certain specified grounds, “regulate the exercise of the rights and opportunities” linked to the right to participate in government (art. 23(2)).

As to the *principle of legality*, all limitation provisions stipulate that the limitations imposed must be prescribed by law, established by law, imposed in conformity with the law, or pursuant to law. However, article 30 contains a general provision whereby restrictions on the exercise of rights foreseen in the Convention “may not be applied except in accordance with the laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established”.

The Inter-American Court of Human Rights has analysed the term “laws” found in article 30 in an Advisory Opinion, in which it held that the meaning of this word “in the context of a system for the protection of human rights cannot be dissociated from the nature and origin of that system”, which

“is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power”.²⁰

In the view of the Court, it was therefore

“essential that State actions affecting basic rights not be left to the discretion of the government but, rather, that they be surrounded by a set of guarantees designed to ensure that the inviolable attributes of the individual not be impaired”.²¹

¹⁹For further information on limitations on the exercise of rights, see in particular Chapter 12 of this Manual concerning “Some Other Key Rights: The Freedoms of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly”.

²⁰*I-A Court HR, The Word “Laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986, Series A, No. 6, p. 29, para. 21.*

²¹*Ibid.*, pp. 29-30, para. 22.

The Court then added that perhaps “the most important of these guarantees is that restrictions to basic rights only be established by a law passed by the Legislature in accordance with the Constitution”.²² The term “laws” in article 30 thus means “formal law”, namely,

“a legal norm passed by the legislature and promulgated by the Executive Branch, pursuant to the procedure set out in the domestic law of each State”.²³

However, article 30 also links the term “laws” to the “general interest”, which means that “they must have been adopted for the ‘general welfare’ as referred to in article 32(2) of the Convention, a concept, which, in the view of the Court,

“must be interpreted as an integral element of public order (*ordre public*) in democratic States, the main purpose of which is ‘the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness’”.²⁴

As subsequently reaffirmed in its Advisory Opinion on *Habeas Corpus*, there exists, consequently, “an inseparable bond between the principle of legality, democratic institutions and the rule of law”.²⁵

With regard to *the principle of a democratic society*, only the limitation provisions concerning the exercise of the right to assembly and the right to freedom of association provide that the limitations must also be “*necessary in a democratic society*” (emphasis added). However, as emphasized by the Inter-American Court of Human Rights in its Advisory Opinion on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* regarding the right to freedom of expression in article 13, the interpretation of the provisions contained in the American Convention on Human Rights is also conditioned by the restrictions laid down in particular in articles 29(c) and 32(2),²⁶ which respectively provide that “no provision of this Convention shall be interpreted as ... (c) precluding other rights or guarantees that are inherent in the human personality *or derived from representative democracy as a form of government*” (art. 29(c); emphasis added); and that “the rights of each person are limited by the rights of others, by the security of all, and *by the just demands of the general welfare, in a democratic society*” (art. 32(2), emphasis added).

These articles, in particular, define “the context within which the restrictions permitted under Article 13(2) must be interpreted”; and, in the view of the Court, it followed

²²Ibid., at p. 30.

²³Ibid., p. 32, para. 27.

²⁴Ibid., p. 33, para. 29.

²⁵I-A Court HR, *Habeas Corpus in Emergency Situations* (Art. 27(2), 25(1) and 7(6)), *Advisory Opinion OC-8/87 of January 30, 1987*, Series A, No. 8, p. 40, para. 24.

²⁶I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), *Advisory Opinion OC-5/85 of November 13, 1985*, Series A, No. 5, p. 105, para. 41.

“from the repeated reference to ‘democratic institutions’, ‘representative democracy’ and ‘democratic society’ that the question whether a restriction on freedom of expression imposed by a state is ‘necessary to ensure’ one of the objectives listed in subparagraphs (a) or (b) **must be judged by reference to the legitimate needs of democratic societies and institutions**”.²⁷

The Court concluded that, consequently,

“the just demands of democracy must ... guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions”.²⁸

To be lawful under the American Convention on Human Rights, limitations on the exercise of rights must comply with:

- **the principle of legality**, in that the restrictive measures must be based in law;
- **the principle of a democratic society**, in that the measure imposed must be judged by reference to the legitimate needs of democratic societies and institutions;
- **the principle of necessity/proportionality**, in that the interference with the exercise of the individual’s right must be necessary in a democratic society for one or more of the specified purposes.

3.1.4 Permissible derogations from legal obligations

With some modifications as compared to article 4 of the International Covenant on Civil and Political Rights, article 27 of the American Convention on Human Rights also foresees the possibility for the States parties to derogate from the obligations incurred under the Convention. Below is a brief survey of the conditions attached to this right, which will be dealt with in further detail in Chapter 16:

- ❖ **the condition of exceptional threat**: a State party can only resort to derogations “in time of war, public danger, or other emergency that threatens the independence or security of a State Party” (art. 27(1)). This definition is thus worded differently from that under article 4 of the International Covenant and article 15 of the European Convention on Human Rights;
- ❖ **the condition of non-derogability of certain obligations**: article 27(2) of the American Convention provides a long list of provisions from which no suspension can ever be made: article 3 (right to juridical personality); article 4 (right to life); article 5 (right to humane treatment); article 6 (freedom from slavery); article 9

²⁷Ibid., p. 106, para. 42; emphasis added.

²⁸Ibid., p. 108, para. 44.

(freedom from ex post facto laws); article 12 (freedom of conscience and religion); article 17 (rights of the family); article 18 (right to a name); article 19 (rights of the child); article 20 (right to nationality); article 23 (right to participate in government); and ***“the judicial guarantees essential for the protection of such rights”*** (emphasis added);²⁹

- ❖ ***the condition of strict necessity***: a State party may only “take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation” (art. 27(1));
- ❖ ***the condition of consistency with other international legal obligations***: the measures of derogation taken by the State party must not be “inconsistent with its other obligations under international law”, such as obligations incurred under other international treaties or customary international law (art. 27(1));
- ❖ ***the condition of non-discrimination***: the measures of derogation must “not involve discrimination on the ground of race, colour, sex, language, religion, or social origin” (art. 27(1)); and, finally,
- ❖ ***the condition of international notification***: in order to avail itself of the right to derogate under article 27(1), the State party must also comply with the conditions in article 27(3), whereby it “shall immediately inform the other States Parties, through the Secretary-General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination” thereof.

When derogating from their obligations under article 27 of the American Convention on Human Rights, States Parties must comply with:

- *the condition of exceptional threat;*
- *the condition of non-derogability of certain obligations;*
- *the condition of strict necessity;*
- *the condition of consistency with other international obligations;*
- *the condition of non-discrimination; and*
- *the condition of international notification.*

3.1.5 The implementation mechanism

The inter-American system for the protection of human rights comprises, in the first instance, the Inter-American Commission on Human Rights and, in the second instance, the Inter-American Court of Human Rights for those States parties having accepted its jurisdiction. In the present context the procedures concerned will be explained in general terms only:

²⁹The words “judicial guarantees essential for the protection of such rights” have, inter alia, been interpreted in two Advisory Opinions by the Inter-American Court of Human Rights, which will be dealt with in further detail in Chapter 16.

- ❖ ***the competence of the Inter-American Commission on Human Rights:*** the Inter-American Commission is composed of seven members elected in their personal capacity (arts. 34 and 36(1)) whose main functions are to “promote respect for and defence of human rights” by, inter alia, (1) developing an awareness of human rights in the Americas; (2) making recommendations to Governments of the member States, when it considers such action advisable; (3) preparing such studies and reports as it considers advisable in the performance of its duties; and, (4) taking action on petitions and other communications pursuant to its authority under the Convention (art. 41(a), (b), (c) and (f)). The ***right of individual petition*** to the Commission is ***mandatory*** under the Convention, according to which “any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organization [of American States] may lodge petitions ... containing denunciations or complaints of violation of this Convention by a State Party” (art. 44). On the other hand, inter-State complaints require a specific declaration whereby the State concerned recognizes the competence of the Commission to examine communications brought against another State party having made the same declaration (art. 45(1) and (2)).

The admission of an individual petition or inter-State communication submitted to the Commission is subject to several requirements, such as the exhaustion of domestic remedies rule (art. 46(1)(a)). Moreover, the petition or communication must be lodged within six months from the date on which the alleged victim was notified of the final judgement, and the subject of the complaint must not be pending in another international proceeding for settlement (art. 46(1)(b) and (c)). Individual petitions must of course also contain information such as the name, address and signature of the alleged victim or his or her legal representative (art. 46(1)(d)). The exhaustion of domestic remedies rule is not, however, applicable (a) where the domestic legislation “does not afford due process of law for the protection of the right or rights that have allegedly been violated”; (b) where the alleged victim has been denied access to domestic remedies; and (c) where there has been “unwarranted delay in rendering a final judgement” (art. 46(2)).

If a petition or communication does not fulfil these conditions or if, for instance, it is “manifestly groundless”, the Commission declares the petition or communication concerned inadmissible (art. 47). Otherwise, it shall be declared admissible, which implies that the Commission will proceed to request more information from the parties in order to be enabled to make a more in-depth analysis of the complaints (art. 48(1)(a)). It can also make an on-the-spot investigation and hear oral statements in addition to written submissions (art. 48(1)(d) and (e)). At this stage the Commission can also declare the petition or communication inadmissible or out of order or unsubstantiated (art. 48(1)(c)). Alternatively, it will “place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention” (art. 48(1)(f)). If a settlement is not reached, the Commission will “draw up a report setting forth the facts and stating its conclusions”, a report that will be submitted to the States parties, “which shall not be at liberty to publish it” (art. 50(1) and (2)). If, after a prescribed period, the matter has not been settled or submitted to the Court, the Commission may “set forth its opinion and conclusions concerning the question submitted for its consideration” and may in cases where the State

concerned fails to take “adequate measures”, ultimately decide to publish its report (art. 51).

With regard to those OAS Member States which have not yet ratified the American Convention on Human Rights, the Commission is competent to receive petitions alleging violations of the American Declaration on the Rights and Duties of Man.³⁰

Another interesting aspect of the Commission’s powers is its competence to request advisory opinions from the Inter-American Court of Human Rights (art. 64). The important Advisory Opinion on *Habeas Corpus in Emergency Situations* was thus given by the Court following a request by the Commission.

- ❖ ***the competence of the Inter-American Court of Human Rights:*** as of 16 April 2001, the compulsory jurisdiction of the Court had been accepted by 21 States.³¹ The Court consists of seven judges elected in their individual capacity (art. 52). It has its Secretariat in San José, Costa Rica. Before the Court can hear a case, the procedure before the Commission must be completed (art. 61(2)). “In cases of extreme gravity and urgency”, the Court “shall adopt such provisional measures as it deems pertinent”, and, at the request of the Commission, it may in fact also do this with respect to cases not yet submitted to it (art. 63(2)). The Court’s judgments are final and the States parties undertake to comply with the terms thereof “in any case to which they are parties” (arts. 67 and 68(1)).

The enforcement mechanism under the Additional Protocol in the Area of Economic, Social and Cultural Rights differs from the procedures under the Convention in that the States parties only undertake “to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth” therein (art. 19(1) of the Protocol). Only with regard to the right to organize and join trade unions (art. 8(a)) and the right to education (art. 13) does the Protocol provide for application of the complaints procedure before the Commission and Court, and then only in cases where the alleged violation is “directly attributable” to a State party (art. 19(6)).

Both the Commission and the Court have dealt with a considerable number of cases, which can be found in their respective annual reports. The annual report of the Inter-American Commission on Human Rights also provides important information about the Commission’s activities in general, which reach far beyond the framework of the American Convention on Human Rights.

³⁰See article 51 of the *Regulations of the Inter-American Commission on Human Rights*, approved by the Commission at its 660th Meeting, 49th Session, held on 8 April 1980, and modified at its 70th Session, at its 938th meeting, held on 29 June 1987, published in OAS doc. OEA/Ser.L/V/II.82, doc. 6, rev. 1, July 1, 1992, *Basic Documents Pertaining to Human Rights in the Inter-American System*, p. 121.

³¹See OAS doc. OEA/Ser.L/V/II.111, doc. 20 rev., *Annual Report of the Inter-American Commission on Human Rights 2000*, Annex 1; the text of this report can be found at the following web site: <http://www.cidh.oas.org/annualrep/2000eng/TOC.htm>.

The Inter-American Commission on Human Rights is competent to receive petitions concerning alleged human rights violations:

- *from any person or group of persons, or any legally recognized non-governmental entity; this competence is mandatory (art. 44);*
- *from one State party against another State party, if such competence has been recognized (art. 45).*

The Inter-American Court of Human Rights is competent to examine cases submitted to it by the States parties and the Commission provided that these cases have first been considered by the Commission (art. 61).

3.2 The Inter-American Convention to Prevent and Punish Torture, 1985

The Inter-American Convention to Prevent and Punish Torture, 1985, entered into force on 28 February 1987, and as of 9 April 2002 had 16 States parties.³²

3.2.1 The scope of the Convention

According to the Convention, “torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.” (art. 2).

The Convention further defines the field of personal responsibility for those committing, instigating or inducing torture or who have failed to prevent it although being able to do so (art. 3). As in the case of the United Nations Convention against Torture, “the existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture” (art. 5). Furthermore, nor can “the dangerous character of the detainee or prisoner” justify the resort to torture (art. 5).

3.2.2 The undertakings of the States parties

The Convention provides that “the States Parties shall take effective measures to prevent and punish torture within their jurisdiction”, and “shall ensure that all acts of torture and attempts to commit torture are offences under their criminal law” (art. 6). The Convention further contains provisions, inter alia, with regard to the training of

³²OAS, Treaty Series, No. 67; for the ratifications see <http://www.oas.org/juridico/english/Sigs/a-51.html>.

police officers (art. 7), impartial investigations of alleged torture (art. 8), the duty to establish jurisdiction over the crime of torture in certain cases (art. 12), and extradition (arts. 13-14).

3.2.3 The implementation mechanism

Unlike the United Nations and European torture conventions, the Inter-American Convention does not provide for any specific implementation mechanism. However, under its article 17, “the States Parties shall inform the Inter-American Commission on Human Rights of any legislative, judicial, administrative, or other measures they adopt in application of this Convention”; it is subsequently for the Commission to “endeavour in its annual report to analyze the existing situation in the member States of the Organization of American States in regard to the prevention and elimination of torture” (art. 17). Thus, the Convention does not foresee any possibility for the Commission to make any on-the-spot investigation in a country where it has reason to believe that torture is being practised. However, the Commission may still be able to make such visits, with the agreement of the State concerned, by invoking the general field of competence accorded to it under the Charter of the OAS.

Under the Inter-American Convention to Prevent and Punish Torture, the States parties must take effective measures to prevent and punish torture within their jurisdiction.

As is confirmed by the Convention, the right not to be tortured is non-derogable and no emergency situation of any kind can justify acts of torture.

3.3 The Inter-American Convention on Forced Disappearance of Persons, 1994

The Inter-American Convention on Forced Disappearance of Persons was adopted by the General Assembly of the OAS in 1994 and entered into force on 28 March 1996. As of 9 April 2002 it had ten States parties.³³ This Convention was elaborated in response to the considerable wave of enforced or involuntary disappearances that had occurred in many parts of the Americas in the 1970s and the 1980s in particular.

3.3.1 The scope of the Convention

As defined in the Convention, “forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give

³³See <http://www.oas.org/juridico/english/Sigs/a-60.html>.

information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees” (art. II).

3.3.2 *The undertakings of the States parties*

The States parties undertake, in particular, not to practise, permit or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees; to punish within their jurisdictions those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories; to cooperate with one another in helping to prevent, punish and eliminate the forced disappearance of persons; and to take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in the Convention (art. I; for further details as to the duty to take legislative measures, see also art. III).

The Convention further regulates the duty to establish jurisdiction over cases involving the forced disappearance of persons (art. IV), and provides that such cases shall not be considered political offences for purposes of extradition but shall be deemed extraditable offences (art. V). Moreover, “criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations”, unless there is a norm of a fundamental character preventing the application of this rule; in the latter case, however, “the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the ... State Party” (art. VII). Quite significantly, persons alleged to be responsible for the acts constituting the offence of forced disappearance of persons “may be tried only in the competent jurisdictions of ordinary law in each State, **to the exclusion of all other special jurisdictions, particularly military jurisdictions**” (art. IX; emphasis added).

As in the case of the torture conventions, exceptional circumstances such as a state of war or any other public emergency cannot be invoked to justify the forced disappearance of persons; in such cases, “the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom”. In connection with such procedures, “the competent judicial authorities shall have free and immediate access to all detention centres and to each of their units, and to all places where there is reason to believe the disappeared person might be found, including places that are subject to military jurisdiction” (art. X).

3.3.3 *The implementation mechanism*

The Convention provides that “the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights and to the Statute and Regulations of the ... Commission ... and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures” (art. XIII). An urgent procedure is also provided for cases where the

Inter-American Commission on Human Rights receives a petition or communication concerning an alleged forced disappearance, requiring its Executive Secretariat to “urgently and confidentially address the respective Government” with a request for information as to the whereabouts of the person concerned (art. XIV).

The Inter-American Convention on the Forced Disappearance of Persons is a reaffirmation that the forced disappearance of persons is an act violating international human rights law. The forced disappearance of persons cannot be justified in any circumstances, not even in emergency situations.

Persons accused of being involved in the forced disappearance of persons shall only be tried by ordinary courts of law. They may not be tried by special jurisdictions.

3.4 The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, also called “Convention of Belém do Pará”, was adopted in 1994 by the General Assembly of the OAS and entered into force on 5 March 1995. As of 9 April 2002 it had been ratified by 31 countries.³⁴ This Convention is the only international treaty that exclusively aims at the elimination of gender-based violence.

3.4.1 The scope of the Convention

For the purposes of the Convention, “violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere” (art. 1). As further specified, violence against women shall, inter alia, “be understood to include physical, sexual and psychological violence”, irrespective of whether that violence occurs within the family or domestic unit or within any other interpersonal relationship, or in the community, or is perpetrated or condoned by the State or its agents regardless of where it occurs (art. 2(a)-(c)). The scope of the application is thus comprehensive and encompasses all spheres of society, be they *public or private*.

The Convention further emphasizes women’s right to enjoyment and protection of all human rights contained in regional and international instruments, and the States parties “recognize that violence against women prevents and nullifies” the exercise of civil, political, economic, social and cultural rights (arts. 4-5). Lastly, the Convention provides that the right of every woman to be free from violence includes,

³⁴See <http://www.oas.org/juridico/english/Sigs/a-61.html>.

among others, the right to be free from all forms of discrimination, as well as the right to be valued and educated free of stereotyped patterns of behaviour (art. 6).

3.4.2 The undertakings of the States parties

The States parties agree in particular “to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate” violence against women (art. 7), and also “to undertake progressively specific measures”, such as programmes “to promote awareness and observance of the right of women to be free from violence”, “to modify social and cultural patterns of conduct of men and women” and “to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers” (art. 8).

3.4.3 The implementation mechanisms

The mechanisms of implementation foreseen by the Convention are threefold:

- ❖ **the reporting procedure:** in the first place, the States parties shall include in their national reports to the *Inter-American Commission of Women*, inter alia, “information on measures adopted to prevent and prohibit violence against women” and any difficulties they have observed in applying those measures (art. 10);
- ❖ **advisory opinions:** the States parties and the Inter-American Commission of Women may request of the Inter-American Court of Human Rights *advisory opinions* on the interpretation of the Convention on the Prevention, Punishment and Eradication of Violence against Women (art. 11); and, finally,
- ❖ **individual petitions:** any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the OAS “may lodge petitions with the *Inter-American Commission on Human Rights* containing denunciations or complaints of violations of Article 7 of this Convention by a State Party”, that is, of its duties to prevent, punish and eradicate violence against women as described in that article (art. 12; emphasis added).

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women is the only international treaty exclusively aimed at the elimination of gender-based violence.

*The Convention covers violence occurring in all spheres of society, whether **public** or **private**.*

*The implementation mechanism consists of: (1) a **reporting procedure** to the Inter-American Commission of Women; and (2) the possibility of submitting **individual petitions** to the Inter-American Commission on Human Rights.*

*Both the States parties and the Inter-American Commission of Women may request **advisory opinions** of the Inter-American Court of Human Rights on the interpretation of the Convention.*

4. European Human Rights Treaties and their Implementation

4.1 The European Convention on Human Rights, 1950, and its Protocols Nos. 1, 4, 6 and 7

The European Convention on Human Rights was adopted by the Council of Europe in 1950, and entered into force on 3 September 1953.³⁵ As of 29 April 2002 it had 43 States parties.³⁶ The Convention originally created both a European Commission and a European Court of Human Rights entrusted with the observance of the engagements undertaken by the High Contracting Parties to the Convention, but with the entry into force of Protocol No. 11³⁷ to the Convention on 1 November 1998, the control machinery was restructured so that all allegations are now directly referred to the European Court of Human Rights in Strasbourg, France. This Court is the first, and so far only, permanent human rights court sitting on a full-time basis.

The rights protected by the Convention have been extended by Additional Protocols Nos. 1, 4, 6 and 7, all of which will be dealt with below. Protocol No. 12 concerning the prohibition of discrimination was opened for signature on 4 November 2000 in Rome, in the context of the fiftieth anniversary celebrations of the Convention itself, which was signed in the Italian capital on 4 November 1950. Finally, Protocol No. 13 was opened for signature in Vilnius on 3 May 2002. This protocol concerns the abolition of the death penalty *in all circumstances*.

4.1.1 The undertakings of the States parties

The High Contracting Parties “shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention” (art. 1). This means, *inter alia*, that they also have to provide everyone whose rights and freedoms guaranteed by the Convention have been violated with “an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity” (art. 13).

4.1.2 The rights guaranteed

The European Convention guarantees the following civil and political rights:

- ❖ the right to life – art. 2;
- ❖ the prohibition of torture, inhuman or degrading treatment or punishment – art. 3;
- ❖ the prohibition of slavery, servitude, and forced or compulsory labour – art. 4;
- ❖ the right to liberty and security – art. 5;

³⁵The official name of this treaty is: Convention for the Protection of Human Rights and Fundamental Freedoms, see European Treaty Series (ETS), no.: 005.

³⁶For the ratifications of the European Convention on Human Rights and its various Protocols, see <http://conventions.coe.int/>.

³⁷ETS no.: 155.

- ❖ the right to a fair trial – art. 6;
- ❖ prohibition of ex post facto laws – art. 7;
- ❖ the right to respect for one’s private and family life – art. 8;
- ❖ the right to freedom of thought, conscience and religion – art. 9;
- ❖ the right to freedom of expression – art. 10;
- ❖ the right to freedom of assembly and association – art. 11;
- ❖ the right to marry and to found a family – art. 12;
- ❖ the right to an effective remedy – art. 13;
- ❖ prohibition of discrimination – art. 14.

Protocol No. 1 was adopted in 1952 and entered into force on 18 May 1954.³⁸ As of 29 April 2002 it had 40 States parties. This Protocol provides the following rights and undertakings between the States parties thereto:

- ❖ the right to peaceful enjoyment of one’s possessions – art. 1;
- ❖ the right to education and the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions – art. 2;
- ❖ the holding of free elections at reasonable intervals by secret ballot – art. 3.

Protocol No. 4 of 1963 entered into force on 2 May 1968.³⁹ As of 29 April 2002 it had 35 States parties. Protocol No. 4 added the following rights to be protected:

- ❖ the right not to be deprived of one’s liberty merely on the ground of inability to fulfil a contractual obligation – art. 1;
- ❖ the right to freedom of movement and of residence; the right to leave any country, including one’s own – art. 2;
- ❖ the right not to be expelled from the country of which one is a national and the right not to be refused entry into the State of which one is a national – art. 3;
- ❖ prohibition of the collective expulsion of aliens – art. 4.

Protocol No. 6 of 1983 came into force on 1 March 1985.⁴⁰ As of 29 April 2002 it had 40 States parties. Protocol No. 6 concerns the abolition of the death penalty (art. 1), but a State may nonetheless “make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war” (art. 2). No derogations can be made from the provisions of these articles under article 15 of the Convention, nor can any reservations be made to this Protocol (arts. 3-4).

Protocol No. 7, adopted in 1984, entered into force on 1 November 1988.⁴¹ As of 29 April 2002 there were 32 States parties to this Protocol, which extended the scope of the Convention by providing for the following additional protection:

³⁸The official name of this Protocol is: Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention, ETS, no.: 009.

³⁹The official name of this Protocol is: Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol, ETS, no.: 046.

⁴⁰The official name of this Protocol is: Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, ETS, no.: 114.

⁴¹The official name of this Protocol is: Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no.: 117.

- ❖ certain protections against arbitrary expulsion of aliens lawfully resident in the territory of the High Contracting Parties – art. 1;
- ❖ the right to appeal against a criminal conviction – art. 2;
- ❖ the right to compensation in case of a miscarriage of justice – art. 3;
- ❖ the right not to be tried again for the same offence within the jurisdiction of the same State – a provision which cannot be derogated from under article 15 of the Convention – art. 4; and
- ❖ equality of rights and responsibilities between spouses as to marriage, during marriage and in the event of its dissolution – art. 5.

As indicated above, Protocol No. 12⁴² to the European Convention provides a general prohibition of discrimination, which is independent of the other rights and freedoms guaranteed by the Convention. According to article 1(1) of the Protocol, “the enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. Article 1(2) of the Protocol specifies that “no one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1”. As of 29 April 2002, however, this Protocol had not entered into force, having received only one out of the necessary ten ratifications.

4.1.3 Permissible limitations on the exercise of rights⁴³

Some of the articles of the Convention and its Protocols provide for the possibility to impose restrictions on the exercise of rights in particular defined circumstances. This is the case with articles 8 (the right to respect for one’s private and family life), 9 (the right to freedom of thought, conscience and religion), 10 (the right to freedom of expression) and 11 (the right to peaceful assembly and freedom of association) of the Convention. The same holds true with regard to the right to peaceful enjoyment of one’s possessions in article 1 of Protocol No. 1 and the right to freedom of movement and residence in article 2 of Protocol No. 4.

The restrictions on the exercise of these rights must, however, in all circumstances be imposed “in accordance with the law”, be “provided for by law” or “prescribed by law”; and, with the exception of article 1 of Protocol No. 1, they must also be “necessary in a democratic society” for the particular purposes specified in the various articles, such as, for instance, in the interests of public safety, for the protection of public order, health or morals, the prevention of disorder or crime or the protection of the rights and freedoms of others (the legitimate reasons vary depending on the right protected). It is true that, while the notion of a democratic society is thus not referred to in connection with restrictions that might be imposed on the right to peaceful enjoyment of one’s possessions, the notion of democracy and a democratic constitutional order is ever-present in the Convention and is a precondition for States that wish to join the Council of Europe. It is therefore possible to conclude that

⁴²The official name of this Protocol is: Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS no.: 177.

⁴³For further information on limitations on the exercise of rights, see in particular Chapter 12 of this Manual concerning “Some Other Key Rights: The Freedoms of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly”.

restrictive measures clearly alien to a democratic society respectful of human rights standards would not be considered to be in “the public interest” within the meaning of article 1 of Protocol No. 1.

The case-law of both the European Court of Human Rights and the now defunct European Commission of Human Rights contains rich and numerous interpretations of the term “*necessity*” in the various limitations provisions, examples of which will be given in Chapter 12. Although “it is for the national authorities to make the *initial* assessment of the reality of the *pressing social need* implied by the notion of ‘necessity’” in the context of freedom of expression, for instance, it is for the Court to give the final ruling on the conformity of any measure with the terms of the Convention, a competence that “covers not only the basic legislation but also the decision applying it, even one given by an independent court”; this European supervision thus also comprises the “aim” and “necessity” of the measure challenged.⁴⁴ In exercising its supervisory functions with respect to the right to freedom of expression, for instance, the Court has also repeatedly held that it is obliged “to pay the utmost attention to the principles characterising a ‘democratic society’”.⁴⁵ The Court must consequently decide whether the reasons provided by the national authorities to justify the necessity of the interference in the exercise of the right concerned “are relevant and sufficient”.⁴⁶ In other cases again it has emphasized that the exceptions to the right to privacy in article 8(2) must be “interpreted narrowly” and that the necessity thereof must be “convincingly established”.⁴⁷ It is thus not sufficient that the interference concerned might be useful or that it is simply so harmless that it does not disturb the functioning of a democratic society. On the contrary, the High Contracting Parties are under a legal obligation to provide sufficient reasons to prove the necessity in a democratic society both of the law on which the measure is based and of the measure itself.

The European Convention on Human Rights and its Protocols 1, 4, 6 and 7 provide extensive protection of the rights and freedoms of the human person at the European level.

Limitations on the exercise of certain rights protected by the Convention may be permissible, provided that they comply with the principles of:

- **legality;**
- *the legitimate needs of a **democratic society**; and*
- **necessity/proportionality**, in that the measures must be necessary in a democratic society for one or more of the specified purposes.

⁴⁴Eur. Court HR, *Handyside judgment of 7 December 1976, Series A, No. 24*, pp. 22-23, paras. 48-49; emphasis added.

⁴⁵*Ibid.*, p. 23, para. 49.

⁴⁶*Ibid.*, pp. 23-24, paras. 49-50.

⁴⁷See *Judgments of Funke, Crémieux and Miaillhe of 25 February 1993, Series A, Nos. 256 A-C*, p. 24, para. 55, p. 62, para. 38 and p. 89, para. 36 respectively.

4.1.4 Permissible derogations from legal obligations

Although differing in some respects from article 4 of the International Covenant on Civil and Political Rights and article 27 of the American Convention on Human Rights, article 15 of the European Convention provides for the possibility of derogations from legal obligations in exceptional situations. In general terms, the conditions are the following:

- ❖ ***the condition of exceptional threat***: a High Contracting Party may resort to derogations “in time of war or other public emergency threatening the life of the nation”. The European Court has interpreted this to mean that the High Contracting Party must face an “exceptional” and “imminent” “situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed”.⁴⁸ In the *Greek case*, the Commission specified that “the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are *plainly inadequate*”.⁴⁹ The Court has, moreover, granted Governments a “wide margin of appreciation” in deciding whether they are faced with a public emergency within the meaning of article 15(1).⁵⁰ However, in exercising its supervision, the Court “must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation”;⁵¹
- ❖ ***the condition of non-derogability of certain obligations***: according to article 15(2) of the Convention the following articles cannot be derogated from: article 2 (the right to life), “except in respect of deaths resulting from lawful acts of war”; article 3 (freedom from torture); article 4(1) (freedom from slavery and servitude); and article 7 (no punishment without law). Finally, following the entry into force of Protocols Nos. 6 and 7, no derogations can be made from the provisions concerning the abolition of the death penalty and protection against double jeopardy;
- ❖ ***the condition of strict necessity***: according to article 15(1), a High Contracting Party may only “take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation”. The European Court of Human Rights has held that the High Contracting Parties also enjoy a “wide margin of appreciation” in deciding “how far it is necessary to go in attempting to overcome the emergency”;⁵² however, the decisions taken by the domestic authorities are always subjected to supervision at the European level;⁵³
- ❖ ***the condition of consistency with other international legal obligations***: the measures of derogation taken by the High Contracting Party must not be “inconsistent with its other obligations under international law”. In the case of

⁴⁸ Eur. Court HR, *Lawless Case (Merits)*, judgment of 1 July 1961, Series A, No. 3, p. 56, para. 28. The term “imminent” is only present in the French text of the judgment; both texts are equally authentic.

⁴⁹ Eur. Comm. HR, *Greek case*, Report of the Commission, 12 Yearbook, p. 72, para. 152; emphasis added.

⁵⁰ Eur. Court HR, *Brannigan and McBride judgment of 26 May 1993*, Series A, No. 258-B, p. 49, para. 43.

⁵¹ Ibid., p. 49, para. 43 at p. 50.

⁵² Ibid., p. 49, para. 43.

⁵³ Ibid., pp. 49-50, para. 43.

Brannigan and McBride, the European Court of Human Rights had to examine whether the United Kingdom Government had fulfilled the requirement of “official proclamation” under article 4(1) of the International Covenant on Civil and Political Rights; it did so without seeking to define authoritatively the meaning of the terms “officially proclaimed” in article 4 of the Covenant; yet it had to examine whether there was “any plausible basis for the applicant’s argument” that this condition had not been complied with;⁵⁴

- ❖ ***the condition of non-discrimination***: it is noteworthy that article 15 of the European Convention contains no specific prohibition of discrimination, and that this condition is thus exclusively regulated by article 14;
- ❖ ***the condition of international notification***: the High Contracting Party availing itself of the right to derogate “shall keep the Secretary-General of the Council of Europe fully informed of the measures” taken and of “the reasons therefor”; it shall also inform him “when such measures have ceased to operate and the provisions of the Convention are again being fully executed”; if need be, the European Court of Human Rights examines *proprio motu* whether this condition has been complied with.⁵⁵

When derogating from their obligations under article 15 of the European Convention on Human Rights, the High Contracting Parties must comply with:

- *the condition of exceptional threat;*
- *the condition of non-derogability of certain obligations;*
- *the condition of strict necessity;*
- *the condition of consistency with other international obligations; and*
- *the condition of international notification.*

4.1.5 The implementation mechanism

As from 1 November 1998, when the restructuring of the control machinery established under the Convention entered into force, all alleged violations of the rights and freedoms guaranteed by the Convention and its Protocols are referred directly to the European Court of Human Rights, which shall “ensure the observance of the engagements undertaken by the High Contracting Parties” (art. 19). The Court is permanent, and consists of a number of judges equal to that of the Contracting Parties, that is, 43 as of 30 April 2002 (art. 20). The Court can sit in committees of three judges, in Chambers of seven judges or in a Grand Chamber of seventeen judges (art. 27(1)).

Apart from being competent to receive and examine *inter-State* complaints (art. 33), the Court “may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols

⁵⁴Ibid., p. 57, para. 72.

⁵⁵See e.g. *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25, p. 84, para. 223.*

thereto” (art. 34). The “High Contracting Parties undertake not to hinder in any way the effective exercise of this right” (art. 34, *in fine*). ***The right to bring inter-State and individual complaints to the Court does not depend on any specific act of acceptance.***

The Court may not, however, deal with an application of any kind unless domestic remedies have been exhausted and the application has been submitted within six months from the date on which the final decision was taken (art. 35(1)). Further criteria of admissibility exist with regard to individual applications, which must not, for instance, be anonymous or “substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information” (art. 35(2)).

The Court decides on the admissibility and merits of the case and, if necessary, undertakes an investigation. After having declared a case admissible, it also places itself “at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto” (art. 38(1)(b)). Hearings before the Court are public, unless it decides otherwise in “exceptional circumstances” (art. 40).

Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional circumstances, request that the case be referred to a Grand Chamber. If the request is accepted, the Grand Chamber shall decide the case by means of a judgment that shall be final (arts. 43-44). Otherwise, the judgment of the Chamber will be final when the parties declare that they have no intention of requesting referral to the Grand Chamber; or three months after the judgment in the absence of such a request; or, finally, when the request for referral has been rejected (art. 44).

The High Contracting Parties “undertake to abide by the final judgment of the Court in any case to which they are parties”; the execution of the final judgment is supervised by the Committee of Ministers of the Council of Europe (art. 46).

The implementation of the European Convention on Human Rights is monitored by the European Court of Human Rights, which is a permanent and full-time body, sitting in

- *Committees of 3 judges;*
- *Chambers of 7 judges; or*
- *a Grand Chamber of 17 judges.*

The Court is competent to receive and examine

- *inter-State cases; and*
- *applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation of the rights guaranteed by the Convention or its Protocols.*

4.2 The European Social Charter, 1961, and its Protocols of 1988, 1991 and 1995

The European Social Charter⁵⁶ was adopted in 1961 and entered into force on 26 February 1965. As of 30 April 2002 it had 25 ratifications. The European Social Charter aims at securing a number of social and economic rights, and it is therefore the natural counterpart to the European Convention on Human Rights which guarantees civil and political rights. The Charter sets up a biennial reporting procedure and, following the entry into force of the 1995 Additional Protocol, a system of collective complaints was also created.

4.2.1 The undertakings of the States parties

There are three fundamental undertakings that each State has to accept when adhering to the European Social Charter:⁵⁷

- ❖ *first*, it must “consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that Part” (art. 20(1)(a)). Part I of the Charter lists in general terms the nineteen rights and principles that should “be effectively realized” through the national and international means pursued by the Contracting Parties;
- ❖ *second*, it must “consider itself bound by at least five of the following articles of Part II” of the Charter, namely, articles 1, 5, 6, 12, 13, 16 and 19, which respectively concern the right to work, the right to organize, the right to bargain collectively, the right to social security, the right to social and medical assistance, the right of the family to social, legal and economic protection, and the right of migrant workers and their families to protection and assistance (Art. 20(1)(b));
- ❖ *lastly*, it must moreover “consider itself bound by such a number of articles or numbered paragraphs of Part II of the Charter as it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than 10 articles or 45 numbered paragraphs” (art. 20(1)(c)).

4.2.2 The rights recognized

On the specific conditions explained above, the Contracting States undertake “to consider themselves bound by the obligations laid down in the following articles and paragraphs”, which concern:

- ❖ the right to work – art. 1;
- ❖ the right to just conditions of work – art. 2;
- ❖ the right to safe and healthy working conditions – art. 3;
- ❖ the right to a fair remuneration – art. 4;

⁵⁶ETS, no.: 35 and, for the three Additional Protocols, see ETS, nos.: 128, 142 and 158.

⁵⁷For more details about the European Social Charter, see e.g. David Harris, *The European Social Charter* (Charlottesville, University Press of Virginia, 1984, Procedural Aspects of International Law Series, vol. 17), xvi, 345 pp.; and L. Samuel, *Fundamental Social Rights: Case law of the European Social Charter* (Strasbourg, Council of Europe, 1997), 450 pp. For information about the European Social Charter see also the Council of Europe web site: www.coe.int/.

- ❖ the right to organize – art. 5;
- ❖ the right to bargain collectively – art. 6;
- ❖ the right of children and young persons to protection – art. 7;
- ❖ the right of employed women to protection – art. 8;
- ❖ the right to vocational guidance – art. 9;
- ❖ the right to vocational training – art. 10;
- ❖ the right to protection of health – art. 11;
- ❖ the right to social security – art. 12;
- ❖ the right to social and medical assistance – art. 13;
- ❖ the right to benefit from social welfare services – art. 14;
- ❖ the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement – art. 15;
- ❖ the right of the family to social, legal and economic protection – art. 16;
- ❖ the right of mothers and children to social and economic protection – art. 17;
- ❖ the right to engage in a gainful occupation in the territory of other Contracting Parties – art. 18; and, finally,
- ❖ the right of migrant workers and their families to protection and assistance – art. 19.

The 1988 Additional Protocol entered into force on 4 September 1992 and as of 30 April 2002 had ten States parties. By virtue of this Protocol, which does not prejudice the provisions of the European Social Charter itself, the Contracting Parties also undertake to consider themselves bound by one or more of the articles concerning the following rights:

- ❖ the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex – art. 1;
- ❖ the right to information and consultation – art. 2;
- ❖ the right to take part in the determination and improvement of working conditions and the working environment – art. 3; and
- ❖ the right of elderly persons to social protection – art. 4.

4.2.3 Permissible limitation on the exercise of rights

The Charter contains a general limitation provision (art. 31) whereby the rights and principles set forth in Parts I and II of the Charter shall not be subject to any restrictions or limitations not already specified therein “except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals”. As in most other limitation provisions in the field of international human rights law, the following three important legal conditions are all present in this provision, namely, the *principle of legality*, the *principle of a democratic society*, and the *principle of proportionality*.

4.2.4 Permissible derogations from legal obligations

The European Social Charter further contains a derogation provision according to which, “in time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter 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” (art. 30(1)). An Appendix to the Charter which forms an integral part thereof provides that the “term ‘in time of war or other public emergency’ shall be so understood as to cover also the *threat* of war” (emphasis added).

It is noteworthy that, as compared to article 15 of the European Convention on Human Rights, article 27 of the American Convention on Human Rights and article 4 of the International Covenant on Civil and Political Rights, article 30 of the European Social Charter contains neither any prohibition of discrimination nor any non-derogable rights. The scope for permissible restrictions in emergency situations seems thus to be wider than in the field of civil and political rights.

The European Social Charter, 1961, protects a wide range of social and economic rights. While the Charter provides the contracting States with a certain flexibility, they must consider themselves bound by at least 5 of 7 specified core articles, as well as by an additional 10 articles or 45 numbered paragraphs.

The Charter allows for the limitation of the rights contained therein provided that such limitations are consistent with the principles of legality, a democratic society and proportionality.

States parties may also be allowed to derogate from their legal obligations under the Charter in times of war, threat of war, or other public emergency. The measures of derogation taken must comply with the principles of strict necessity and consistency with the State’s other international obligations

4.2.5 The implementation mechanism

The procedure for examining the reports submitted under the European Social Charter was revised by the 1991 Amending Protocol, which had not, however, entered into force as of 30 April 2002. In spite of this, and following a decision taken in December 1991 by the Committee of Ministers, the supervision measures embodied in the Amending Protocol are de facto operational. As amended de facto, the monitoring procedures can consequently be briefly described as follows:

- ❖ ***the reporting procedure***: in the first place, the Contracting Parties undertake to submit biennial reports to the Secretary-General of the Council of Europe on the application of those provisions they have expressly accepted (art. 21); secondly, they have to submit reports on those provisions they have not accepted when requested by the Committee of Ministers to do so (art. 22); the Contracting Parties also have to transmit a copy of these reports to specific national organizations of employers and

trade unions; the Secretary-General himself shall forward a copy of the reports to the international NGOs which have consultative status with the Council of Europe and which have particular competence in the matters governed by the Social Charter. The country reports are then examined by a Committee of Independent Experts (currently named European Committee of Social Rights) consisting of at least nine members. Upon completion of its examination, the Committee of Independent Experts draws up a report containing its conclusions which are to be made public. The country reports as well as, in particular, the conclusions of the Committee of Independent Experts are thereafter submitted to a Governmental Committee composed of one representative of each of the Contracting Parties. The Governmental Committee prepares the decisions of the Committee of Ministers and shall explain why a particular situation should be the subject of recommendations. Its report to the Committee of Ministers shall be made public; the Committee of Ministers shall finally adopt, by a majority of two thirds of those voting, with entitlement to voting limited to the Contracting Parties, on the basis of the report of the Governmental Committee, a resolution covering the entire supervision cycle and containing individual recommendations to the Contracting Parties concerned (arts. 23-28 as amended de facto). Lastly, the Secretary-General communicates the conclusions of the Committee of Ministers to the Parliamentary Assembly of the Council of Europe for the purpose of holding periodic plenary debates (art. 29). The Charter provides for the duty to involve both the International Labour Organization (ILO) and specialized NGOs in the monitoring procedures in a consultative capacity (art. 26 and art. 27 as amended de facto);

- ❖ ***the complaints procedure:*** the Additional Protocol Providing for a System of Collective Complaints entered into force on 1 July 1998, and as of 30 April 2002 had nine States parties. It introduced a procedure whereby international and national organizations of employers and trade unions (as well as certain non-governmental organizations) can submit complaints alleging unsatisfactory application of the Charter (art. 1). The complaint shall be addressed to the Secretary-General of the Council of Europe who shall “notify it to the Contracting Party concerned and immediately transmit it to the Committee of Independent Experts” (art. 5). The procedure before the Committee is primarily written but may also be oral (art. 7). The Committee prepares a report to be submitted to the Committee of Ministers, in which it shall, inter alia, present its conclusions as to whether or not the Contracting Party concerned has ensured the satisfactory application of the Charter provisions (art. 8 (1)). It is ultimately for the Committee of Ministers to adopt a resolution as to whether the Contracting Party has applied the Charter provisions in a satisfactory manner and, if not, to address a recommendation to the Contracting Party concerned (art. 9).

The European Social Charter, 1961, provides for a reporting procedure, as well as, on a more limited scale, for a collective complaints procedure allowing international and national organizations of employers and trade unions as well as non-governmental organizations to submit complaints alleging an unsatisfactory application of the Charter (Additional Protocol).

4.3 The European Social Charter (revised), 1996

The European Social Charter in its revised version was adopted in 1996 and entered into force on 1 July 1999. As of 30 April 2002 it had 12 ratifications.⁵⁸ The revised Social Charter will thus only progressively replace the original Charter, the terms of which it updates and extends. By taking into account new social and economic developments, the revised Charter amends certain existing provisions and adds new ones. As to the new features, they include, in particular, a considerably longer list of rights and principles in Part I than those contained in the old Charter (31 rights and principles as compared to only 19 in the 1961 Charter). In addition to the rights taken from the 1988 Additional Protocol, and which have not been amended, the new important features include:

- ❖ the right to protection in cases of termination of employment – art. 24;
- ❖ the right of workers to protection of their claims in the event of the insolvency of their employer – art. 25;
- ❖ the right to dignity at work – art. 26;
- ❖ the right of workers with family responsibilities to equal opportunities and equal treatment – art. 27;
- ❖ the right of workers’ representatives to protection in the undertaking and facilities to be accorded to them – art. 28;
- ❖ the right to information and consultation in collective redundancy procedures – art. 29;
- ❖ the right to protection against poverty and social exclusion – art. 30; and lastly,
- ❖ the right to housing – art. 31.

To the number of articles comprising the hard core of the revised Charter have been added articles 7 and 20, concerning the right of children and young persons to protection and the right of women and men to equal opportunities and equal treatment in matters of employment and occupation; and the number of core articles that have to be accepted by the Contracting Parties has been increased to six. In addition, they must be bound by not less than 16 articles or 63 numbered paragraphs (Part IV, art. A).

The implementation of the legal obligations of the revised Charter is submitted to the same supervision procedure as the original European Social Charter (Part IV, art. C).

The European Social Charter (revised), 1996, updates and extends the old Charter, and increases to 6 the number of core rights that must be accepted by the States parties. They must moreover agree to be bound by not less than 16 other articles or 63 numbered paragraphs.

⁵⁸ETS no.: 163.

4.4 The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment⁵⁹ was adopted in 1987 and entered into force on 1 February 1989. As of 30 April 2002 it had 42 Contracting Parties. While the European Convention is closely related to the Convention against Torture adopted by the United Nations General Assembly in 1984, which was dealt with in Chapter 2, it has a distinctive feature in that it established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which, as will be seen below, has the power to visit any place of detention within the jurisdiction of the Contracting States.

4.4.1 *The undertakings of the States parties and the monitoring mechanism*

The European Convention for the Prevention of Torture contains no definition of the illegal act or practice of torture, but, in its second preambular paragraph, it refers to article 3 of the European Convention on Human Rights, which provides that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Since the monitoring procedure set up under the European Convention on Human Rights operates only in regard to the lodging of individual or inter-State complaints, it was considered necessary to create “a non-judicial means of a preventive character based on visits” in order to try to eradicate the use of torture in European places of detention (see fourth preambular paragraph).

The purpose of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is therefore “by means of visits [to] examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment” (art. 1). The State party “shall permit visits”, in accordance with the Convention, “to any place within its jurisdiction where persons are deprived of their liberty by a public authority” (art. 2), and, to this end, “the Committee and the competent national authorities ... shall cooperate with each other” (art. 3).

The Committee consists of a number of members equal to that of the States parties, who serve in their individual capacity in an independent and impartial manner (art. 4). “Apart from periodic visits, the Committee may organize such other visits as appear to it to be required in the circumstances” (art. 7). After having notified the Government of the Party concerned of its intention to carry out a visit, the Committee “may at any time visit any place” within the jurisdiction of the relevant State party “where persons are deprived of their liberty by a public authority” (art. 8(1) read in conjunction with art. 2).

⁵⁹ETS no.: 126.

“In exceptional circumstances, the competent authorities of the Party concerned may make representations to the Committee against a visit at the time or to the particular place proposed by the Committee”, although “such representations may only be made on grounds of national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or that an urgent interrogation relating to a serious crime is in progress” (art. 9(1)). When such representations have been made, the Committee and the State party “shall immediately enter into consultations in order to clarify the situation and seek agreement on arrangements to enable the Committee to exercise its functions expeditiously (art. 9(2)).

Following each visit “the Committee shall draw up a report on the facts found during the visit, taking account of any observations which may have been submitted by the Party concerned”. The report shall then be transmitted to the State party with any recommendations that the Committee considers necessary (art. 10). If the State party “fails to cooperate or refuses to improve the situation in the light of the Committee’s recommendations, the Committee may decide, after the Party has had an opportunity to make known its views, by a majority of two-thirds of its members to make a public statement on the matter” (art. 10(2)).

Otherwise, both the information collected by the Committee during an on-the-spot visit and its report shall be confidential, although the report shall be published, “together with any comments of the Party concerned”, whenever so requested by the latter (art. 11(1) and (2)).

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment complements the European Convention on Human Rights by creating a system of visits for the purposes of preventing and eradicating the use of torture in Europe.

To this end, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is authorized both to make periodic visits to the States parties concerned and to organize such other visits as it deems required by the circumstances.

4.5 The Framework Convention for the Protection of National Minorities, 1995

The Framework Convention for the Protection of National Minorities⁶⁰ was adopted by the Committee of Ministers of the Council of Europe in 1995, and entered into force on 1 February 1998. As of 30 April 2002 it had 34 States parties. One of the particular features of the Framework Convention is that, at the invitation of the Committee of Ministers, it is open to signature by States that are not members of the Council of Europe (art. 29). This Framework Convention is the first legally binding multilateral instrument devoted to the protection of national minorities in general and it makes clear that the protection of these minorities “forms an integral part of the

⁶⁰ETS no.: 157.

international protection of human rights, and as such falls within the scope of international cooperation” (art. 1).⁶¹

The Framework Convention contains, however, “mostly programme-type provisions”, because, as the term “Framework” indicates, “the principles contained in the instrument are not directly applicable in the domestic legal orders of the Member States, but will have to be implemented through national legislation and appropriate governmental policies”.⁶² The Convention also establishes that “every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such”, without suffering any disadvantage because of this choice (art. 3(1)).

4.5.1 *The undertakings of the States parties*

The undertakings of the States parties vis-à-vis national minorities are defined in Section II of the Framework Convention, and cover a number of important issues, such as, in particular:

- ❖ the right to equality before the law, equal protection by the law and the promotion of full and effective equality in various areas – art. 4;
- ❖ promotion of conditions necessary for the maintenance and development of the culture and the preservation of the essential elements of the identity of national minorities – art. 5;
- ❖ the encouragement of tolerance and intercultural dialogue and the protection of persons who may be subject to threats or acts of discrimination – art. 6;
- ❖ the freedoms of peaceful assembly, association, expression, thought, conscience and religion; the right to manifest beliefs and establish religious institutions – arts. 7-8;
- ❖ the right to freedom of expression, including the right of access to the media – art. 9;
- ❖ linguistic freedoms, such as the right to use one’s minority language in private or in public, and, to the extent possible, also before administrative authorities; “the right to be informed promptly, in a language which he or she understands, of the reasons for his or her arrest, and of the nature and cause of any accusation against him or her, and to defend himself or herself in this language, if necessary with the free assistance of an interpreter” – art. 10;
- ❖ the rights to a name in one’s minority language and to display signs of a private nature visible to the public – art. 11;
- ❖ education: fostering of knowledge of the culture, history, language and religion of the national minorities and of the majority; the right to set up and manage educational institutions – arts. 12-13;
- ❖ the right to learn one’s minority language – art. 14;
- ❖ effective participation of persons belonging to national minorities in cultural, social and economic life as well as in public affairs – art. 15;

⁶¹See *Introduction to the Framework Convention for the Protection of National Minorities*, <http://www.humanrights.coe.int/Minorities/Eng/FrameworkConvention/FCNMIntro.htm>, p. 1.

⁶²*Ibid.*, loc. cit.

- ❖ prohibition of forced assimilation in that States “shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the ... Convention” – art. 16;
- ❖ the right to “maintain free and peaceful contacts across frontiers with persons lawfully staying in other States” and the right to participate in the activities of NGOs, both locally and internationally – art. 17.

4.5.2 Permissible limitations on the exercise of rights

“Where necessary”, the States parties are allowed to resort only to “those limitations, restrictions or derogations which are provided for in international legal instruments” and, in particular, in the European Convention on Human Rights, and only “in so far as they are relevant to the rights and freedoms flowing from the said principles” (art. 19). In other words, the terms of the Framework Convention cannot be interpreted as adding a further legal basis for imposing limitations on the exercise of rights, or resorting to derogations more extensive than those already allowed, for instance, by article 15 of the European Convention on Human Rights and article 4 of the International Covenant on Civil and Political Rights.

4.5.3 The implementation mechanism

The Committee of Ministers of the Council of Europe has the task of monitoring the implementation of the Framework Convention by the Contracting States (art. 24). In carrying out this task, the Committee of Ministers “shall be assisted by an advisory committee, the members of which shall have recognized expertise in the field of the protection of national minorities” (art. 26). The monitoring is based on a reporting procedure, with the Contracting State being required to submit, within one year following the entry into force of the Convention in its respect, “full information on the legislative and other measures taken to give effect to the principles set out” in the Convention, and thereafter, whenever the Committee of Ministers so requests, “any further information of relevance to the implementation” thereof (art. 25).⁶³

The Framework Convention for the Protection of National Minorities is the first legally binding international treaty aimed at protecting national minorities.

This Convention contains undertakings vis-à-vis national minorities in areas such as, for instance, the right to equality before the law, freedom of expression, freedom of religion, freedom of association and assembly, linguistic freedoms, education, promotion of culture and national identity, and the encouragement of tolerance and intercultural dialogue.

⁶³For more details of this monitoring procedure, see “Rules on the monitoring arrangements under articles 24 to 26 of the Framework Convention for the Protection of National Minorities”, Resolution (97)10, adopted by the Committee of Ministers on 17 September 1997; for the text see the Council of Europe web site: <http://www.coe.int/>.

5. Concluding remarks

This Chapter has provided some basic information about the rights protected by the major treaties existing in Africa, the Americas and Europe, and has also provided a general introduction to the regional monitoring mechanisms. These treaties have contributed to important changes in the laws of many countries, and, in view of the large number of States having ratified, acceded or adhered to them, they are also becoming particularly important for the work of judges, prosecutors and lawyers, who may have to apply them in the exercise of their professional duties. Many of the provisions of the general treaties have been extensively interpreted, *inter alia* with regard to the administration of justice and treatment of persons deprived of their liberty; and this case-law constitutes an important source of information and guidance for judges and lawyers.

.....Chapter 4
**INDEPENDENCE AND
IMPARTIALITY OF
JUDGES, PROSECUTORS
AND LAWYERS.....**

Learning Objectives

- *To consolidate knowledge and understanding of the importance of an independent and impartial Judiciary, independent and impartial prosecutors and an independent legal profession in order to ensure the rule of law and effective protection of the fundamental rights and freedoms of the human person.*
- *To familiarize participants with the existing international and regional legal rules and principles governing the functioning of the Judiciary, prosecutors and lawyers, including the relevant jurisprudence.*

Questions

- *How do you, as judges, prosecutors and lawyers, perceive the role of the principle of separation of powers?*
- *How is this principle ensured in your country?*
- *How are the independence and impartiality of the Judiciary and the independence of lawyers guaranteed in the country where you carry out your work?*
- *Have you ever experienced any difficulties in performing your professional duties in an independent and impartial manner?*
- *If so, what were those difficulties, and how did you deal with them?*
- *More specifically, have you, as judges, prosecutors and lawyers, ever been confronted with attempts to corrupt you?*
- *If so, how did you deal with such propositions?*

Questions (cont.d)

- For those participants who are women jurists, have you, in the course of your work, experienced any specific problems, difficulties or harassment that may be attributable to your gender?
- If so, how did you confront the problems, difficulties, or harassment?
- If you have had to deal with any of the above situations, were you aware of the existence of international legal standards aimed at strengthening the role of the Judiciary and the legal professions in general that might have been conducive to strengthening your position vis-à-vis the Executive, Legislature or other groups or persons acting with or without the connivance of the State?
- Lastly, in your country, would there be any room for you, as judges, to soften the effect of repressive laws by means of interpretation?

Relevant Legal Instruments

Universal Instruments

- The International Covenant on Civil and Political Rights, 1966
- *****
- Basic Principles on the Independence of the Judiciary, 1985
 - Guidelines on the Role of Prosecutors, 1990
 - Basic Principles on the Role of Lawyers, 1990

Regional Instruments

- The African Charter on Human and Peoples' Rights, 1981
- The American Convention on Human Rights, 1969
- The European Convention on Human Rights, 1950

- Council of Europe Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the independence, efficiency and role of judges.¹

¹ In addition to these binding and non-binding legal sources, ethical standards have been adopted by professional associations such as judges', prosecutors' and lawyers' associations. Such standards may provide useful guidance to the legal professions. See e.g. the following standards adopted by the International Bar Association (IBA): IBA Minimum Standards of Judicial Independence, 1982; IBA Standards for the Independence of the Legal Profession, 1990. See also the IBA statement of General Principles for Ethics of Lawyers, IBA Resolution on Non-Discrimination in Legal Practice, as well as the IBA paper *Judicial Corruption Identification, Prevention and Cure* of 14 April 2000. These documents can be found at the IBA web site: <http://www.ibanet.org>.

1. Introduction

This chapter will deal with two of the fundamental pillars of a democratic society respectful of the rule of law and the effective protection of human rights, namely, *the independence and impartiality of the judiciary and prosecutors*, and *the independence of lawyers*. It will first describe the role played by judges, prosecutors and lawyers in this regard; and secondly, will focus on the various legal limitations on, and de facto threats to, the ability of judges, prosecutors and lawyers to exercise their professional responsibilities in an independent and impartial manner. Finally, this chapter will analyse the existing international legal standards relating to the functioning of the legal professions and selected relevant case-law.

2. The Role of Judges, Prosecutors and Lawyers in Upholding the Rule of Law, Including Human Rights Standards

In the modern constitutional State, the principle of an independent Judiciary has its origin in the theory of *separation of powers*, whereby the Executive, Legislature and Judiciary form three separate branches of government, which, in particular, constitute a system of mutual checks and balances aimed at preventing abuses of power to the detriment of a free society. This independence means that both the Judiciary as an institution and also the individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by the Executive, the Legislature or any other inappropriate sources.

Only an independent Judiciary is able to render justice *impartially* on the basis of law, thereby also protecting the human rights and fundamental freedoms of the individual. For this essential task to be fulfilled efficiently, the public must have full confidence in the ability of the Judiciary to carry out its functions in this independent and impartial manner. Whenever this confidence begins to be eroded, neither the Judiciary as an institution nor individual judges will be able fully to perform this important task, or at least will not easily be *seen* to do so.

Consequently, the principle of independence of judges was not invented for the personal benefit of the judges themselves, but was created to protect human beings against abuses of power. It follows that judges cannot act arbitrarily in any way by deciding cases according to their own personal preferences, but that *their duty is and remains to apply the law*. In the field of protecting the individual, this also means that judges have a responsibility to apply, whenever relevant, domestic and international human rights law.

A legal system based on respect for the rule of law also needs strong, independent and impartial prosecutors willing resolutely to investigate and prosecute suspected crimes committed against human beings even if these crimes have been committed by persons acting in an official capacity.

Unless judges and prosecutors play their respective key roles to the full in maintaining justice in society, there is a serious risk that a culture of impunity will take root, thereby widening the gap between the population in general and the authorities. If people encounter problems in securing justice for themselves, they may be driven to take the law into their own hands, resulting in a further deterioration in the administration of justice and, possibly, new outbreaks of violence.²

Lastly, this legal system would not be complete without independent lawyers who are able to pursue their work freely and without fear of reprisals. Indeed, independent lawyers play a key role in defending human rights and fundamental freedoms *at all times*, a role which, together with that played by independent and impartial judges and prosecutors, is indispensable for ensuring that the rule of law prevails, and that individual rights are protected effectively.

In this regard it has been pointed out that all special rapporteurs of the United Nations Commission on Human Rights have emphasized the close relationship that exists between the greater or lesser respect for the due process guarantees of article 10 of the Universal Declaration of Human Rights and the greater or lesser gravity of the violations established.³ Human rights and fundamental freedoms are, in other words, “all the better safeguarded to the extent that the judiciary and the legal professions are protected from interference and pressure”.⁴

3. Challenges to the Independence and Impartiality of the Legal Professions

In spite of the need for judges, prosecutors and lawyers to exercise their professional responsibilities in true independence, experience shows that they are often subjected to pressures of various kinds aimed at compromising their ability to do so.

For instance, although the way in which judges are appointed varies from country to country, there may be a danger to their independence where they are appointed exclusively by the Executive or Legislature, or even where they are elected. A further threat to their independence is posed by lack of security of tenure, as arises in countries where judges are generally employed on temporary contracts. Such insecurity may make judges more susceptible to inappropriate outside pressure. Inadequate

²See e.g. UN doc. E/CN.4/2000/3, *Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions*, para. 87.

³UN doc. E/CN.4/Sub.2/1993/25, *Report on the independence of the judiciary and the protection of practising lawyers*, para. 1.

⁴*Ibid.*, loc. cit.

remuneration may also constitute a threat to the independence of judges in that it may for instance make them more amenable to corruption.

Furthermore, the independence of judges, prosecutors and lawyers is frequently threatened by the refusal of the Executive to allow them to organize freely in professional associations. For instance, where the Executive issues licences to lawyers and obliges them to exercise their profession as members of State-run professional organizations, they cannot carry out their work independently.

However, judges, prosecutors and lawyers are frequently also subjected to other kinds of persecution. Such acts may involve public criticism by either the Executive or Legislature aimed at intimidating the legal professions, but they also often take the form of arbitrary detentions and direct threats to their lives, including killings and disappearances.⁵ In some countries the fact of being a woman lawyer further adds to the precariousness of the profession. Because of their willingness to take up the defence of cases involving the sensitive issue of women's rights, these lawyers face intimidation and violence, sometimes resulting in death.

The threats and attacks described above are not only perpetrated by State authorities, but are frequently also carried out by private individuals, either independently or in connivance with bodies such as criminal organizations and drugs cartels.

Clearly, unless judges, prosecutors and lawyers are able to exercise their professional duties freely, independently and impartially, and unless the Executive and the Legislature are likewise always prepared to ensure this independence, the rule of law will slowly but steadily be eroded, and with it effective protection of the rights of the individual. As can be seen, it is the entire structure of a free and democratic constitutional order that is upheld by an independent and impartial Judiciary, independent and impartial prosecutors and independent lawyers.

4. International Law and the Independence and Impartiality of the Judiciary

4.1 Applicable international law

All general universal and regional human rights instruments guarantee the right to a fair hearing in civil and criminal proceedings before an independent and impartial court or tribunal, and the purpose of this section is to analyse the meaning of the terms “independent” and “impartial” in the light of the case-law of the competent international monitoring organs. While these treaties as interpreted do not solve all the

⁵See e.g. UN doc. E/CN.4/2000/61, *Report of the Special Rapporteur on the independence of judges and lawyers*, 74 pp.; and *Attacks on Justice – The Harassment and Persecution of Judges and Lawyers* (Centre for the Independence of Judges and Lawyers (CIJL), Geneva), 10th edn., January 1999-February 2000, 499 pp.

problems arising with particular regard to the notion of independence of the Judiciary, they do provide a number of essential clarifications.

Of the most important treaties, the International Covenant on Civil and Political Rights states in its article 14(1) that “all persons shall be equal before the courts and tribunals” and further, that “in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, *everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*” (emphasis added). The Human Rights Committee has unambiguously held that “the right to be tried by an independent and impartial tribunal is an *absolute right that may suffer no exception*”.⁶ It is thus a right that is applicable in all circumstances and to all courts, whether ordinary or special.

Second, article 7(1) of the African Charter on Human and Peoples’ Rights provides that “every individual shall have the right to have his cause heard”, a right that comprises, in particular, “(b) the right to be presumed innocent until proved guilty *by a competent court or tribunal*”, as well as “(d) the right to be tried within a reasonable time *by an impartial court or tribunal*” (emphasis added). Furthermore, according to article 26 of the Charter, the States parties “shall have the duty to guarantee the independence of the Courts”. It is the view of the African Commission on Human and Peoples’ Rights that article 7 “should be considered *non-derogable*” since it provides “*minimum* protection to citizens”.⁷

Third, article 8(1) of the American Convention on Human Rights provides that “every person has the right to a hearing, with due guarantees and within a reasonable time, *by a competent, independent, and impartial tribunal*, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature” (emphasis added).

Lastly, article 6(1) of the European Convention on Human Rights specifies that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time *by an independent and impartial tribunal* established by law” (emphasis added).

Although some countries may not yet have ratified or acceded to any of these human rights treaties, they are still bound by customary rules of international law, as well as by general principles of law, of which the principle of an independent and impartial judiciary is generally considered to form part. They are thus also bound by the fundamental principles laid down in the Universal Declaration of Human Rights, which provides in its article 10 that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”.

⁶Communication No. 263/1987, *M. González del Río v. Peru* (Views adopted on 28 October 1992), in UN doc. GAOR, A/48/40 (vol. II), p. 20, para. 5.2; emphasis added.

⁷ACHPR, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April – 7 May 2001*, p. 3 of the text published on <http://www1.umn.edu/humanrts/africa/comcases/218-98.html>; emphasis added.

4.2 Basic Principles on the Independence of the Judiciary, 1985

In 1985, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, which were subsequently unanimously endorsed by the General Assembly.⁸ These principles can therefore be described as being declaratory of universally accepted views on this matter by the States Members of the United Nations, and they have become an important yardstick in assessing the independence of the Judiciary in the work of international monitoring organs and non-governmental organizations (NGOs).

These principles deal with the following subjects: (i) independence of the Judiciary; (ii) freedom of expression and association; (iii) qualifications, selection and training; (iv) conditions of service and tenure; (v) professional secrecy and immunity; and (vi) discipline, suspension and removal. Without seeking to be in any sense exhaustive, the present chapter will deal with some of the significant issues relating to the independence and impartiality of the judiciary.

4.3 The notions of independence and impartiality: links and basic differences

The notions of “independence” and “impartiality” are closely linked, and in some instances the international control organs have dealt with them jointly. Yet each has its specific meaning and requirements, which will be further explained in more detail below. Suffice it to indicate at this juncture that the concept of “independence” is an expression of the constitutional value of judicial independence and, as stated by the Canadian Supreme Court in the case of *Valiente v. The Queen*, in a passage that conveys well the general understanding of the notion of independence of the Judiciary not only under Canadian constitutional law but also under international human rights law, this notion “connotes not only a state of mind but also a status or relationship to others – particularly to the executive branch of government – that rests on objective conditions or guarantees”.⁹ This status or relationship of independence of the Judiciary “involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government”.¹⁰

By contrast, the Supreme Court of Canada described the concept of judicial “impartiality” as referring to “a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case”.¹¹ This view has also been confirmed at the international level, where, for instance, the Human Rights Committee has held that the

⁸See General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁹See (1985) 2 S.C.R. *Valiente v. The Queen* 673, to be found at http://www.lexum.umontreal.ca/csc-scc/en/pub/1985/vol2/html/1985scr2_0673.html, at p. 2.

¹⁰*Ibid.*, loc. cit.

¹¹*Ibid.*

notion of “impartiality” in article 14(1) “implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”.¹² As to the European Court of Human Rights, it considers that the notion of impartiality contains both a *subjective* and an *objective* element: not only must the tribunal be impartial, in that “no member of the tribunal should hold any personal prejudice or bias”, but it must also “be impartial from an objective viewpoint”, in that “it must offer guarantees to exclude any legitimate doubt in this respect”.¹³ The European Court thus adds to the more subjective mental element of bias the important aspect of availability of *guarantees*.

4.4 The notion of institutional independence

The notion of institutional independence means that the Judiciary has to be independent of the other branches of government, namely the Executive and Parliament. According to Principle 1 of the Basic Principles on the Independence of the Judiciary:

“The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”

Furthermore, according to Principle 7 of the Basic Principles,

“It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.”

In order to secure true independence of the Judiciary from the other two branches of government, it is necessary for this independence to be guaranteed, preferably by the Constitution; or, failing this, by other legal provisions.

4.4.1 Independence as to administrative matters

Although international law does not provide details as to how this institutional independence is to be realized in practice, it is clear that, as a minimum, the Judiciary must be able to handle its own administration and matters that concern its operation in general. This includes “the assignment of cases to judges within the court to which they belong”, a matter which, as stated in Principle 14 of the Basic Principles, “is an internal matter of judicial administration”.

¹²Communication No. 387/1989, *Arvo O. Karttunen v. Finland* (Views adopted on 23 October 1992), in UN doc. *G.AOR*, A/48/40 (vol. II), p. 120, para. 7.2.

¹³*Eur. Court HR, Case of Daktaras v. Lithuania, judgment of 10 October 2000*, para. 30; for the text see the Courts’s web site: <http://echr.coe.int>.

4.4.2 Independence as to financial matters

As supported by Principle 7 of the Basic Principles, the Judiciary must further be granted sufficient funds to properly perform its functions. Without adequate funds, the Judiciary will not only be unable to perform its functions efficiently, but may also become vulnerable to undue outside pressures and corruption. Moreover, there must logically be some kind of judicial involvement in the preparation of court budgets.

However, when it comes to administrative and financial issues, independence may not always be *total*, given that the three branches of government, although in principle independent of each other, are also by nature in some respects dependent on each other, for instance with respect to the appropriation of resources. While this inherent tension is probably inevitable in a system based on the separation of powers, it is essential that in situations where, for instance, Parliament controls the budget of the Judiciary, this power is not used to undermine the efficient working of the latter.¹⁴

4.4.3 Independence as to decision-making

Next, as follows from Principle 1 of the Basic Principles, the other branches of government, including “other institutions”, have the duty “to respect and observe the independence of the judiciary”. *This means, more importantly, that the Executive, the Legislature, as well as other authorities, such as the police, prison, social and educational authorities, must respect and abide by the judgements and decisions of the Judiciary, even when they do not agree with them. Such respect for the judicial authority is indispensable for the maintenance of the rule of law, including respect for human rights standards, and all branches of Government and all State institutions have a duty to prevent any erosion of this independent decision-making authority of the Judiciary.*

The condition of the Judiciary’s independence as to decision-making is further supported by Principle 4 of the Basic Principles, according to which:

“There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.”¹⁵

It is not clear whether executive amnesties and pardons would be contrary to Principle 4, but Governments must in any event always exercise considerable care in resorting to such measures, so that any measures of clemency do not subvert the independent decision-making power of the Judiciary, thereby undermining the rule of law and true respect for human rights standards.

¹⁴For a discussion of this issue and others, as regards the system in the United States of America, see *An Independent Judiciary*, Report of the American Bar Association Commission on Separation of Powers and Judicial Independence, published on: <http://www.abanet.org/govaffairs/judiciary/report.html>.

¹⁵Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges provides that “decisions of judges should not be the subject of any revision outside any appeals procedures as provided for by law” (Principle I.2.a.i.), and that “with the exception of decisions on amnesty, pardon or similar, the Government or the administration should not be able to take any decision which invalidates judicial decisions retroactively” (Principle I.2.a.iv.)

4.4.4 Jurisdictional competence

According to Principle 3 of the Basic Principles, the independent decision-making power of the Judiciary also comprises “jurisdiction over all issues of a judicial nature and ... exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law”.¹⁶

This *rule of judicial autonomy in the determination of questions of competence* is in fact well established at both national and international levels and can also be found, for instance, in article 36(6) of the Statute of the International Court of Justice, and, as regards the European Court of Human Rights, in article 32(2) of the European Convention on Human Rights.

4.4.5 The right and duty to ensure fair court proceedings and give reasoned decisions

This issue will be dealt with in subsection 4.5.8 below.

The notion of independence of the Judiciary means, in particular, that:

- *the Judiciary must enjoy **institutional independence**, in that it must be independent of the other branches of government, namely, the Executive and Parliament;*
- *the Judiciary must be independent as to **internal matters of judicial administration**, including the assignment of cases to judges within the court to which they belong;*
- *the Judiciary must have independence in **financial matters** and have sufficient funds to perform their functions efficiently;*
- *the Judiciary must be **independent as to decision-making**: both the Government and other institutions have the duty to respect and observe the decisions handed down by the Judiciary;*
- *the Judiciary must have **jurisdictional competence**, which means that there must be judicial autonomy in the determination of questions of competence;*
- *the Judiciary has both the right and the duty to **ensure fair court proceedings** and issue **reasoned decisions**.*

¹⁶Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe provides that “no organ other than the courts themselves should decide on its own competence, as defined by law” (Principle I.2.a.iii).

4.5 The notion of individual independence

It is not only the Judiciary per se, as a branch of government, that must be independent of the Executive and Parliament; the *individual judges*, too, have a right to enjoy independence in carrying out their professional duties. This independence does not mean, of course, that the judges can decide cases on the basis of their own whims or preferences: it means, as will be shown below, that *they have both a right and a duty to decide the cases before them according to the law, free from fear of personal criticism or reprisals of any kind, even in situations where they are obliged to render judgements in difficult and sensitive cases*. Unfortunately, judges are not always allowed to carry out their work in this spirit of true independence, but in many countries have to suffer undue pressure ranging from inappropriate personal criticism and transfer or dismissal to violent and even fatal attacks on their person.

The independence of the individual judge must be secured in a number of ways, the most important of which will be described below.

4.5.1 Appointment

International law does not provide any details as to *how* judges should be appointed, and the Basic Principles are neutral with regard to the appointment or election of judges. However, according to Principle 10 of the Basic Principles:

“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”

This principle means that, irrespective of the method of selection of judges, candidates’ professional qualifications and their personal integrity must constitute the sole criteria for selection. Consequently, judges cannot lawfully be appointed or elected because of the political views they hold or because, for instance, they profess certain religious beliefs. Such appointments would seriously undermine the independence both of the individual judge and of the Judiciary as such, thereby also undermining public confidence in the administration of justice.

The Human Rights Committee has expressed concern “that in appearance as well as in fact” the Judiciary in the Sudan was “not truly independent, ... that judges can be subject to pressure through the supervisory authority dominated by the Government, and that very few non-Muslims or women occupy judicial positions at all levels”. It therefore recommended that “measures should be taken to improve the independence and technical competence of the judiciary, including the appointment of

qualified judges from among women and members of minorities”.¹⁷ The Human Rights Committee has also recommended to Bolivia that “the nomination of judges be based on their competence and not their political affiliation”.¹⁸

With regard to Zambia, the Human Rights Committee has expressed concern about “the proposals made by the Constitutional Review Committee in regard to the appointment of judges of the Supreme Court by the President after their retirement and the removal of Supreme Court judges by the President, subject only to ratification by the National Assembly without any safeguard or inquiry by an independent judicial tribunal”. It concluded that such proposals were “incompatible with the independence of the judiciary and run counter to article 14 of the Covenant”.¹⁹

Consequently, article 14 of the Covenant has not been complied with in cases where judges are appointed or dismissed by the President without these decisions having been taken in consultation with some independent legal authority, even where the President’s decisions must be ratified by Parliament.

Likewise, as regards Slovakia the Committee has noted with concern that the rules in force “governing the appointment of judges by the Government with approval of Parliament could have a negative effect on the independence of the judiciary”; it recommended that “specific measures be adopted as a matter of priority guaranteeing the independence of the judiciary and protecting judges from any form of political influence, through the adoption of laws regulating the appointment, remuneration, tenure, dismissal and disciplining of members of the judiciary”.²⁰

With regard to the Republic of the Congo, the Committee expressed its “concern at the attacks on the independence of the judiciary in violation of” article 14(1), and drew attention to the fact that such independence was “limited owing to the lack of any independent mechanism responsible for the recruitment and discipline of judges, and to the many pressures and influences, including those of the executive branch, to which the judges [were] subjected”.²¹ It therefore recommended to the State party that it should “take the appropriate steps to ensure the independence of the judiciary, in particular by amending the rules concerning the composition and operation of the Supreme Council of Justice and its effective establishment”.²²

Appointments of judges must, in other words, in themselves constitute a strong factor for independence and cannot be left to the exclusive discretion of the Executive and Legislature.

The question of “lack of full independence of the judiciary” has also arisen in connection with Kyrgyzstan, when the Committee noted, in particular, “that the applicable certification procedure for judges, the requirement of re-evaluation every seven years, the low level of salaries and the uncertain tenure of judges may encourage corruption and bribery”.²³

¹⁷UN doc. GAOR, A/53/40 (vol. I), para. 132.

¹⁸UN doc. GAOR, A/52/40 (vol. I), para. 224.

¹⁹UN doc. GAOR, A/51/40, para. 202.

²⁰UN doc. GAOR, A/52/40 (vol. II), para. 379.

²¹UN doc. GAOR, A/55/40 (vol. I), para. 279.

²²Ibid., para. 280.

²³UN doc. GAOR, A/55/40 (vol. I), para. 405.

As to the *election* of certain judges in the United States of America, the Human Rights Committee noted that it was “concerned about the impact which the current system of election of judges may, in a few states, have on the implementation of the rights” guaranteed by article 14, and it welcomed “the efforts of a number of states in the adoption of a merit-selection system”. It also recommended that the system of “appointment of judges through elections be reconsidered with a view to its replacement by a system of appointment on merit by an independent body”.²⁴

Accordingly, the election of judges would not seem to be compatible with the notion of independence as set forth in article 14.²⁵

With regard to the Special Military Tribunal in Nigeria, the African Commission on Human and Peoples’ Rights held that “the selection of serving military officers, with little or no knowledge of law as members of the Tribunal” was in contravention of Principle 10 of the Basic Principles on the Independence of the Judiciary.²⁶

As to the European Convention on Human Rights, the European Court of Human Rights has consistently held that

“in order to establish whether a tribunal can be considered ‘independent’ for the purposes of article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence”.²⁷

In the case of *Lauko*, the Court thus held that the applicant’s right to have a fair hearing by an independent and impartial tribunal under article 6(1) had been violated. The applicant had been fined for committing a minor offence. This decision was imposed by the local office and an appeal rejected by the district office; the Constitutional Court of Slovakia could not deal with the matter since it was a minor offence falling within the competence of the administrative authorities.²⁸ The Court noted that the local and district offices were “charged with carrying out local State administration under the control of the Government”, and that the appointment of the heads of these bodies was controlled by the Executive and their officers, who had the

²⁴UN doc. GAOR, A/50/40, paras. 288 and 301; emphasis added.

²⁵The United Nations Special Rapporteur on the independence of judges and lawyers has emphasized the importance of adhering to the **objective criteria** listed in Principle 10 of the United Nations Basic Principles in connection with the election and appointment of judges; see e.g. UN doc. E/CN.4/2000/61/Add.1, *Report of the Special Rapporteur on the independence of judges and lawyers, Addendum: Report on the mission to Guatemala*, paras. 60-64. For concern as to risks that the *election* of judges, and, in particular *re-election*, pose to the independence of judges, see *The Rule of Law and Human Rights: Principles and Definitions* (Geneva, International Commission of Jurists, 1966), p. 30, para. 2. As to the use of objective criteria in the selection of judges, see also Principle I.2.c of Council of Europe Recommendation No. R (94) 12 on the independence, efficiency and role of judges. For general information on the European judiciaries, see *Judicial Organization in Europe (2000)*, Strasbourg, Council of Europe Publication, 2000, 352 pp.

²⁶ACHPR, *Media Rights v. Nigeria*, Communication No. 224/98, decision adopted during the 28th session, 28 October – 6 November 2000, para. 60 at <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>.

²⁷*Eur. Court HR, Case of Incal v. Turkey*, judgment of 9 June 1998, Reports 1998-IV, p. 1571, para. 65.

²⁸*Eur. Court HR, Case of Lauko v. Slovakia*, judgment of 2 September 1998, Reports 1998-VI, pp. 2497-2498, paras.12-17.

status of salaried employees.²⁹ It followed that “the manner of appointment of the officers of the local and district offices together with the lack of any guarantees against outside pressures and any appearance of independence clearly show that those bodies [could not] be considered to be ‘independent’ of the executive within the meaning of” article 6(1).³⁰ Although the Court added that it is not inconsistent with the Convention to entrust “the prosecution and punishment of minor offences to administrative authorities”, it had “to be stressed that the person concerned must have an opportunity to challenge any decision made against him before a tribunal that offers the guarantees of Article 6”.³¹

Since in the present case the applicant was unable to have the decisions of the local and district offices reviewed by an independent and impartial tribunal, his rights under article 6(1) of the Convention had been violated.³²

In some situations, however, the notions of independence and impartiality are closely linked, and, when considering the compatibility with article 6 of the European Convention of the National Security Courts in Turkey and the courts martial in the United Kingdom, the Court has, as will be seen in subsection 4.7 below, examined these notions together. As stated in the case of *Incal*, for instance, what is of decisive importance is whether the manner in which the court concerned functioned “infringed the applicant’s right to a fair trial”:

“In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (...). In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (...).”³³

The Inter-American Commission on Human Rights has recommended that the member States of the OAS

“take the steps necessary to protect the integrity and independence of members of the Judiciary in the performance of their judicial functions, and specifically in relation to the processing of human rights violations; in particular, judges must be free to decide matters before them without any influence, inducements, pressures, threats or interferences, direct or indirect, for any reason or from any quarter”.³⁴

²⁹Ibid., p. 2506, para. 64.

³⁰Ibid., loc. cit.

³¹Ibid. at p. 2507.

³²Ibid., pp. 2506-2507, paras. 64-65. However, the Court came to a different conclusion in the case of *Stallinger and Kusov*, where expert members were included in the Regional and Supreme Land Reform Boards on account of their experience of agronomy, forestry and agriculture: “the adversarial nature of the proceedings before the boards was unaffected by the participation of the ‘civil-servant experts’”; hence, there was no violation of article 6(1) of the Convention; see *Eur. Court HR, Case of Stallinger and Kusov v. Austria, judgment of 18 March 1997, Reports 1997-II*, p. 677, para. 37.

³³*Eur. Court HR, Incal judgment of 9 June 1998, Reports 1998-IV*, pp. 1572-1573, para. 71.

³⁴OAS doc. OEA/Ser.L/V/II.95, doc. 7 rev., *Annual Report of the Inter-American Commission on Human Rights 1996*, p. 761.

In the *Constitutional Court* case, the Inter-American Court held that the independence of any judge presupposes an adequate process of appointment (“un adecuado proceso de nombramiento”), for a period in the post (“con una duración en el cargo”) and with guarantees against external pressures (“con una garantía contra presiones externas”).³⁵

4.5.2 Security of tenure

As indicated above, unless judges have some long-term security of tenure, there is a serious risk that their independence will be compromised, since they may be more vulnerable to inappropriate influence in their decision-making. Principle 11 of the Basic Principles therefore provides that

“The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.”

Principle 12 further specifies that

“Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.”³⁶

It would consequently be contrary to Principles 11 and 12 to appoint or elect judges with no guarantee of tenure at all or only a brief period of guaranteed term of office.³⁷ *It is by providing judges with a permanent mandate that their independence will be maximized, as will public confidence in the Judiciary.*

With regard to the situation in Armenia, the Human Rights Committee noted that the independence of the Judiciary was not fully guaranteed, observing, in particular, that “the election of judges by popular vote for a fixed maximum term of six years does not ensure their independence and impartiality”.³⁸

In some countries judges may be obliged to go through a recertification procedure at certain intervals in order to be authorized to continue in office. Faced with this practice in Peru, the Human Rights Committee noted “with concern that the judges retire at the expiration of seven years and require recertification for reappointment”. It considered this “a practice which tends to affect the independence of the Judiciary by denying security of tenure”.³⁹ The Committee therefore recommended to the

³⁵I-A Court HR, *Constitutional Court Case (Aguirre Roca, Rey Terry and Revorado Marsano v. Peru)*, judgment of 31 January 2001, para. 75 of the Spanish version of the judgment, which can be found on the Court’s web site: http://www.corteidh.or.cr/serie_c/C_71_ESP.html.

³⁶Recommendation I.3 of Council of Europe Recommendation No. R (94) 12 is identical to Principle 12.

³⁷The Special Rapporteur on the independence of judges and lawyers has held that while “fixed-term contracts may not be objectionable and not inconsistent with the principle of judicial independence, a term of five years is too short for security of tenure”. In his view “a reasonable term would be 10 years”; UN doc. E/CN.4/2000/61/Add.1, *Report on the Mission to Guatemala*, para. 169(c).

³⁸UN doc. GAOR, A/54/40 (vol. I), para. 104.

³⁹UN doc. GAOR, A/51/40, para. 352.

Government that “the requirement for judges to be recertified be reviewed and replaced by a system of secure tenure and independent judicial supervision”.⁴⁰

The question of review was also at issue with regard to Lithuania, and the Committee was concerned that, although there were “new provisions aimed at ensuring the independence of the judiciary, District Court judges must still undergo a review by the executive after five years of service in order to secure permanent appointment”. Consequently, it recommended that “any such review process should be concerned only with judicial competence and should be carried out only by an independent professional body”.⁴¹

It follows that, in the view of the Human Rights Committee, the practice of executive recertification or review of judges is contrary to article 14(1) of the International Covenant on Civil and Political Rights.

4.5.3 Financial security

The international and regional treaties do not expressly deal with the question of financial security for the Judiciary and individual judges, but Principle 11 of the Basic Principles quoted above provides that judges shall have adequate remuneration and also pensions.

The question of fair and adequate remuneration is important since it may help attract qualified persons to the bench and may also make judges less likely to yield to the temptation of corruption and political or other undue influences. In some countries judges’ salaries are protected against decreases, although pay increases may depend on the Executive and Legislature. Where the Executive and Legislature control the budgets of the Judiciary, there may be a potential threat to the latter’s independence.

In the case of *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice)*, the Canadian Supreme Court had to decide “whether and how the guarantee of judicial independence in s. 11(d) of the *Canadian Charter of Rights and Freedoms* restricts the manner by and extent to which provincial governments and legislatures can reduce the salaries of provincial court judges”.⁴² As part of its budget deficit reduction plan, the Province had enacted the Public Sector Pay Reduction Act whereby it reduced the salaries of Provincial Court judges and others paid from the public purse in the province. Following these pay reductions, numerous accused persons challenged the constitutionality of their proceedings in the Provincial Court, alleging that, as a result of the salary reductions, the court had lost its status as an independent and impartial tribunal. The Supreme Court concluded that the salary reductions “as part of an overall public economic measure were consistent with s. 11(d) of the *Charter*”, as there was “no evidence that the reductions were introduced in order to influence or manipulate the judiciary”.⁴³ What constituted a violation of judicial independence was, however, the refusal of the Manitoba Government to sign a joint recommendation to the Judicial Compensation Committee, “unless the judges agreed to forgo their legal challenge” of

⁴⁰Ibid., para. 364.

⁴¹See UN doc. GAOR, A/53/40 (vol. 1), para. 173.

⁴²(1997) 3 S.C.R. *Manitoba Provincial Judges Assn. v. Manitoba (Minister of Judges)* 3, at http://www.lexum.umontreal.ca/csc-cc/en/pub/1997/vol3/html/1997scr3_0003.html at p. 5.

⁴³Ibid., p. 12.

the law whereby the salary reduction was imposed. The Court considered that the Government had thereby “placed economic pressure on the judges so that they would concede the constitutionality of the planned salary changes”.⁴⁴ In its view, “the financial security component of judicial independence must include protection of judges’ ability to challenge legislation implicating their own independence free from the reasonable perception that the government might penalize them financially for doing so”.⁴⁵

4.5.4 Promotion

Principle 13 of the Basic Principles provides that “promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience”. Improper factors not linked to the professional merits of the judges concerned are thus not to be considered for purposes of promotion.⁴⁶ Such improper factors might, for instance, include attitudes of discrimination based on gender, race or ethnicity.⁴⁷

4.5.5 Accountability

While there is no disagreement about the need for judicial discipline among judges, the question arises as to how to decide on possible sanctions in cases of misconduct, who should decide, and what the sanctions should be. It is also imperative that judges not be subjected to disciplinary action because of opposition to the merits of the case or cases decided by the judge in question.

With regard to Belarus, the Human Rights Committee noted “with concern the allegation that two judges were dismissed by the President ... on the ground that in the discharge of their judicial functions they failed to impose and collect a fine imposed by the executive”.⁴⁸ The Committee was also concerned that the Cambodian Supreme Council of the Magistracy was “not independent of government influence” and that it had “not yet been able to deal with the allegations of judicial incompetence and unethical behaviour”. Given its further concern *inter alia* about the fact that the Ministry of Justice issued circulars that were binding on judges, the Committee recommended that the State party “should take urgent measures to strengthen the judiciary and to guarantee its independence, and to ensure that all allegations of corruption or undue pressure on the judiciary are dealt with promptly”.⁴⁹

⁴⁴Ibid., loc. cit. The Judicial Compensation Committee was a body created by The Provincial Court Act for the purpose of issuing reports on judges’ salaries to the legislature.

⁴⁵Ibid.

⁴⁶Council of Europe Recommendation No. R (94) 12 emphasizes that “all decisions concerning the selection and career of judges should be based on objective criteria” and that not only the selection of judges but also their career “should be based on merit, having regard to qualifications, integrity, ability and efficiency”; moreover, decisions regarding the career of judges should be independent of both the Government and the administration (principle I.2.c.).

⁴⁷As to minority representation in the legal profession in the United States, see report by the American Bar Association Commission on Racial and Ethnic Diversity in the Profession entitled *Miles to Go 2000: Progress of Minorities in the Legal Profession*. According to this report, minority representation in the legal profession is significantly lower than in most other professions. Although mainly devoted to lawyers, the report also contains a subsection on the Judiciary; see www.abanet.org/minorities.

⁴⁸UN doc. GAOR, A/53/40 (vol. I), para. 149.

⁴⁹UN doc. GAOR, A/54/40 (vol. I), paras. 299-300.

It would thus appear clear that the Human Rights Committee considers that the term “independent” in article 14(1) of the Covenant requires that unethical professional behaviour be dealt with by an organ fully independent of government influence.

The matter of discipline, suspension and removal of judges is also dealt with in Principles 17-20 of the United Nations Basic Principles, which read as follows:

“17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to decisions of the highest court and those of the legislature in impeachment or similar proceedings.”

It is noteworthy, however, that Principle 17 speaks only of “an appropriate procedure” and that Principle 20 recommends that decisions in disciplinary and other procedures “*should* be subject to an independent review” (emphasis added). It would thus appear that the interpretation of article 14(1) of the International Covenant on Civil and Political Rights by the Human Rights Committee goes further than the Basic Principles in this respect.⁵⁰

In a case against Burkina Faso, the African Commission on Human and Peoples’ Rights had to consider the State’s failure to give any legal reasons to justify the retention of the punishment meted out to two magistrates. The two were among a number of magistrates who had been suspended, dismissed or forced to retire in 1987. Many of the persons affected by this measure were subsequently reinstated by virtue of an amnesty, while many others, including the two magistrates who were the subject of

⁵⁰Principle VI of Council of Europe Recommendation No. R (94) 12 also deals with the failure to carry out responsibilities and disciplinary offences, and, depending on legal principles in force and traditions of the States, disciplinary measures may inter alia include: 1) withdrawal of cases from the judge; 2) moving the judge to other judicial tasks within the court; 3) economic sanctions such as a reduction in salary for a temporary period; and 4) suspension (Principle VI.1). However, appointed “judges may not be permanently removed from office without valid reasons until mandatory retirement”, reasons that “should be defined in precise terms by the law”. These reasons could also “apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules” (Principle VI.2). Moreover, where the measures mentioned in Principles VI.1 and 2 “need to be taken, States should consider setting up, by law, a special competent body which has as its task to apply disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions *shall* be controlled by a superior judicial organ, or which is a superior judicial organ itself” (emphasis added). The law should also “provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements [of the European Convention on Human Rights], for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges” (Principle VI.3).

the case before the Commission, were not so reinstated.⁵¹ In the view of the Commission, this failure constituted a violation of Principles 18 and 19 of the Basic Principles on the Independence of the Judiciary.⁵² As to the refusal by the Supreme Court to proceed with the two magistrates' claims for damages, lodged fifteen years earlier, it constituted a violation of article 7(1)(d) of the African Charter, which guarantees the right to be tried within a reasonable time by an impartial court or tribunal.⁵³

The *Constitutional Court* case dealt with by the Inter-American Court of Human Rights concerned the impeachment and final removal by legislative decisions of 28 May 1997 of three judges from the bench of the Constitutional Court. These decisions were a consequence of a complex process that had begun in 1992, when President Fujimori dissolved both Congress and the Court of Constitutional Guarantees. In 1996 the new Constitutional Court was called upon to examine the constitutionality of a law that interpreted article 112 of the Peruvian Constitution regarding presidential re-elections. After five of the seven members had found that the relevant law was “non-applicable”, although they did not declare it unconstitutional, the judges forming the majority were allegedly subjected to a campaign of pressure, intimidation and harassment.⁵⁴ As noted by the Inter-American Court, the removal of the three judges was the result of the application of a sanction by the legislative power within the framework of a political trial (“juicio político”),⁵⁵ and the Court concluded unanimously that articles 8 and 25 of the American Convention on Human Rights had been violated with regard to the three former constitutional court judges.

As to article 8 of the Convention, it had been violated since the proceedings of the political trial to which the three judges were subjected did not ensure due process guarantees and, further, since in this specific case the Legislature did not comply with the necessary condition of independence and impartiality in conducting the political trial of the judges.⁵⁶ As to *the lack of impartiality*, it was inter alia due to the fact that some of the 40 members of Congress who had addressed a letter to the Constitutional Court requesting the Court to decide on the question of the constitutionality of the law on presidential elections subsequently participated in the various commissions and sub-commissions appointed during the impeachment proceedings. Furthermore, some of those members taking part in the vote on the removal of the judges were in fact expressly prohibited from doing so on the basis of the Rules of Congress.⁵⁷ With regard to the violation of the *due process guarantees*, the three judges in question had not received complete and adequate information as to the charges laid against them and their access

⁵¹ ACHPR, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Communication No. 204/97, decision adopted during the 29th Ordinary session, 23 April – 7th May 2001, para. 38; for the text see <http://www1.umn.edu/humanrts/africa/comcases/204-97.html>.

⁵² *Ibid.*, loc. cit.

⁵³ *Ibid.*, para. 40.

⁵⁴ I-A Court HR, *Constitutional Court Case, Competence, judgment of September 24, 1999*, in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report of the Inter-American Court of Human Rights 1999*, para. 2 at pp. 374-378.

⁵⁵ I-A Court HR, *Constitutional Court Case (Aguirre Roca, Rey Terry and Revorado Marsano v. Peru)*, judgment of 31 January 2001, para. 67 of the Spanish version of the judgment which can be found on the Court's web site: http://www.corteidh.or.cr/serie_c/C_71_ESP.html.

⁵⁶ *Ibid.*, para. 84.

⁵⁷ *Ibid.*, para. 78.

to the evidence against them was limited. The time available to them for the preparation of their defence was also “extremely short” (“extremadamente corto”). Lastly, they were not allowed to question witnesses whose testimony was at the basis of the decision of the members of Congress to initiate the impeachment proceedings and their eventual decision to remove the three judges.⁵⁸

As to the right to judicial protection laid down in article 25 of the American Convention, that too had been violated. The three judges had in fact filed writs of *amparo* against the decisions to remove them, writs which were considered unfounded by the Superior Court of Justice in Lima; these decisions were subsequently confirmed by the Constitutional Court.⁵⁹ According to the Inter-American Court of Human Rights, the failure of these writs was “due to assessments that were not strictly judicial” (“se debe a apreciaciones no estrictamente jurídicas”). It had for instance been established that the judges of the Constitutional Court who considered the writs of *amparo* were the same persons who participated, or were otherwise involved, in the congressional proceedings; consequently, the Constitutional Court did not comply with the Inter-American Court’s criteria relating to the *impartiality of a judge*. It followed that the writs filed by the alleged victims were incapable of producing their intended result and were doomed to fail, as indeed they did.⁶⁰

To sum up, the general assertion can be made that, under international law, judges subjected to disciplinary proceedings must be granted due process before a **competent, independent and impartial** organ which must be – or must be controlled by – an authority independent of the Executive. It would however seem that, at least under the American Convention on Human Rights, disciplinary proceedings may be brought against judges of constitutional courts by the Legislature, provided that the organ determining the charges strictly respects the principles of **independence and impartiality** and that the relevant proceedings comply with the **due process guarantees** laid down in article 8 of the Convention.

4.5.6 Freedom of expression and association

The rights of judges to freedom of expression and association are essential in a democratic society respectful of the rule of law and human rights. By being free to form associations, judges are better able to defend their independence and other professional interests.

Principle 8 of the Basic Principles provides that:

“In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a

⁵⁸Ibid., para. 83.

⁵⁹Ibid., paras. 97 and 56.27.

⁶⁰Ibid., para. 96.

manner as to preserve the dignity of their office and the impartiality and independence of the judiciary”.⁶¹

4.5.7 Training and education

The training and continued education of judges in national and international human rights law is essential if it is to become a meaningful reality at the domestic level. Without such training, implementation of human rights law will remain illusory. The Human Rights Committee has on several occasions emphasized the importance of providing training in human rights law for judges, other legal professions and law enforcement officers.⁶²

The Committee has further recommended that the Republic of the Congo should give “particular attention ... to the training of judges and to the system governing their recruitment and discipline, in order to free them from political, financial and other pressures, ensure their security of tenure and enable them to render justice promptly and impartially”; accordingly, it invited the State party “to adopt effective measures to that end and to take the appropriate steps to ensure that more judges are given adequate training”.⁶³

Whether educational programmes such as, for instance, “social context education” should be made *mandatory* for judges, and, if so, in what way judges would be accountable for refusing to participate, is, however, an issue which has given rise to debate in Canada.⁶⁴

The important point to emphasize in this respect is that it is in any event the Judiciary itself or the independent associations of judges that must ultimately be responsible for the promotion of the professional education and/or training concerned (cf. Principle 9 of the Basic Principles).

4.5.8 The right and duty to ensure fair court proceedings and give reasoned decisions

The independence of a tribunal is indispensable to fair court proceedings, be they criminal or civil. As laid down in Principle 6 of the Basic Principles:

“The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.”

⁶¹Somewhat more laconically, Council of Europe Recommendation No. R (94) 12 provides in Principle IV that judges “should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protect their interest”.

⁶²See, as to Libyan Arab Jamahiriya, UN doc. *GAOR*, A/54/40 (vol. 1), para. 134; and as to the Sudan, UN doc. *GAOR*, A/53/40 (vol. I), para. 132.

⁶³UN doc. *GAOR*, A/55/40 (vol. I), para. 280.

⁶⁴See speech given by the Rt. Hon. Antonio Lamer, P.C., Chief Justice of Canada, “*The Tension Between Judicial Accountability and Judicial Independence: A Canadian Perspective*” (Singapore Academy of Law Annual Lecture 1996), published at www.sal.org.sg/lect96.html, discussion at pp. 8-9. Principle V.3.g of the Council of Europe Recommendation provides that judges should have the responsibility “to undergo any necessary training in order to carry out their duties in an efficient and proper manner”.

As is made clear in subsequent chapters, and in particular Chapter 7 on *The Right to a Fair Trial* and Chapter 16 concerning *The Administration of Justice during States of Emergency*, this means that judges have an obligation to decide the cases before them according to the law, protect individual rights and freedoms, and constantly respect the various procedural rights that exist under domestic and international law. Further, this important task has to be carried out without any inappropriate or unwarranted interference with the judicial process (Principle 4 of the Basic Principles).

The Human Rights Committee expressed concern that the new Judiciary in Cambodia was susceptible to “bribery and political pressure” and that it was seeking “the opinions of the Ministry of Justice in regard to the interpretation of laws and that the Ministry issues circulars which are binding on judges”. Consequently, it recommended that the State party “should take urgent measures to strengthen the judiciary and to guarantee its independence, and to ensure that all allegations of corruption or undue pressure on the judiciary are dealt with promptly”.⁶⁵

It is further inherent in the notion of a competent, independent and impartial tribunal that it must give *reasons for its decisions*. With regard to article 6(1) of the European Convention on Human Rights, the European Court held in this respect, in the case of *Higgins and Others*, that this obligation “cannot be understood as requiring a detailed answer to every argument”, but that “the extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case”.⁶⁶ Where the Court of Cassation had failed in its judgement to give express and specific explanations on a complaint that the Court of Appeal had not been impartial, the Court found a violation of article 6(1).⁶⁷

The Human Rights Committee has examined numerous cases where Jamaican courts have failed to give reasoned judgements, thereby effectively preventing the convicted persons from exercising their right to appeal. However, rather than examining this issue within the framework of the notion of independence and impartiality in article 14(1) of the Covenant, the Committee has considered it under article 14(3)(c), which guarantees the right to “be tried without undue delay”, and article 14(5), which safeguards the right of appeal in criminal cases.⁶⁸

⁶⁵UN doc. GAOR, A/54/40 (vol. I), para. 299.

⁶⁶*Eur. Court HR, Case of Higgins and Others v. France, judgment of 19 February 1998, Reports 1998-I*, p. 60, para. 42.

⁶⁷*Ibid.*, p. 61, para. 43.

⁶⁸See, for example, Communication No. 283/1988, *A. Little v. Jamaica* (Views adopted on 1 November 1991, in UN doc. GAOR, A/47/40, p. 284, para. 9 read in conjunction with p. 283, para. 8.5 (violation of article 14(5) of the Covenant; no reasoned judgement issued by the Court of Appeal for more than five years after dismissal); and Communication No. 377/1988, *A. Currie v. Jamaica* (Views adopted on 29 March), in UN doc. GAOR, A/49/49 (vol. II), p. 77, para. 13.5 (violation of both article 14(3)(c) and (5) for failure of the Court of Appeal to issue written judgement thirteen years after dismissal of appeal).

The notion of independence of the Judiciary also means that

- ***individual judges must enjoy independence in the performance of their professional duties; individual judges have a right and a duty to decide cases before them according to law, free from outside interference including the threat of reprisals and personal criticism;***
- ***individual judges must be appointed or elected exclusively on the basis of their professional qualifications and personal integrity;***
- ***individual judges must enjoy long-term security of tenure;***
- ***individual judges must be adequately remunerated;***
- ***the promotion of individual judges must be based on objective factors;***
- ***the question of accountability of individual judges for unethical professional behaviour must be dealt with by a fully independent and impartial organ ensuring due process of law.***

4.6 The notion of impartiality

As previously noted, the concept of impartiality is closely linked to that of independence and sometimes the two notions are considered together. The requirement of impartiality is contained in article 14(1) of the International Covenant on Civil and Political Rights, article 7(1) of the African Charter of Human and Peoples' Rights, article 8(1) of the American Convention on Human Rights and article 6(1) of the European Convention on Human Rights.

Principle 2 of the Basic Principles also specifies that

“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”

In the case of *Arvo O. Karttunen*, the Human Rights Committee explained that “the impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial” within the meaning of article 14(1) of the Covenant, adding that the notion of impartiality “implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”.⁶⁹ It specified that, “where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to

⁶⁹Communication No. 387/1989, *Arvo O. Karttunen v. Finland* (Views adopted on 23 October 1992), in UN doc. GAOR, A/48/40 (vol. II), p. 120, para. 7.2.

consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria. ... A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of article 14”.⁷⁰ In this particular case, the Finnish Court of Appeal had considered, on the basis of only written evidence, that the verdict of the District Court “had not been influenced by the presence of lay judge V. S., while admitting that V. S. manifestly should have been disqualified”.⁷¹ The lay judge had made some allegedly improper remarks during the testimony given by the author’s wife, remarks that, as admitted by the Government itself, “could very well have influenced the procurement of evidence and the content of the court’s decision”.⁷² The Committee concluded that, in the absence of oral proceedings before the Court of Appeal, which was the only means of determining “whether the procedural flaw had indeed affected the verdict of the District Court”, there had been a violation of article 14.⁷³

As further emphasized by the Human Rights Committee, *in addressing a jury*, the presiding judge must not give instructions that are either arbitrary, amount to a denial of justice, or violate his obligations of impartiality.⁷⁴

In the case concerning the *Constitutional Rights Project*, the African Commission on Human and Peoples’ Rights had, inter alia, to consider the compatibility with article 7(1)(d) of the African Charter on Human and Peoples’ Rights of the Civil Disturbances (Special Tribunal) Act, under the terms of which that tribunal should consist of one judge and four members of the armed forces. In the view of the Commission, the tribunal was as such “composed of persons belonging largely to the executive branch of government, the same branch that passed the Civil Disturbance Act”.⁷⁵ The Commission then recalled that article 7(1)(d) of the Charter “requires the court or tribunal to be impartial”, adding that, “regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality”. Consequently, there had been a violation of the said provision in this case.⁷⁶

⁷⁰Ibid., loc. cit.

⁷¹Ibid., p. 120, para. 7.3.

⁷²Ibid., p. 117, para. 2.3 and p. 119, para. 6.3 read together.

⁷³Ibid., p. 120, para. 7.3.

⁷⁴Communication No. 731/1996, *M. Robinson v. Jamaica* (Views adopted on 29 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), para. 9.4 at p. 128; in this particular case there was no evidence “to show that the trial judge’s instructions or the conduct of the trial suffered from any such defects”.

⁷⁵ACHPR, *Constitutional Rights Project v. Nigeria*, *Communication No. 87/93*, para. 13; for the text of the judgment, see e.g. <http://www1.umn.edu/humanrts/africa/comcases/87-93.html>. See also ACHPR, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v. Nigeria*, *Communications Nos. 137/94, 139/94, 154/96 and 161/97*, decision of 1 October 1998, para. 86; for the text see http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

⁷⁶Ibid., para. 14.

As to the requirement of impartiality in article 6(1) of the European Convention on Human Rights, the European Court of Human Rights has consistently ruled that it has two requirements, namely, one *subjective* and one *objective* requirement. In the first place, “the tribunal must be *subjectively impartial*”, in that “no member of the tribunal should hold any personal prejudice or bias”, and this personal “impartiality is presumed unless there is evidence to the contrary”.⁷⁷ Secondly, “the tribunal must also be impartial from an objective viewpoint”, in that “it must offer guarantees to exclude any legitimate doubt in this respect”.⁷⁸ With regard to the *objective test*, the Court added that it must be determined whether there are ascertainable facts, which may raise doubts as to the impartiality of the judges, and that, in this respect, “even appearances may be of a certain importance”, because “what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings”.⁷⁹

Thus, in the case of *Oberschlick*, the European Court concluded that article 6(1) had been violated for lack of impartiality since a judge who had taken part in a decision quashing an order dismissing criminal proceedings subsequently sat in the hearing of an appeal against the applicant’s conviction.⁸⁰ The possibility exists, nevertheless, “that a higher or the highest tribunal may, in some circumstances, make reparation for an initial violation of one of the Convention’s provisions”.⁸¹ However, this is only possible where the subsequent control is exercised by a judicial body having “full jurisdiction” and providing the guarantees foreseen by article 6(1).⁸² Issues that may be of relevance to assess the adequacy of the review, on a point of law for instance, may be “the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the contents of the dispute, including the desired and actual grounds of appeal”.⁸³ Where the higher court does not have full jurisdiction to make such review, the Court has found a violation of article 6(1).⁸⁴

In the case of *Daktaras*, the Court concluded that article 6(1) had been violated because the applicant’s doubts as to the impartiality of the Lithuanian Supreme Court “may be said to have been *objectively* justified”.⁸⁵ In this case, the President of the Criminal Division of the Supreme Court had lodged a petition for cassation with the judges of that Division, at the request of the judge at first instance, who was dissatisfied with the judgement of the Court of Appeal. The President proposed that the appellate decision be quashed but the same President also appointed the Judge Rapporteur and constituted the chamber that was to examine the case. The President’s cassation petition was endorsed at the hearing by the prosecution and finally accepted by the

⁷⁷ Eur. Court HR, *Case of Daktaras v. Lithuania*, judgment of 10 October 2000, para. 30; emphasis added.

⁷⁸ Ibid., loc. cit.

⁷⁹ Ibid., para. 32.

⁸⁰ Eur. Court HR, *Case of Oberschlick v. Austria (1)*, judgment of 23 May 1991, Series A, No. 204, p. 13, para. 16 and p. 15 para. 22. For similar cases, see also Eur. Court HR, *Case of Castillo Algar v. Spain*, judgment of 28 October 1998, Reports 1998-VIII, p. 3124 ff. and Eur. Court HR, *the Case of de Haan v. the Netherlands*, judgment of 26 August 1997, Reports 1997-IV, p. 1379 ff.

⁸¹ Eur. Court HR, *Case of de Haan v. the Netherlands*, judgment of 26 August 1997, Reports 1997-IV, p. 1393, para. 54.

⁸² Eur. Court HR, *Case of Kingsley v. the United Kingdom*, judgment of 7 November 2000, para. 51; for the text of the judgment, see <http://www.echr.coe.int/>.

⁸³ Eur. Court HR, *Case of Bryan v. the United Kingdom*, judgment of 22 November 1995, Series A, No. 335-A, p. 17, para. 45.

⁸⁴ Eur. Court HR, *Kingsley v. the United Kingdom*, judgment of 7 November 2000, para. 59.

⁸⁵ Eur. Court HR, *Case of Daktaras v. Lithuania*, judgment of 10 October 2000, para. 38; emphasis added.

Supreme Court. As to the *subjective test*, there was no evidence of *personal bias* of the individual judges of the Supreme Court,⁸⁶ but, under the *objective test*, the conclusion was different. In the view of the Court, the legal opinion given by the President in submitting a cassation petition could not be regarded as neutral from the parties' point of view, since, "by recommending that a particular decision be adopted or quashed, [he] necessarily becomes the defendant's ally or opponent".⁸⁷ The European Court added that, "when the President of the Criminal Division not only takes up the prosecution case but also, in addition to his organisational and managerial functions, constitutes the court, it cannot be said that, from an objective standpoint, there are sufficient guarantees to exclude any legitimate doubt as to the absence of inappropriate pressure". Further, the fact that the President's intervention was prompted by the judge at first instance only aggravated the situation.⁸⁸

The notion of impartiality is also applicable to *jurors*, and, in the case of *Sander*, the European Court found a violation of article 6(1) after a juror had made racist remarks and jokes and the judge's subsequent direction had failed to dispel the reasonable impression and fear of a lack of impartiality. The Court accepted that, "although discharging the jury may not always be the only means to achieve a fair trial, there are certain circumstances where this is required by Article 6 § 1 of the Convention".⁸⁹ In this particular case, "the judge was faced with a serious allegation that the applicant risked being condemned because of his ethnic origin", and, moreover, "one of the jurors indirectly admitted to making racist comments"; given "the importance attached by all Contracting States to the need to combat racism", the Court considered "that the judge should have acted in a more robust manner than merely seeking vague assurances that the jurors could set aside their prejudices and try the case solely on the evidence".⁹⁰ It concluded that, "by failing to do so, the judge did not provide sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the court", which was not, consequently, "impartial from an objective point of view".⁹¹

In a second case concerning a juror who had allegedly uttered a racist slur, the Court also emphasized that article 6(1) of the Convention "imposes an obligation on every national court to check whether, as constituted, it is 'an impartial tribunal' within the meaning of that provision ... [where] this is disputed on a ground that does not immediately appear to be manifestly devoid of merit".⁹² In the case of *Remli* the court concerned had not made such a check, and, consequently, the applicant had been deprived "of the possibility of remedying, if it proved necessary, a situation contrary to the requirements of the Convention".⁹³

⁸⁶Ibid., para. 31.

⁸⁷Ibid., para. 35.

⁸⁸Ibid., para. 36.

⁸⁹*Eur. Court HR, Case of Sander v. the United Kingdom, judgment of 9 May 2000*, para. 34; for the text of the judgment, see <http://www.echr.coe.int/>.

⁹⁰Ibid., loc. cit.

⁹¹Ibid. For other cases involving the notion of impartiality, see e.g., *Eur. Court HR, Case of Diennet v. France, judgment of 26 September 1995, Series A, No. 325-A* (no violation); and the cases mentioned under the section dealing with "Military and other special courts or tribunals".

⁹²*Eur. Court HR, Case of Remli v. France, judgment of 30 March 1996, Reports 1996-II*, p. 574, para. 48.

⁹³Ibid., loc. cit.

*The notion of **impartiality of the judiciary** is an essential aspect of the right to a fair trial. It means that all the judges involved must act objectively and base their decisions on the relevant facts and applicable law, without personal bias or preconceived ideas on the matter and persons involved and without promoting the interests of any one of the parties.*

4.7 Military and other special courts and tribunals

The creation in special situations of military courts or other courts of special jurisdiction such as State Security Courts is commonplace and often gives rise to violations of the right to due process of law. While the international treaties examined in this Manual do not draw any express distinction between ordinary and special, including military, tribunals, the Human Rights Committee made it clear in its General Comment No. 13 that the provisions of article 14 of the Covenant “apply to all courts and tribunals within the scope of that article whether ordinary or specialized”.⁹⁴ This means, for instance, that likewise, military or other special tribunals which try civilians must comply with the condition of independence and impartiality. The Committee admitted that this could cause a problem, since “quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice”.⁹⁵ Yet, “while the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14”.⁹⁶

In the case of *R. Espinoza de Polay*, the Human Rights Committee further expressed the view that special tribunals composed of anonymous, so called “faceless”, judges are not compatible with article 14, because they “fail to guarantee a cardinal aspect of a fair trial within the meaning of article 14”, namely, “that the tribunal must be, and be seen to be, independent and impartial”.⁹⁷ It added that, “in a system of trial by ‘faceless judges’, neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established ad hoc, may comprise serving members of the armed forces”.⁹⁸ The Committee has also severely criticized the system of trial of civilians by “faceless judges” in a military court during the consideration of Peru’s periodic reports, since it was the same military force that detained, charged and tried the persons accused of terrorism, without there being any possibility of review by a higher independent and impartial court.⁹⁹ The Committee emphasized “that trials of

⁹⁴United Nations *Compilation of General Comments*, p. 123, para. 4.

⁹⁵*Ibid.*, loc. cit.

⁹⁶*Ibid.*

⁹⁷Communication No. 577/1994, *R. Espinoza de Polay v. Peru* (Views adopted on 6 November 1997), in UN doc. GAOR, A/53/40 (vol. II), p. 43, para. 8.8.

⁹⁸*Ibid.*, loc. cit. In the view of the Committee this system also “fails to safeguard the presumption of innocence as guaranteed by” article 14(2), *ibid.* See also Communication No. 688/1996, *C. T. Arredondo v. Peru*, (Views adopted on 27 July 2000), in UN doc. GAOR, A/55/40 (vol. II) p. 60, para. 10.5.

⁹⁹UN doc. GAOR, A/51/40, p. 62, para. 350; see also p. 64, para. 363.

non-military persons should be conducted in civilian courts before an independent and impartial judiciary”.¹⁰⁰

The Committee further expressed its concern that the Government of Nigeria had “not abrogated the decrees establishing special tribunals or those revoking normal constitutional guarantees of fundamental rights as well as the jurisdiction of the normal courts”.¹⁰¹ It emphasized that “all decrees revoking or limiting guarantees of fundamental rights and freedoms should be abrogated”, and that all “courts and tribunals must comply with all standards of fair trial and guarantees of justice prescribed by article 14 of the Covenant”.¹⁰² Similarly, the Committee has noted with concern that special courts in Iraq “may impose the death penalty”, although they “do not provide for all procedural guarantees required by article 14 of the Covenant, and in particular the right of appeal”. It informed the State party in this respect that “Courts exercising criminal jurisdiction should not be constituted other than by independent and impartial judges, in accordance with article 14, paragraph 1, of the Covenant”; and, further, that “the jurisdiction of such courts should be strictly defined by law and all procedural safeguards protected by article 14, including the right of appeal, should be fully respected”.¹⁰³

The question of military tribunals has also arisen with regard to Cameroon, with the Committee expressing concern about the jurisdiction of military courts over civilians and about the extension of that jurisdiction to offences which are not per se of a military nature, for example all offences involving firearms. The Committee consequently recommended that the State party “should ensure that the jurisdiction of military tribunals is limited to military offences committed by military personnel”.¹⁰⁴ With regard to Guatemala the Committee noted that “the wide jurisdiction of the military courts to hear all cases involving the trial of military personnel and their powers to decide cases that belong to the ordinary courts contribute to the impunity enjoyed by such personnel and prevent their punishment for serious human rights violations”. The Committee consequently informed the State party that it should “amend the law to limit the jurisdiction of the military courts to the trial of military personnel who are accused of crimes of an exclusively military nature”.¹⁰⁵ The same recommendation was made to Uzbekistan after the Committee had expressed concern about the “broad jurisdiction” of the military courts, which was “not confined to criminal cases involving members of the armed forces but also covers civil and criminal cases when, in the opinion of the executive, the exceptional circumstances of a particular case do not allow the operation of courts of general jurisdiction”.¹⁰⁶ After having also considered with concern “the broad scope of the jurisdiction of military courts” in Lebanon, the Committee recommended that the State party “should review the jurisdiction of the military courts and transfer the competence of [these] courts, in all trials concerning

¹⁰⁰Ibid., p. 62, para. 350.

¹⁰¹Ibid., p. 51, para. 278.

¹⁰²Ibid., p. 53, para. 293.

¹⁰³UN doc. GAOR, A/53/40, pp. 20-21, para. 104.

¹⁰⁴UN doc. GAOR, A/55/40 (vol. I), paras. 215-216.

¹⁰⁵UN doc. GAOR, A/56/40 (vol. I), p. 96, para. 20.

¹⁰⁶Ibid., p. 61, para. 15.

civilians and in all cases concerning the violation of human rights by members of the military, to the ordinary courts”.¹⁰⁷

The African Commission on Human and Peoples’ Rights concluded that, inter alia, article 7(1)(d) of the African Charter on Human and Peoples’ Rights was violated in a case concerning special tribunals set up in Nigeria by the Robbery and Firearms (Special Provisions) Act. These tribunals consisted of three persons, namely, one judge, one officer of the army, navy or air force and one officer of the police force. As noted by the African Commission, jurisdiction had “thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government, the same branch that passed the Robbery and Firearms Decree, whose members do not necessarily possess any legal expertise”. The Commission then concluded that such courts violated the condition laid down in article 7(1)(d) of the African Charter requiring the court or tribunal to be impartial; “regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality”.¹⁰⁸

The question of the compatibility of purely military tribunals with the African Charter was at issue in the *Media Rights Agenda* case concerning the secret trial before a Special Military Tribunal of Niran Malaolu, editor of an independent Nigerian daily newspaper, *The Diet*. The Tribunal sentenced Mr. Malaolu to life imprisonment after having found him guilty of treason.¹⁰⁹ As to its general position on the issue of trials of civilians by Military Tribunals, the African Commission recalled the terms of its Resolution on the Right to Fair Trial and Legal Assistance in Africa, where it had held that:

*“In many African countries Military Courts and Special Tribunals exist alongside regular judicial institutions. The purpose of Military Courts is to determine offences of a purely military nature committed by military personnel. While exercising this function, Military Courts are required to respect fair trial standards.”*¹¹⁰

The Commission now added that military courts “*should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, Special Tribunals should not try offences that fall within the jurisdiction of regular courts*”.¹¹¹ The Commission considered, inter alia, that the creation of the Special Military Tribunal for the trial of treason and other related offences impinged on the independence of the judiciary, inasmuch as such offences were being recognized in

¹⁰⁷UN doc. GAOR, A/52/40 (vol. I), p. 55, para. 344.

¹⁰⁸ACHPR, *Constitutional Rights Project (in respect of Wabab Akamu, Gbolahan Adeaga and Others) v. Nigeria*, Communication No. 60/91, decision adopted on 3 November 1994, 16th session, paras. 36-37; text can be found at <http://www.up.ac.za/chr/>; for a similar case, see ACHPR, *Constitutional Rights Project (in respect of Zamani Lekwot and 6 Others) v. Nigeria*, Communication No. 87/93, decision adopted during the 16th session, October 1994, paras. 30-31; for the text, see preceding web site.

¹⁰⁹ACHPR, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000, paras. 6-8; for the text of the decision, see <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>.

¹¹⁰Ibid., para. 62; Commission’s own emphasis.

¹¹¹Ibid., loc. cit.; emphasis added.

Nigeria as falling within the jurisdiction of the regular courts; and that the trial before the Court further violated the right to a fair trial as guaranteed by article 7(1)(d) of the African Charter and Principle 5 of the Basic Principles on the Independence of the Judiciary, which provides that

“Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.”

Furthermore, the Tribunal also violated article 26 of the Charter, according to which the States parties “shall have the duty to guarantee the independence of the Courts”.¹¹²

Lastly, in a case concerning a Special Military Tribunal set up under the Nigerian Military Government, the African Commission had to consider *the fairness of legal proceedings before this court against military officers accused of offences punishable in terms of military discipline*. In this case the Commission stated that it

“... must be clearly understood that the military tribunal here is one under an undemocratic military regime. In other words, the authority of the Executive and the Legislature has been subsumed under the military rule. Far from this suggesting that military rulers have carte blanche to govern at the whim of a gun, we wish to underscore the fact that the laws of human rights, justice and fairness must still prevail.”¹¹³

It was the view of the Commission, furthermore, that “the provisions of Article 7 should be considered non-derogable, providing as they do the minimum protection to citizens and military officers alike, especially under an unaccountable, undemocratic military regime”. The Commission thereafter referred to General Comment No. 13 of the Human Rights Committee, as well as the case-law of the European Commission of Human Rights, according to which “the purpose of requiring that courts be ‘established by law’ is that the organization of justice must not depend on the discretion of the Executive, but must be regulated by laws emanating from parliament”. The African Commission added with regard to military tribunals that the “critical factor is whether the process is fair, just and impartial”.¹¹⁴ While considering that “a military tribunal *per se* is not offensive to the rights in the Charter” and does not imply “an unfair or unjust process”, the Commission made the point that

“Military Tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process. What causes offence is failure to observe basic and fundamental standards that would ensure fairness.”¹¹⁵

¹¹²Ibid., para. 66.

¹¹³ACHPR, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April – 7 May 2001, at p. 3 of the text published at <http://www1.umn.edu/humanrts/africa/comcases/218-98.html>.

¹¹⁴Ibid., loc. cit.

¹¹⁵Ibid., p. 6, para. 44.

Since the military tribunal had in this case already failed the independence test, the Commission did not find it necessary also to decide whether the fact that the tribunal was presided over by a military officer was another violation of the Charter.¹¹⁶

In its judgment on the merits of the case of *Castillo Petruzzi et al.*, the Inter-American Court of Human Rights found that the military tribunals that had tried the victims for the crimes of treason “did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8(1) of the American Convention recognizes as essentials of due process of law”.¹¹⁷ In 1992 a decree-law had extended the competence of military courts to try civilians accused of treason “regardless of temporal considerations”, while previously they had been allowed to do so only when the country was at war abroad. DINCOTE, the National Counter-Terrorism Bureau, “was given investigative authority, and a summary proceeding ‘in the theatre of operations’ was conducted, as stipulated in the Code of Military Justice”.¹¹⁸ The pertinent parts of the Court’s reasoning read as follows:

“128. ... Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviours that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual’s right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.

129. A basic principle of the independence of the Judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create ‘tribunals that do not use the duly established procedures of the legal process ... to displace the jurisdiction belonging to the ordinary courts or judicial tribunals’.¹¹⁹

130. Under article 8(1) of the American Convention, a presiding judge must be competent, independent and impartial. In the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have. Moreover, under the Statute of Military Justice, members of the Supreme Court of Military Justice, the highest body in the military judiciary, are appointed by the minister of the pertinent sector. Members of the Supreme Court of Military Justice also decide who among their subordinates will be

¹¹⁶Ibid., loc. cit.

¹¹⁷I-A Court HR, *Castillo Petruzzi et al. case v. Peru*, judgment of May 30, 1999, in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report I-A Court HR 1999*, Appendix IX, p. 263, para. 132.

¹¹⁸Ibid., p. 262, para. 127.

¹¹⁹The Court here quoted the United Nations Basic Principles on the Independence of the Judiciary.

promoted and what incentives will be offered to whom; they also assign functions. This alone is enough to call the independence of the military judges into serious question”.¹²⁰

With regard to the fact that the presiding judges were “faceless” the Court said, more specifically, that in such cases “defendants have no way of knowing the identity of their judge and therefore, of assessing their competence”. An additional problem was “the fact that the law does not allow these judges to recuse themselves”.¹²¹

In the *Genie Lacayo* case, however, the Court stated that the fact that it involved a military court did not per se signify that the human rights guaranteed to the accusing party by the Convention were being violated.¹²² In this particular case, the applicant had been “able to participate in the military proceeding, submit evidence, avail himself of the appropriate remedies and, lastly, apply for judicial review before the Supreme Court of Justice of Nicaragua”; consequently, he could not claim that the application of the decrees on military trials had restricted his procedural rights as protected by the Convention.¹²³ As to the allegation that the decrees concerning military trials violated the principle of independence and impartiality of the military tribunals, not only because of their composition, particularly in the second instance where senior army officials were involved, but also because of the possible use of ideological elements such as that of “*Sandinista* juridical conscience” on evaluation of evidence, the Court felt that

“... although those provisions were in force when the military case was heard and ... could have impaired the independence and impartiality of the military tribunals that heard the case, they were not applied in this specific Case”.¹²⁴

On the other hand, the Court admitted that in the military court of first instance the court had, inter alia, invoked a legal provision in which the expression “*Sandinista* law” was used; however, this term had “only a superficial ideological connotation” and it had “not been proven that the invoking [thereof had] either diminished the impartiality and independence of the tribunals or violated Mr. Raymond Genie-Peñalba’s procedural rights”.¹²⁵

In the light of the different reasoning in these two judgments rendered by the Inter-American Court of Human Rights the question might be raised whether, with respect to the second case, it would not have been appropriate to apply the principle that justice must not only be done but *also be seen to be done*.

¹²⁰Ibid., pp. 262-263, paras. 128-130.

¹²¹Ibid., p. 263, para. 133. The Inter-American Commission on Human Rights has also severely criticized the use of “faceless judges” in Peru; see OAS doc. OEA/Ser.L/V/II.95, doc. 7 rev., *Annual Report of the Inter-American Commission on Human Rights 1996*, pp. 736-737.

¹²²I-A Court HR, *Genie Lacayo Case, judgment of January 29, 1997*, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report I-A Court HR 1997*, p. 54, para. 84.

¹²³Ibid., p. 54, para. 85.

¹²⁴Ibid., p. 54, para. 86.

¹²⁵Ibid., para. 87.

Lastly, the Inter-American Commission on Human Rights has recommended that all member States of the OAS

“... take the legislative and other measures necessary, pursuant to article 2 of the American Convention, to ensure that civilians charged with criminal offences of any kind be tried by ordinary courts which offer all the essential guarantees of independence and impartiality, and that the jurisdiction of military tribunals be confined to strictly military offences”.¹²⁶

While the European Court of Human Rights has decided, with respect to Turkey, that it considers that “its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts”, it still has the task of examining whether, “viewed objectively”, the applicants concerned, being civilians, “had a legitimate reason to fear that [the court trying them] lacked independence and impartiality”.¹²⁷ In the *Süreke* case, among others, the applicant was prosecuted in the Istanbul National Security Court for disclosing the identity of officials involved in the fight against terrorism; the Court concluded that it was understandable that he “should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service”.¹²⁸ It followed that

“he could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant’s fears as to that court’s lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction.”¹²⁹

As to the trial of army officers by *courts martial*, the European Court of Human Rights has in numerous cases had to consider whether such courts in the United Kingdom have been “independent and impartial” within the meaning of article 6(1) of the European Convention on Human Rights. In the case of *Findlay*, for instance, it concluded that a court martial did not comply with these requirements in view in particular of the central part played in the prosecution by the convening officer, who “decided which charges should be brought and which type of court martial was most appropriate”; he further “convened the court martial and appointed its members and the prosecuting and defending officers”.¹³⁰ Furthermore, the court members appointed by the convening officer were of subordinate rank to him, and many of these members, including the president, “were directly or ultimately under his command”. The

¹²⁶OAS doc. OEA/Ser.L/V/II.95, doc. 7 rev., *Annual Report of the Inter-American Commission on Human Rights 1996*, p. 761.

¹²⁷See e.g. *Eur. Court HR, Case of Süreke v. Turkey, judgment of 8 July 1999*.

¹²⁸*Ibid.*, loc. cit.

¹²⁹*Ibid.* For similar cases see e.g. *Eur. Court HR, Case of Incal v. Turkey, judgment of 9 June 1998, Reports 1998-IV*, p. 1547 ff.; *Eur. Court HR, Case of Çiraklar v. Turkey, judgment of 28 October 1998, Reports 1998-VI*, p. 3059 ff.; and *Eur. Court HR, Case of Okçuoglu v. Turkey, judgment of 8 July 1999*; for the text of this judgment, see <http://www.echr.coe.int>.

¹³⁰*Eur. Court HR, Case of Findlay v. the United Kingdom, judgment of 21 January 1997, Reports 1997-I*, p. 281, para. 74.

convening officer also “had the power, albeit in prescribed circumstances, to dissolve the court martial either before or during the trial”.¹³¹ The European Court concluded that “in order to maintain confidence in the independence and impartiality of the court, appearances may be of importance”, and that, since “the members of the court martial ... were subordinate in rank to the convening officer and fell within his chain of command, Mr. Findlay’s doubts about the tribunal’s independence and impartiality could be objectively justified”.¹³²

For the European Court of Human Rights it was also of importance that the convening officer was “confirming officer”, in that “the decision of the court martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit”.¹³³ In the view of the Court this competence was

“... contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of ‘tribunal’ and can also be seen as a component of the ‘independence’ required by Article 6 § 1”.¹³⁴

The fair trial or due process guarantees in international human rights law, including the condition of independence and impartiality of the Judiciary, apply with full force to military and other special courts or tribunals also when trying civilians.

Under the African Charter on Human and Peoples’ Rights, military tribunals shall under no circumstances try civilians, and special tribunals shall not deal with cases falling within the jurisdiction of ordinary courts of law.

Although the Human Rights Committee has not, as such, held that trials of civilians by military courts would in all circumstances be unlawful under article 14 of the International Covenant on Civil and Political Rights, the clear trend is to recommend that the States parties transfer the competence of such courts in all cases concerning civilians to the ordinary courts of law.

¹³¹Ibid., p. 282, para. 75.

¹³²Ibid., para. 76.

¹³³Ibid., para. 77.

¹³⁴Ibid., loc. cit. For similar cases, see e.g. *Eur. Court HR, Case of Coyne v. the United Kingdom, judgment of 24 September 1997, Reports 1997-V*, p. 1842 ff., and *Eur. Court HR, Case of Cable and Others v. the United Kingdom, judgment of 18 February 1999*; see <http://www.echr.coe.int>.

5. International Law and the Independence of Prosecutors

5.1 Guidelines on the Role of Prosecutors, 1990

The need for strong, independent and impartial prosecutorial authorities for the effective maintenance of the rule of law and human rights standards has already been emphasized in this chapter. While the specific professional duties of prosecutors under international human rights law will be further dealt with whenever relevant in this Manual, the present section will limit itself to providing an overview of the contents of the Guidelines on the Role of Prosecutors, which were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990 “to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings” (final preambular paragraph).

This document provides 24 Guidelines covering the following questions: qualifications, selection and training; status and conditions of service; freedom of expression and association; role in criminal proceedings; discretionary functions; alternatives to prosecution; relations with other government agencies or institutions; disciplinary proceedings; and observance of the Guidelines.

As noted in the fifth preambular paragraph of the Guidelines as read in conjunction with the second preambular paragraph, “prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect and compliance with ... the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal...” for the purpose of “contributing to fair and equitable criminal justice and the effective protection of citizens against crime”.

5.2 Professional qualifications

Guidelines 1 and 2 provide respectively that “persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications”, and that States shall ensure that “selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice” on various stated grounds, “except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned”. Further, according to Guideline 2(b), States shall ensure that “prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law”.

5.3 Status and conditions of service

While prosecutors, “as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession” (Guideline 3), States shall, for their part, “ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability” (Guideline 4). Furthermore, “prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions” (Guideline 5). The law or published regulations shall, *inter alia*, set out “reasonable conditions of service of prosecutors, adequate remuneration”, and, wherever a system of promotion exists, it “shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures” (Guidelines 6 and 7).

It is noteworthy that, unlike these Guidelines, the Basic Principles on the Independence of the Judiciary contain no specific provision concerning the duty of States to protect judges’ personal safety when necessary.

5.4 Freedom of expression and association

“Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly”, and they have, in particular, “the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national and international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization.” However, “in exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession” (Guideline 8).

5.5 The role in criminal proceedings

As to its role in criminal proceedings, “the office of prosecutors shall be strictly separated from judicial functions” (Guideline 10). Furthermore, prosecutors

“shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation or crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest” (Guideline 11).

Like judges, prosecutors cannot act according to their own preferences but are duty-bound to act “in accordance with the law” and to

“perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system” (Guideline 12).

In performing their duties, prosecutors shall, inter alia, “carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination”, and

“shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences” (Guideline 15).

Prosecutors have a special obligation with regard to “evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights”. In situations of this kind they shall either “refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice” (Guideline 16).

The Human Rights Committee expressed concern with regard to France “at existing procedures of investigation against the police for human rights abuses” and also “at the failure or inertia of prosecutors in applying the law to investigating human rights violations where law enforcement officers are concerned and at the delays and unreasonably lengthy proceedings in investigation and prosecution of alleged human rights violations involving law enforcement officers”. It therefore recommended that the State party “take appropriate measures fully to guarantee that all investigations and prosecutions are undertaken in full compliance with” the provisions of articles 2(3), 9 and 14 of the Covenant.¹³⁵

5.6 Alternatives to prosecution

The Guidelines concerning alternatives to prosecution, in particular in cases where the prosecutors are dealing with juveniles (Guidelines 18 and 19) will be dealt with in Chapter 10 concerning *The Rights of the Child in the Administration of Justice*.

¹³⁵UN doc. GAOR, A/52/40 (vol. I), para. 402.

5.7 Accountability

Disciplinary proceedings against prosecutors alleged to have “acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures”. Prosecutors “shall have the right to a fair hearing”; and, as with respect to judges, the decision “shall be subject to independent review”, a requirement that eliminates the possibility of undue interference by the Executive and strengthens the independence of the prosecutors (Guideline 21).

Prosecutors fulfil an essential function in the administration of justice and must be strictly separated from the Judiciary and the Executive.

Prosecutors must, in particular:

- *be able to perform their professional duties in criminal proceedings in safety, without hindrance or harassment;*
- *act objectively and impartially, respect the principles of equality before the law, the presumption of innocence and due process guarantees;*
- *give due attention to human rights abuses committed by public officials, including law enforcement officials;*
- *not use evidence obtained by unlawful methods which violate human rights (forced confessions through torture, etc.).*

6. International Law and the Independence of Lawyers

6.1 Applicable international law

In addition to independent and impartial judges and prosecutors, lawyers constitute the third fundamental pillar for maintaining the rule of law in a democratic society and ensuring the efficient protection of human rights. As stated in the ninth preambular paragraph of the Basic Principles on the Role of Lawyers, which were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990:

“... adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession”.

In order to be able to carry out their professional duties effectively, lawyers must not only be granted all the due process guarantees afforded by domestic and international law, but must also be free from pressures of the kind previously described

with regard to judges and prosecutors: *in other words, a just and efficient administration of justice requires that lawyers too should be allowed to work without being subjected to physical attacks, harassment, corruption, and other kinds of intimidation.*

The various procedural guarantees contained in international law that allow lawyers to represent the interests of their clients in an independent and efficient manner in civil and criminal proceedings will be considered in other parts of this Manual. Here, the analysis will be limited to highlighting some of the main principles contained in the Basic Principles on the Role of Lawyers, as well as some statements made, and cases decided by, the international monitoring organs concerning the rights of lawyers.

6.2 Duties and responsibilities

Principle 12 of the Basic Principles provides that “lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice”, and, according to Principle 13, their duties “shall include:

- (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
- (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
- (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate”.

In “protecting the rights of their clients and in promoting the cause of justice”, lawyers shall also “seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession” (Principle 14). Lastly, “lawyers shall always loyally respect the interests of their clients” (Principle 15).

6.3. Guarantees for the functioning of lawyers

According to Principle 16 of the Basic Principle on the Role of Lawyers,

“Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.”

Furthermore, “where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities” (Principle 17).

As already mentioned, every year many lawyers are killed, threatened, intimidated or harassed in various ways in order to prevail upon them to relinquish the defence of clients seeking to claim their rights and freedoms. It is therefore essential that Governments do their utmost to protect lawyers against this kind of interference in the exercise of their professional duties.

The African Commission has concluded that the right to defence as guaranteed by article 7(1)(c) of the African Charter on Human and Peoples' Rights was violated in a case where two defence teams had been "harassed into quitting the defence of the accused persons".¹³⁶

Another important rule is laid down in Principle 18, according to which "lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions". The question of lawyers' identification with their clients has been dealt with by the Special Rapporteur on the independence of judges and lawyers, who in 1998 for instance stated that he viewed "with some concern the increased number of complaints concerning Governments' identification of lawyers with their clients' cause", adding that lawyers "representing accused persons in politically sensitive cases are often subjected to such accusations".¹³⁷ However, "identifying lawyers with their clients' causes, unless there is evidence to that effect, could be construed as intimidating and harassing the lawyers concerned". According to the Special Rapporteur, "Governments have an obligation to protect such lawyers from intimidation and harassment".¹³⁸ If Governments have evidence to the effect that lawyers identify themselves with their clients' cause, it is, as stressed by the Special Rapporteur, "incumbent on [them] to refer the complaints to the appropriate disciplinary bodies of the legal profession",¹³⁹ where, as described below, they will be dealt with in accordance with due process of law.

The question of identification of lawyers with their clients is particularly relevant when they are called upon to represent human rights defenders. However, here too lawyers must be given the same guarantees of security enabling them to carry out their professional duties independently and efficiently without governmental or other undue interference. Again, any alleged professional misconduct should be referred to the established independent organs.

With regard to guarantees for the functioning of lawyers, Principle 19 of the Basic Principles also provides that

¹³⁶ACHPR, *International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa Jr. And Civil Liberties Organisation) v. Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998, para. 101; text of the decision to be found at the following web site: http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

¹³⁷UN doc. E/CN.4/1998/39, *Report of the Special Rapporteur on the independence of judges and lawyers*, para. A.1 of the *Conclusions*.

¹³⁸*Ibid.*, loc. cit.

¹³⁹*Ibid.*, para. 2

“No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.”

Lastly, Principle 20 adds that

“Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.”

6.4 Lawyers and fundamental freedoms

Principle 23 of the Basic Principles on the Role of Lawyers provides that

“Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.”

Principle 24 further states that lawyers “shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity”. Moreover, according to this principle “the executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference”. It follows from this principle that these associations shall aim at safeguarding the professional interests of the lawyers and strengthening the independence of the legal profession. As pointed out by the Special Rapporteur, Bar Associations shall not, consequently, be used “to indulge in partisan politics” whereby they would compromise “the independence of the legal profession”.¹⁴⁰

6.4.1 Executive permission to exercise the legal profession

One of the keys to ensuring the independence of lawyers is to allow them to work freely without being obliged to obtain clearance or permission from the Executive to carry out their work. This view was confirmed by the Human Rights Committee with regard to Belarus when it noted with concern “the adoption of the Presidential Decree on the Activities of Lawyers and Notaries of 3 May 1997, which gives competence to the Ministry of Justice for licensing lawyers and obliges them, in order to be able to practise, to be members of a centralized Collegium controlled by the Ministry, thus undermining the independence of lawyers”. Stressing that “the independence of the judiciary and the legal profession is essential for a sound administration of justice and

¹⁴⁰UN doc. E/CN.4/1995/39, *Report of the Special Rapporteur on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers*, para. 72.

for the maintenance of democracy and the rule of law”, the Committee urged the State party “to take all appropriate measures, including review of the Constitution and the laws, in order to ensure that judges and lawyers are independent of any political or other external pressure”.¹⁴¹ In this respect the Committee drew the attention of the State party to the Basic Principles on the Independence of the Judiciary as well as the basic Principles on the Role of Lawyers.¹⁴²

The Committee has also expressed “serious doubts” both as to the independence of the Judiciary in the Libyan Arab Jamahiriya and as to “the liberty of advocates to exercise their profession freely, without being in the employment of the State, and to provide legal services”; it recommended “that measures be taken to ensure full compliance with article 14 of the Covenant as well as with United Nations Basic Principles on the Independence of the Judiciary and the basic Principles on the Role of Lawyers”.¹⁴³

It is thus beyond doubt that the obligation in some States for lawyers to be *in government employment* runs counter to the fair trial guarantees laid down in article 14 of the International Covenant on Civil and Political Rights.

6.4.2 The right to peaceful assembly

In the case of *Ezēlin*, the European Court of Human Rights examined the justifiability of an interference with the entitlement of an *avocat* in France to exercise his right to peaceful assembly. In this particular case, the Court examined the complaint under article 11 of the European Convention on Human Rights, which guarantees the right to peaceful assembly, as a *lex specialis* in relation to article 10 of the Convention, which secures the right to freedom of expression. The lawyer had been reprimanded for taking part in a demonstration in the course of which some unruly incidents occurred. He was disciplined for having failed to dissociate himself from these incidents, although he had not in any way been violent or unruly himself. This conduct was judged “inconsistent with the obligations of his profession”.¹⁴⁴ The Court examined, “in the light of the case as a whole”, whether the reprimand “was proportionate to the legitimate aim pursued, having regard to the special importance of freedom of peaceful assembly and freedom of expression, which are closely linked in this instance”.¹⁴⁵ It concluded that

“the proportionality principle demands that a balance be struck between the requirements of the purposes listed in Article 11 § 2 and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places. The pursuit of a just balance must not result in *avocats* being discouraged, for fear of disciplinary sanctions, from making clear their beliefs on such occasions”.¹⁴⁶

¹⁴¹UN doc. GAOR, A/53/40, para. 150.

¹⁴²*Ibid.*, loc. cit.

¹⁴³UN doc. GAOR, A/54/40, para. 134.

¹⁴⁴*Eur. Court HR, Ezēlin v. France judgment of 26 April 1991, Series A, No. 202, p. 20, para. 38.*

¹⁴⁵*Ibid.*, p. 23, para. 51.

¹⁴⁶*Ibid.*, para. 52.

Although “minimal” in this case, the sanction against Mr. Ezelin did “not appear to have been ‘necessary in a democratic society’” and therefore violated article 11 of the Convention.¹⁴⁷ The European Court of Human Rights consequently construes very strictly the possibilities for the States parties to limit the exercise of the right to peaceful assembly, even in the case of lawyers.

6.4.3 The right to freedom of association

In a case against Nigeria, the African Commission on Human and Peoples’ Rights had to consider whether the Legal Practitioners (Amendment) Decree, 1993, was consistent with the terms of the African Charter on Human and Peoples’ Rights. This decree established a new governing body of the Nigerian Bar Association; of the total of 128 members of this organ, called the Body of Benchers, only 31 were nominees of the Bar Association while the other members were nominated by the Government.¹⁴⁸

As pointed out by the Commission, the Body of Benchers was “dominated by representatives of the government” and had “wide discretionary powers, among them the disciplining of lawyers”; as “an association of lawyers legally independent of the government, the Nigerian Bar Association should be able to choose its own governing body”. The Commission added that “interference with the self-governance of the Bar Association may limit or negate the reasons for which lawyers desire in the first place to form an association”.¹⁴⁹ The Commission next pointed out that it had

“... resolved several years ago that, where regulation of the right to freedom of association is necessary, the competent authorities should not enact provisions which limit the exercise of this freedom or are against obligations under the Charter. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights instruments”.¹⁵⁰

In the present case, the Government intervention in the governing of the Nigerian Bar Association was “inconsistent with the preamble of the African Charter, where states reaffirm adherence to the principles of human and peoples’ rights contained in declarations such as the UN Principles on the Independence of the judiciary and thereby constitutes a violation of Article 10 of the African Charter”, which guarantees the right to freedom of association.¹⁵¹

¹⁴⁷Ibid., para. 53.

¹⁴⁸ACHPR, *Civil Liberties Organisation v. Nigeria (in respect of the Nigerian Bar Association)*, Communication No. 101/93, decision adopted during the 17th Ordinary session, March 1995, para. 1; for the text of the decision, see <http://www.up.ac.za/chr/>.

¹⁴⁹Ibid., para. 24.

¹⁵⁰Ibid., para. 25; footnote omitted.

¹⁵¹Ibid., para. 26; footnote omitted.

6.4.4 The right to freedom of expression

In the case of *Schöpfer*, the European Court of Human Rights arrived at the conclusion that there had been no violation of article 10 of the European Convention on Human Rights when the Lawyers' Supervisory Board in the Canton of Lucerne, Switzerland, imposed a fine of 500 Swiss francs on the applicant for breach of professional ethics after he had called a press conference at which he criticized the actions of a district prefect and two district clerks in a pending case in which he was involved. The Court confirmed its previous jurisprudence according to which “the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts”, adding that “such a position explains the usual restrictions on the conduct of members of the Bar”.¹⁵² Considering that “the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence”, and, having regard, furthermore, to “the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein”.¹⁵³ Quite significantly, it emphasized that

“It also goes without saying that freedom of expression is secured to lawyers too, who are certainly entitled to comment in public on the administration of justice, but their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession... . Because of their direct, continuous contact with their members, the Bar authorities and a country's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck. That is why they have a certain margin of appreciation in assessing the necessity of an interference in this area, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them”.¹⁵⁴

The Court concluded in this case that, in imposing a fine of “modest amount”, the authorities had not gone beyond their margin of appreciation in punishing the lawyer. It noted that the lawyer had in this case “raised in public his complaints on the subject of criminal proceedings which were at that time pending before a criminal court”, and, “in addition to the general nature, the seriousness and the tone of the applicant's assertions”, he had “first held a press conference, claiming that this was his last resort, and only afterwards lodged an appeal before the Lucerne Court of Appeal, which was partly successful”; lastly, he had also failed to apply to the prosecutor's office, “whose ineffectiveness he did not attempt to establish except by means of mere assertions”.¹⁵⁵

¹⁵²*Eur. Court HR, Schöpfer case v. Switzerland, judgment of 20 May 1998, Reports 1998-III, p. 1052, para. 29.*

¹⁵³*Ibid.* p. 1053.

¹⁵⁴*Ibid.*, pp. 1053-1054, para. 33.

¹⁵⁵*Ibid.*, p. 1054, para. 34.

6.5 Codes of professional discipline

With regard to professional discipline, Principle 26 of the Basic Principles provides that

“Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.”

Complaints against lawyers “shall be processed expeditiously and fairly under appropriate procedures”, and lawyers “shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice” (Principle 27). Furthermore, “disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review” (Principle 28). Finally, all such proceedings “shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles” (Principle 29).

It follows from these principles that any disciplinary proceedings against lawyers who are accused of having failed to conduct themselves in accordance with the recognized standards and ethics of their profession must be truly independent of the Executive and guarantee due process in the course of the proceedings.

Lawyers constitute a fundamental pillar for maintaining the rule of law and ensuring the effective protection of human rights. In order to be able to fulfil their professional duties, lawyers must, in particular:

- *be able to work in true independence, free from external political or other pressure, threats and harassment; e.g., they shall not have to obtain Executive permission to exercise their professional duties;*
- *be ensured due process guarantees, which include the legal right and duty to advise and assist their clients in every appropriate way in order to protect their interests;*
- *be able to act to uphold nationally and internationally recognized human rights;*
- *be allowed to answer for violations of rules of professional conduct before an independent disciplinary board respecting due process guarantees.*

Lawyers also enjoy the fundamental freedoms of association, assembly and expression.

7. Concluding Remarks

As emphasized throughout this chapter, judges, prosecutors and lawyers are three professional groups that play a crucial role in the administration of justice and in the prevention of impunity for human rights violations. They are consequently also essential for the preservation of a democratic society and the maintenance of a just rule of law. It is therefore indispensable that States assume their international legal duties derived from the various sources of international law, whereby they must permit judges, prosecutors and lawyers to carry out their professional responsibilities independently and impartially without undue interference from the Executive, Legislature or private groups or individuals. States' duty to secure the independence and impartiality of judges and prosecutors and the independence of lawyers is not necessarily fulfilled by passively allowing these professions to go about their business: through having a legal obligation to *ensure* their independence, States may have to take positive actions to protect judges, lawyers, and prosecutors against violence, intimidation, hindrance, harassment or other improper interference so as to enable them to perform all their professional functions effectively.

In situations where judges, prosecutors and lawyers are either unwilling or unable fully to assume their responsibilities, inter alia of investigation and instituting criminal proceedings against public officials suspected of corruption and serious human rights violations, the rule of law cannot be maintained and human rights cannot be enforced. It is not only individuals who will suffer in such a situation: it is the entire free and democratic constitutional order of the State concerned that will ultimately be in jeopardy.

.....Chapter 5
**HUMAN RIGHTS
AND ARREST,
PRE-TRIAL DETENTION
AND ADMINISTRATIVE
DETENTION**

Learning Objectives

- *To familiarize participants with existing international legal standards regarding the right to liberty and security of the person and which protect human rights both in connection with and during arrest, pre-trial detention and administrative detention;*
- *To illustrate how the various legal guarantees are enforced in practice in order to protect the rights of detained persons and their legal counsel;*
- *To explain what legal measures and/or actions judges, prosecutors and lawyers must take in order to safeguard the rights of the persons arrested or detained.*

Questions

- *On what basis can persons be detained on remand in your country, and what alternatives to such detention are available pending trial?*
- *For how long can people be deprived of their liberty in your country before they must be brought before a judge in order to have the legality of their deprivation of liberty determined?*
- *How does the law in the country where you work as judges, prosecutors or lawyers protect individuals against unlawful or arbitrary arrests and detention?*
- *Do illegal or arbitrary arrests and detentions occur in the country where you exercise your professional responsibilities?*
- *If faced with an arrest and detention that appears to be unlawful or arbitrary, what would you do about it, and what could you do about it, given the present status of the law in the country where you work?*

Questions (cont.d)

- *What remedies exist in your country for persons who consider that they are unlawfully or arbitrarily deprived of their liberty?*
- *If a person is found by a judge to have been unlawfully or otherwise arbitrarily deprived of his or her liberty, is there a right in your country to compensation or reparation for unlawful or arbitrary imprisonment?*
- *On what grounds can persons be subjected to detention by the **administrative** authorities in your country, and what legal remedies do they have at their disposal to challenge the legality of the initial and subsequent deprivation of liberty?*
- *At what point following their arrest/detention do persons deprived of their liberty have the right of access to a lawyer in your country?*
- *Does the law in your country authorize resort to **incommunicado** detention, and, if so, for how long?*
- *Before joining this course, what did you know about the international legal standards applicable to arrest and detention?*

Relevant Legal Instruments

Universal Instruments

- The Universal Declaration of Human Rights, 1948
- The International Covenant on Civil and Political Rights, 1966

- The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, 1988;
- The Declaration on the Protection of All Persons from Enforced Disappearance, 1992;
- The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 1989

Regional Instruments

- The African Charter on Human and Peoples' Rights, 1981
- The American Convention on Human Rights, 1969
- The European Convention on Human Rights, 1950

1. Introduction

The present chapter will provide an analysis of the basic legal rules governing arrest, detention on remand and administrative detention in international human rights law. In so doing, it will, inter alia, deal in some depth with the reasons justifying arrest and continued detention and the right of a person deprived of his or her liberty to challenge the legality of this deprivation of liberty. Emphasis will be laid on the jurisprudence of the Human Rights Committee, the Inter-American and European Courts of Human Rights, and the African Commission on Human and Peoples' Rights, which provide interpretations which are indispensable for a full understanding of the meaning of the international legal rules governing arrest and detention.

As to the treatment of detainees and the specific interests and rights of children and women, these issues, although in many ways very closely linked to the subject matter of the present chapter, will be dealt with in separate chapters focusing specifically on the rights and interests of these groups (see Chapters 8, 10 and 11 of this Manual).

2. Arrests and Detention without Reasonable Cause: a Persistent Problem

All human beings have the right to enjoy respect for their liberty and security. It is axiomatic that, without an efficient guarantee of the liberty and security of the human person, the protection of other individual rights becomes increasingly vulnerable and often illusory. Yet, as is evidenced by the work of the international monitoring organs, arrests and detentions without reasonable cause, and without there being any effective legal remedies available to the victims concerned, are commonplace. In the course of such arbitrary and unlawful deprivations of liberty, the detainees are frequently also deprived of access both to lawyers and to their own families, and also subjected to torture and other forms of ill-treatment.¹

It is essential, therefore, that the legal rules that exist in international law to remedy and prevent these kinds of human rights violations be adhered to by national judges and prosecutors, and that lawyers are aware of their contents, to enable them to act effectively on behalf of their clients.

Although arbitrary or unlawful arrests and detentions occur, and can occur, at any time, the experience of, inter alia, the Working Group on Arbitrary Detention has shown that the main causes of arbitrary detentions are related to states of emergency.² However, the question of emergency powers relating to deprivation of liberty will be dealt with in Chapter 16 of this Manual, and will thus not be considered in the present context.

¹See e.g. UN doc. E/CN.4/1999/63, *Report of the Working Group on Arbitrary Detention*.

²UN doc. E/CN.4/1996/ 40, *Report of the Working Group on Arbitrary Detention*, para. 106.

3. The Right to Liberty and Security of the Person: Field of Applicability of the Legal Protection

3.1 Universal legal responsibility: All States are bound by the law

Article 9(1) of the International Covenant on Civil and Political Rights, article 6 of the African Charter of Human and Peoples' Rights, article 7(1) of the American Convention on Human Rights and article 5(1) of the European Convention on Human Rights guarantee a person's right to "liberty" and "security". Moreover, as stated by the International Court of Justice in its *dictum* in the *Hostages in Tebran* case, "wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself 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", article 3 of which guarantees "the right to life, liberty and security of person".³ *It follows that, notwithstanding that a State may not have ratified or otherwise adhered to any of the preceding human rights treaties, it is nonetheless bound by other legal sources to ensure a person's right to respect for his or her liberty and security.*

3.2 The notion of security of person: State responsibility to act

The present chapter will focus on *deprivations of liberty*, but it is important to point out that, in spite of being linked to the concept of "liberty" in the above-mentioned legal texts, the notion of *security of person*, as such, has a *wider field of application*. The Human Rights Committee has thus held that article 9(1) of the Covenant "protects the right to security of person also outside the context of formal deprivation of liberty", and that an interpretation of article 9 "which would allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant".⁴ In the view of the Committee, "it cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained"; on the contrary, "States parties are under an obligation to take reasonable and appropriate measures to protect them".⁵

³Case Concerning *United States Diplomatic and Consular Staff in Tebran* (*United States of America v. Iran*), ICJ Reports 1980, p. 42, para. 91.

⁴Communication No. 711/1996, *Dias v. Angola* (Views adopted on 20 March 2000), in UN doc. GAOR, A/55/50 (vol. II), p. 114, para. 8.3.

⁵Communication No. 195/1985, *W. Delgado Páez v. Colombia* (Views adopted on 12 July 1990), in UN doc. GAOR, A/45/40 (vol. II), p. 47, para. 5.5.

Three relevant cases

In the case of *Delgado Páez*, where the author had received death threats, been subjected to one personal assault and had a colleague murdered, the Human Rights Committee concluded that article 9(1) had been violated since Colombia either had not taken, or had “been unable to take, appropriate measures to ensure Mr. Delgado’s right to security of his person”.⁶ In the case of *Dias*, the Committee concluded that article 9(1) had been violated since it was the Angolan authorities themselves that were alleged to be the sources of the threats and the State party had neither denied the allegations, nor cooperated with the Committee.⁷ Further, in a case where the author was shot from behind before being arrested, the Committee concluded that his right to security of the person as guaranteed by article 9(1) was violated.⁸

All human beings have the right to liberty and security.

*Irrespective of their treaty obligations, all States are bound by international law to respect and ensure everybody’s right to liberty and security of the person (**universal legal responsibility**).*

The notion of “security” also covers threats to the personal security of non-detained persons. States cannot be passive in the face of such threats, but are under a legal obligation to take reasonable and appropriate measures to protect liberty and security of person.

4. Lawful Arrests and Detentions

4.1 The legal texts

Article 9(1) of the International Covenant on Civil and Political Rights reads as follows:

“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.”

⁶Ibid., p. 48, para. 5.6.

⁷Communication No. 711/1996, *Dias v. Angola* (Views adopted on 20 March 2000), in UN doc. GAOR, A/55/50 (vol. II), p. 114, para. 8.3.

⁸Communication No. 613/1995, *Leebong v. Jamaica* (Views adopted on 13 July 1999), in UN doc. A/54/40 (vol. II), p. 60, para. 9.3.

Article 6 of the African Charter on Human and Peoples' Rights 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.”

Article 7 of the American Convention on Human Rights provides, *inter alia*, that:

- “1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.”

The European Convention on Human Rights is the only treaty that specifically enumerates the grounds which can lawfully justify a deprivation of liberty in the Contracting States. This list is exhaustive and “must be interpreted strictly”.⁹ The first paragraph of its article 5 reads:

- “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:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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 or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

⁹*Eur. Court HR, Bouamar Case, judgment of 29 February 1988, Series A, No. 129, p. 19, para. 43.*

Other legal instruments that will be referred to in this chapter are:

- ❖ The Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, adopted by the General Assembly in 1988;
- ❖ The Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly in 1992;
- ❖ The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65.

4.2 The notions of lawfulness and arbitrariness: their meaning

The four major human rights treaties referred to above all stipulate, albeit in somewhat differing terms, that a deprivation of liberty must in all cases be carried out *in accordance with the law* (the principle of legality), and, as regards article 5 of the European Convention, for the exclusive purposes enumerated therein. Furthermore, deprivations of liberty must not be *arbitrary*, a wider notion which, as will be seen below, makes it possible for the international monitoring organs to consider factors that make the domestic laws or their application unreasonable in the circumstances.

As to the *principle of legality*, the Human Rights Committee has held that “it is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation”; in other words, the grounds for arrest and detention must be “established by law”.¹⁰ In a case where a person was arrested without a warrant, which was issued more than three days later, contrary to the domestic law that lays down that a warrant must be issued within 72 hours after arrest, the Committee concluded that article 9(1) had been violated because the author had been “deprived of his liberty in violation of a procedure as established by law”.¹¹

With regard to the meaning of the words “*arbitrary arrest*” in article 9(1), the Committee has explained that

“‘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*. ... [T]his means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime”.¹²

¹⁰ Communication No. 702/1996, *C. McLaurance v. Jamaica* (Views adopted on 18 July 1997), in UN doc. GAOR, A/52/40 (vol. II), pp. 230-231, para. 5.5.

¹¹ Communication No. 770/1997, *Gridin v. Russian Federation* (Views adopted on 20 July 2000), in UN doc. GAOR, A/55/40 (vol. II), p. 175, para. 8.1.

¹² Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 181, para. 9.8; footnote omitted from the quotation; emphasis added.

In other words, remand in custody pursuant to lawful arrest must not only be “*lawful*” but also “*reasonable*” and “*necessary*” in all the circumstances for the aforementioned purposes. It is for the State party concerned to show that these factors are present in the particular case.¹³

The Mukong case

In the case of *Mukong*, the applicant alleged that he had been arbitrarily arrested and detained for several months, an allegation rejected by the State party on the basis that the arrest and detention had been carried out in accordance with the domestic law of Cameroon. The Committee concluded that article 9(1) had been violated, since the author’s detention “was neither reasonable nor necessary in the circumstances of the case”.¹⁴ For instance, the State party had not shown that the remand in custody was “necessary ... to prevent flight, interference with evidence or the recurrence of crime” but had “merely contended that the author’s arrest and detention were clearly justified by reference to” article 19(3) of the Covenant, which allows for restrictions on the right to freedom of expression.¹⁵ However, the Committee considered that “national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights”, and that the author’s right to freedom of expression had therefore been violated.¹⁶ Consequently, the Committee also concluded that the author’s arrest and detention were contrary to article 9(1) of the Covenant.¹⁷

In a case where a victim had been held in detention for about 16 months with a view to forcing him to disclose the whereabouts of his brother, the Committee considered that he had been subjected to “arbitrary arrest and detention” contrary to article 9, there being no other criminal charge laid against him.¹⁸ Clearly, when a person is arrested without warrant or summons and then simply kept in detention without any court order, this also amounts to a violation of the right to freedom from arbitrary arrest and detention set forth in article 9(1).¹⁹ In some cases dealt with by the Committee, persons have been kept in detention contrary to article 9(1) of the Covenant without any court order, simply on grounds of their political opinions.²⁰

¹³Communication No. 305/1988, *H. van Alphen v. the Netherlands* (Views adopted on 23 July 1990), in UN doc. *GAOR*, A/45/40 (vol. II), p. 115, para. 5.8; emphasis added.

¹⁴Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 181 para. 9.8.

¹⁵*Ibid.*, loc. cit.

¹⁶*Ibid.*, p. 181, para. 9.7.

¹⁷*Ibid.*, para. 9.8.

¹⁸Communication No. 16/1977, *D. Monguya Mbenge et al. v. Zaire* (Views adopted on 25 March 1983), in UN doc. *GAOR*, A/38/40, p. 140, paras. 20-21.

¹⁹Communication No. 90/1981, *L. Magana ex-Philibert v. Zaire* (Views adopted on 21 July 1983), in UN doc. *GAOR*, A/38/40, p. 200, paras. 7.2 and 8.

²⁰See, for example, Communication No. 132/1982, *M. Jaona v. Madagascar* (Views adopted on 1 April 1985), in UN doc. *GAOR*, A/40/40, p. 186, para. 14.

It is further evident that, where a person is kept in detention in spite of a judicial order of release, this is also contrary to article 9(1) of the Covenant.²¹

The prohibition of arbitrariness also of course means that deprivations of liberty must not be motivated by discrimination. As further explained in Chapter 13, the States parties to the human rights treaties examined in this Manual undertake to ensure the enjoyment of rights and fundamental freedoms without distinction on such grounds as race, colour, sex, language, religion, and political or other opinion. The African Commission on Human and Peoples' Rights consequently concluded that arrests and detentions carried out by the Rwandan Government "on grounds of ethnic origin alone, ... constitute arbitrary deprivation of the liberty of an individual"; such acts are thus "clear evidence of a violation of" article 6 of the African Charter on Human and Peoples' Rights.²²

In another case the African Commission held that the "*indefinite detention* of persons can be interpreted as arbitrary as the detainee does not know the extent of his punishment"; article 6 of the African Charter had been violated in this case because the victims concerned were detained indefinitely after having protested against torture.²³

Furthermore, it constitutes an arbitrary deprivation of liberty within the meaning of article 6 of the African Charter to *detain people without charges and without the possibility of bail*; in this particular case against Nigeria the victims had been held in these conditions for over three years following elections.²⁴

The Inter-American Court on Human Rights has held, with regard to article 7(2) and (3) of the American Convention on Human Rights, that

"pursuant to the first of these provisions, no person may be deprived of his or her personal freedom except for reasons, cases or circumstances expressly defined by law (*material aspect*) and, furthermore, subject to strict adherence to the procedures objectively set forth in that law (*formal aspect*). The second provision addresses the issue that no one may be subjected to arrest or imprisonment for reasons and by methods which, although classified as legal, could be deemed to be incompatible with the respect for the fundamental rights of the individual because, among other

²¹See, for example, Communication No. R.1/5, *M. H. Valentini de Bazzano et al. v. Uruguay* (Views adopted on 15 August 1977), in UN doc. GAOR, A/34/40, para. 10 at p. 129.

²²ACHPR, *Organisation Contre la Torture and Others v. Rwanda*, Communications Nos. 27/89, 46/91, 49/91, and 99/93, decision adopted during the 20th Ordinary session, October 1996, para. 28; for the text of the decision, see http://www1.umn.edu/humanrts/africa/comcases/27-89_46-91_49-91_99-93.html.

²³ACHPR, *World Organisation against Torture and Others v. Zaire*, Communications Nos. 25/89, 47/90, 56/91 and 100/93, decision adopted during the 19th session, March 1996, para. 67; for the text see <http://www.up.ac.za/chr/>.

²⁴ACHPR, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication No. 102/93, decision adopted on 31 October 1998, para. 55 of the text published at the following web site: <http://www1.umn.edu/humanrts/africa/comcases/102-93.html>.

things, they are *unreasonable, unforeseeable or lacking in proportionality*.”²⁵

In the case of *Castillo-Páez*, Peru had violated various provisions of article 7 of the American Convention, including paragraphs (2) and (3), since the victim had been detained by members of the National Police without a written order issued by a judicial authority contrary to both the American Convention and the Peruvian Constitution.²⁶

Articles 7(1), (2) and (3) of the American Convention were further violated in the *Cesti Hurtado* case, since, in defiance of an order of the Public Law Chamber of the Superior Court of Justice, the Peruvian military proceeded to detain, prosecute and convict Mr. Hurtado.²⁷

Lastly, article 7 was violated in the so-called “*Street Children*” case concerning the abduction and murder of several youths perpetrated by State agents contrary to the conditions established by domestic law. The Inter-American Court emphasized its case-law with regard to arrests and the material and formal aspects of the guarantees that need to be fulfilled, and concluded that neither aspect had been observed. It also referred to the jurisprudence of the European Court of Human Rights, according to which “the promptness of judicial control of arrests is of special importance for the prevention of arbitrary arrests”.²⁸

With regard to article 5(1) of the European Convention on Human Rights, the European Court has consistently held that the “object and purpose” thereof is “precisely to ensure that no one should be deprived of his liberty in an arbitrary fashion”.²⁹ In other words,

“the expressions ‘lawful’ and ‘in accordance with a procedure prescribed by law’ in Article 5 § 1 stipulate not only full compliance with the *procedural* and *substantive rules of national law*, but also that any deprivation of liberty be *consistent with the purpose of Article 5 and not arbitrary* (...). In addition, given the importance of personal liberty, it is essential that the applicable national law meet the standard of ‘lawfulness’ set by the Convention, which requires that all law, whether written or unwritten, be *sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in all circumstances, the consequences which a given action may entail*.”³⁰

²⁵I-A Court HR, *Gangaram Panday Case v. Suriname*, judgment of January 21, 1994, in OAS doc. OAS/Ser.L/V/III.31, doc. 9, *Annual Report of the Inter-American Court of Human Rights 1994*, p. 32, para. 47; emphasis added.

²⁶I-A Court HR, *Castillo Páez Case v. Peru*, judgment of November 3, 1997, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report Inter-American Court of Human Rights 1997*, p. 263, para. 56.

²⁷I-A Court HR, *Cesti Hurtado Case v. Peru*, judgment of September 29, 1999, in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report Inter-American Court of Human Rights 1999*, p. 445, paras. 141-143.

²⁸I-A Court HR, *Villagrán Morales et al. Case (The “Street Children” Case)*, judgment of November 19, 1999, in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report Inter-American Court on Human Rights 1999*, pp. 704-706, paras. 128-136.

²⁹Eur. Court HR, *Case of X v. the United Kingdom*, judgment of 5 November 1981, *Series A*, No. 46, p. 19, para. 43.

³⁰Eur. Court HR, *Case of Steel and Others v. the United Kingdom*, judgment of 23 September 1998, *Reports 1998-VII*, p. 2735, para. 54; emphasis added.

The important question of *foreseeability* has inter alia been considered in relation to the concept of a *breach of the peace* under United Kingdom law, with the European Court holding that “the relevant rules provided sufficient guidance and were formulated with the degree of precision required by the Convention”.³¹ This was so since it was “sufficiently established that a breach of the peace is committed only when an individual causes harm, or appears likely to cause harm, to persons or property or acts in a manner the natural consequences of which would be to provoke others to violence”; it was “also clear that a person may be arrested for causing a breach of the peace or where it is reasonably apprehended that he or she is likely to cause a breach of the peace”.³² However, it found that where applicants had been arrested for about seven hours before being released on bail and where there were no rulings by national courts on the question whether the arrests and detentions accorded with English law, article 5(1) of the Convention had been violated.³³

To be lawful under international human rights law, arrests and detentions must:

- *be carried out in accordance with both formal and substantive rules of domestic and international law, including the principle of non-discrimination;*
- *be free from arbitrariness, in that the laws and their application must be appropriate, just, foreseeable/predictable and comply with due process of law.*

4.2.1 Unacknowledged detentions, abductions and involuntary disappearances

Where people have been abducted, illegally detained under domestic law, and subsequently murdered or made to disappear, the Human Rights Committee has concluded that the detention violated article 9 of the Covenant.³⁴ Abduction and detention by agents of one State party of persons in another country provides another example of “an arbitrary arrest and detention”.³⁵

In its General Comment No. 20 on article 7, the Committee stated, furthermore, that

³¹Ibid., para. 55 at p. 2736.

³²Ibid., loc. cit.

³³Ibid., p. 2737, paras. 62–65.

³⁴Communication No. 612/1995, *Arbuacos v. Colombia* (Views adopted on 29 July 1997), in UN doc. GAOR, A/52/40 (vol. II), pp. 181–182, para. 8.6 (murder); Communication No. 540/1993, *C. Laureano v. Peru* (Views adopted on 25 March 1996), in UN doc. GAOR, A/51/40 (vol. II), p. 114, para. 8.6 (disappearance).

³⁵Communication No. R.12/52, *D. Saldías de López on behalf of S. R. López Burgos* (Views adopted on 29 July 1981), in UN doc. GAOR, A/36/40, p. 183, para. 13.

“To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings.”³⁶

Principle 12 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance, and Principle 6 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions also contain similar requirements with regard, inter alia, to the holding of detained people in officially recognized places of detention and the registration of all relevant information concerning the person deprived of his liberty.

While accepting that “the State has the right and duty to guarantee its security”, the Inter-American Court of Human Rights has emphasized that the State is also “subject to law and morality” and that “disrespect for human dignity cannot serve as the basis for any State action”; it follows that

“forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee’s right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of article 7 of the Convention.”³⁷

The European Court of Human Rights has frequently emphasized the fundamental importance of the guarantees contained in article 5 of the European Convention “for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities”, further stressing that

“the unacknowledged detention of an individual is a complete negation of these guarantees and discloses a most grave violation of Article 5. Given the responsibility of the authorities to account for individuals under their control, article 5 requires them to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.”³⁸

³⁶United Nations *Compilation of General Comments*, p. 140, para. 11.

³⁷I-A Court HR, *Godínez Cruz Case, judgment of January 20, 1989, Series C, No. 5*, pp. 144-145, paras. 162-163; and also the *Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4*, pp. 146-147, paras. 154-155.

³⁸Eur. Court HR, *Case of Çakıcı v. Turkey, judgment of 8 July 1999, Reports 1999-IV*, p. 615, para. 104; emphasis added.

The Court has further specified that

“the recording of accurate holding data concerning the date, time and location of detainees, as well as the grounds for the detention and the name of the persons effecting it, is necessary for the detention of an individual to be compatible with the requirements of lawfulness for the purposes of Article 5 § 1”.³⁹

The Çakici case

In the case of *Çakici*, the lack of records on the applicant – who was held in unacknowledged detention – disclosed “a serious failing”, which was aggravated by the “findings as to the general unreliability and inaccuracy” of the custody records in question. The Court found “unacceptable the failure to keep records which enable the location of a detainee to be established at a particular time”.⁴⁰ Considering that, in spite of there being three eye-witnesses to the detention of the applicant, “no steps were taken to seek any evidence, beyond enquiring as to entries in custody records, until after the application was communicated to the Government by the [European] Commission [of Human Rights]”, the Court concluded that there “was neither a prompt nor a meaningful inquiry into the circumstances of Ahmet Çakici’s disappearance”.⁴¹ There had consequently been “a particularly grave violation of the right to liberty and security of person” as guaranteed by article 5 of the Convention.⁴²

International law outlaws unacknowledged arrests and detentions. States are accountable for all persons in their custody. In particular, the date, time and location of all detentions must be available to families, lawyers and all competent judicial and other authorities at all times, in official registers the accuracy of which should not be open to doubt.

Involuntary or enforced disappearances and unacknowledged detentions constitute particularly serious violations of fundamental human rights, including the right to liberty and security of the person.

³⁹Ibid., para. 105 at p. 616.

⁴⁰Ibid., loc. cit.

⁴¹Ibid., p. 616, para. 106.

⁴²Ibid., para. 107.

4.3 Detention after conviction

Although the European Convention, in its article 5(1)(a), is the only treaty explicitly providing for the “lawful detention of a person after conviction by a competent court”, this legitimate ground for deprivation of liberty is, of course, implicit in the other treaty provisions. It goes without saying, however, that once the officially determined prison sentence has been served, the convicted person must be released. Where convicted persons have not been released although having fully served their sentence of imprisonment, the Human Rights Committee has naturally found that their detention violated article 9(1) of the International Covenant.⁴³

In article 5(1)(a) of the European Convention, “the word ‘conviction’ ... has to be understood as signifying both a ‘finding of guilt’, after ‘it has been established in accordance with the law that there has been an offence’ (...), and the imposition of a penalty or other measure involving deprivation of liberty”; further, the “word ‘after’ does not simply mean that the ‘detention’ must follow the ‘conviction’ in point of time: in addition, the ‘detention’ must result from, ‘follow and depend upon’ or occur ‘by virtue of the ‘conviction’”.⁴⁴

What, then, is the situation where a judgement has two components, whereby, in addition to comprising a penalty involving the deprivation of liberty, it also places the offender at the Government’s disposal, a component the execution of which may take different forms ranging from remaining at liberty under supervision to detention?

In the case of *Van Droogenbroeck* the European Court accepted that there had been no violation of article 5(1) of the European Convention by virtue of the decisions of the Minister of Justice to revoke the applicant’s conditional release; the Court considered that the manner in which the Belgian authorities “exercised their discretion respected the requirements of the Convention, which allows a measure of indeterminacy in sentencing and does not oblige the Contracting States to entrust to the courts the general supervision of the execution of sentences”.⁴⁵ However, “a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary”, if the decisions concerned “were based on grounds that had no connection with the objectives of the legislature and the court or on an assessment that was unreasonable in terms of those objectives”.⁴⁶

⁴³Communication No. R.2/8, *A. M. García Lanza de Netto on behalf of B. Weismann Lanza and A. Lanza Perdomo* (Views adopted on 3 April 1980), in UN doc. GAOR, A/35/40, p. 118, para. 16.

⁴⁴*Eur. Court HR, Van Droogenbroeck Case, judgment of 24 June 1982, Series A, No. 50*, p. 19, para. 35.

⁴⁵*Ibid.*, p. 20, para. 40.

⁴⁶*Ibid.*, loc. cit.

4.4 Arrest and detention for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law

These are both expressly legitimate grounds for depriving a person of his or her liberty under article 5(1)(b) of the European Convention. With regard to the words “to secure the fulfilment of any obligation prescribed by law”, the European Court has held that they “denote an obligation, of a specific and concrete nature, ... already incumbent on the person concerned”; they do not therefore cover, for instance, arrest and detention carried out *prior to* the rendering of a court order for compulsory residence in a specified locality.⁴⁷

4.5 Detention on reasonable suspicion of having committed an offence

The most common legitimate ground for deprivation of liberty is no doubt that a person is reasonably suspected of having committed an offence (see *expressis verbis* article 5(1)(c) of the European Convention). However, as will be seen below, such suspicion does not justify an indefinite detention. What might be considered acceptable differs from case to case, but, as stipulated in article 9(3) of the Covenant and articles 7(5) and 5(3) of the American and European Conventions respectively, the suspect has a right to be tried “within a reasonable time or to release” pending trial.

Liberty is the rule, to which detention must be the exception. As stated in Rule 6.1 of the United Nations Standard Minimum Rules for Non-Custodial Measures, the so-called “Tokyo Rules”, “pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim”.

The European Court has specified that article 5(1)(c) of the European Convention “permits deprivation of liberty only in connection with criminal proceedings”, a view that is “apparent from its wording, which must be read in conjunction both with sub-paragraph (a) and with paragraph 3, which forms a whole with it (...)”.⁴⁸ It follows that compulsory residence orders, which, unlike a conviction and prison sentence, may be based on suspicion rather than proof, “cannot be equated with pre-trial detention as governed by” article 5(1)(c).⁴⁹

⁴⁷ Eur. Court HR, *Ciulla Case v. Italy*, judgment of 22 February 1989, Series A, No. 148, p. 16, para. 36.

⁴⁸ Ibid., p. 16, para. 38.

⁴⁹ Ibid., para. 39 at p. 17.

4.5.1 The meaning of “reasonableness”

The European Court has held that the “‘reasonableness’ of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention, which is laid down in” article 5(1)(c) of the European Convention, and that the fact of “having a ‘reasonable suspicion’ presupposes the existence of facts or information which would satisfy an *objective observer* that the person concerned may have committed the offence”; however, what “may be regarded as ‘reasonable’ will ... depend upon all the circumstances”.⁵⁰

In connection with arrests and detention under criminal legislation enacted to deal with *acts of terrorism* connected with the affairs of Northern Ireland, the European Court has explained that

“in view of the difficulties inherent in the investigation and prosecution of terrorist-type offences, ... the ‘reasonableness’ of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of ‘reasonableness’ to the point where the *essence* of the safeguard secured by Article 5 § 1 (c) is impaired... ”.⁵¹

Although “the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources of their identity”, the Court must nevertheless “be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) has been secured”; this means that “the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence”.⁵²

The case of Fox, Campbell and Hartley

In the case of *Fox, Campbell and Hartley*, the European Court accepted that the applicants had been arrested and detained “on a *bona fide* suspicion” that they were terrorists. However, neither the fact that two of them had “previous convictions for acts of terrorism connected with the IRA”, nor the fact that they were all questioned during their detention “about specific terrorist acts” did more than “confirm that the arresting officers had a genuine suspicion that they had been involved in those acts”. It could not “satisfy *an objective observer* that the applicants may have committed these acts”; these elements alone were “insufficient to support the conclusion that there was ‘reasonable suspicion’”.⁵³ Consequently, there was a breach of article 5(1).⁵⁴

⁵⁰*Eur. Court HR, Case of Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, Series A, No. 182, p. 16, para. 32; emphasis added.*

⁵¹*Ibid.*, pp. 16-17, para. 32.

⁵²*Ibid.*, pp. 17-18, para. 34.

⁵³*Ibid.*, p. 18, para. 35; emphasis added.

⁵⁴*Ibid.*, para. 36.

4.6 Detention in order to prevent flight

In the *Mukong* case, the Human Rights Committee made it clear that a detention on remand is legitimate under article 9(1) if lawful and necessary in the particular case, in order to prevent flight, for instance.⁵⁵ Article 5(1)(c) of the European Convention, too, foresees the possibility lawfully to detain a person “to prevent his ... fleeing after having” committed an offence. The risk of absconding as a possible justification for continued detention will be further dealt with below.

As a general principle, liberty is the rule and detention the exception.

*Deprivation of a person’s liberty must at all times be **objectively** justified in that the reasonableness of the grounds of detention must be assessed from the point of view of an objective observer and based on facts and not merely on subjective suspicion.*

The most common grounds for a lawful judicial deprivation of liberty are:

- *after conviction by a competent, independent and impartial court of law;*
- *on reasonable suspicion of having committed an offence or in order to prevent the person from doing so;*
- *in order to prevent a person from fleeing after having committed a crime.*

4.7 Administrative detention

For the purposes of this Manual, *administrative detention* is detention ordered by the Executive even though there exists, as should be the case under international human rights law, an a posteriori remedy to challenge the lawfulness of the deprivation of liberty before the courts. The power of administrative and ministerial authorities to order detentions is highly controversial, and some experts believe it should be abolished.⁵⁶ It is important to be aware, however, that this form of detention is not outlawed by international law, even though it is surrounded by some important safeguards.

According to General Comment No. 8 of the Human Rights Committee, article 9(1) “is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.”.⁵⁷ *It follows that article 9(1) covers all cases of administrative detention.* However, whilst some other provisions of article 9 “are only applicable to persons against whom criminal charges are brought”, others, such as,

⁵⁵See Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 181, para. 9.8.

⁵⁶See e.g. the view expressed by Mr. Louis Joinet in para. 18 of his *Report on the practice of administrative detention* (UN doc. E/CN.4/Sub.2/1990/29).

⁵⁷*United Nations Compilation of General Comments*, p. 117, para. 1.

in particular, article 9(4), which provides important judicial guarantees, are also applicable to cases of administrative deprivation of liberty.⁵⁸

Article 5(1)(d)-(f) of the European Convention authorizes categories of detention which are largely identical to those enumerated by the Human Rights Committee. *However, it should be emphasized that they may not necessarily be imposed by administrative authorities, but may instead fall within the competence of the ordinary courts of law.* Article 5(4) of the European Convention also provides important judicial guarantees with regard to *all* deprivations of liberty. The same holds true with regard to article 7(6) of the American Convention on Human Rights. These guarantees will be dealt with in further depth below.

4.7.1 Deprivation of liberty for the purpose of educational supervision

In the case of *Bouamar* submitted under the European Convention on Human Rights, the applicant complained of having been subjected to nine periods of detention for up to fifteen days in a remand prison for the purpose of his “educational supervision”. The orders in question were based on the Belgian Children’s and Young Persons’ Welfare Act of 1965.

The Court noted that “the confinement of a juvenile in a remand prison does not necessarily contravene sub-paragraph (d), even if it is not in itself such as to provide for the person’s ‘educational supervision’”. However, in such circumstances “the imprisonment must be speedily followed by actual application” of a regime of supervised education “in a setting (open or closed) designed and with sufficient resources for the purpose”.⁵⁹ It did not share the Government’s view that the placements complained of were part of an educative programme, emphasizing that Belgium “was under an obligation to put in place appropriate institutional facilities which met the demands of security and the educational objectives of the 1965 Act, in order to be able to satisfy the requirements of” article 5(1)(d).⁶⁰ “The detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training” could not “be regarded as furthering any educational aim”; consequently, the placement orders – whereby the applicant had been deprived of his liberty for 119 days during a period of 291 days – were incompatible with article 5(1)(d) of the European Convention.⁶¹

⁵⁸Ibid., loc. cit.

⁵⁹*Eur. Court HR, Bouamar Case, judgment of 29 February 1988, Series A, No. 129, p. 21, para. 50.*

⁶⁰Ibid., pp. 21-22, para. 52.

⁶¹Ibid., paras. 51-53.

4.7.2 Deprivation of liberty for reasons of mental health

The Human Rights Committee has concluded that a nine-year detention of a person under the New Zealand Mental Health Act “was neither unlawful nor arbitrary” and did not, consequently, violate article 9(1) of the Covenant.⁶² The Committee observed that “the author’s assessment under the Mental Health Act followed threatening and aggressive behaviour on the author’s part, and ... the committal order was issued according to the law, based on an opinion of three psychiatrists”; furthermore, “a panel of psychiatrists continued to review the author’s situation periodically”.⁶³ Since the author’s continued detention was also “regularly reviewed by the Courts”, neither was there any violation of article 9(4).⁶⁴

As to the meaning of the words “persons of unsound mind” in article 5(1)(e) of the European Convention, the European Court has held that “this term is not one that can be given a definitive interpretation”, but one “whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society’s attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more widespread”.⁶⁵ It added that article 5(1)(e) “obviously cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society. To hold otherwise would not be reconcilable with the text of Article 5 § 1 which sets out an exhaustive list ... of exceptions calling for a *narrow* interpretation”.⁶⁶ Lastly, such an interpretation would not be “in conformity with the object and purpose of Article 5 § 1, namely, to ensure that no one should be dispossessed of his liberty in an arbitrary fashion”.⁶⁷

Applying these criteria, the European Court has held that the following three minimum conditions must be satisfied for there to be a lawful detention of persons with mental problems under article 5(1)(e), namely:

“except in emergency cases, the individual concerned must be reliably shown to be of unsound mind, that is to say, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder”.⁶⁸

⁶²Communication No. 754/1997, *A. v. New Zealand* (Views adopted on 15 July 1999), in UN doc. GAOR, A/54/40 (vol. II), p. 254, para. 7.2.

⁶³*Ibid.*, loc. cit.

⁶⁴*Ibid.*, p. 254, para. 7.3.

⁶⁵*Eur. Court HR, Winterwerp Case v. the Netherlands, judgment of 24 October 1979, Series A, No. 33*, p. 16, para. 37.

⁶⁶*Ibid.*, loc. cit.; emphasis added.

⁶⁷*Ibid.*

⁶⁸*Eur. Court HR, Case of X. v. the United Kingdom, judgment of 5 November 1981, Series A, No. 46*, p. 18, para. 40.

The Court “has the jurisdiction to verify the fulfilment of these conditions in a given case”, although, “since the national authorities are better placed to evaluate the evidence adduced before them, they are to be recognised as having a certain discretion in the matter and the Court’s task is limited to reviewing under the Convention the decisions they have taken”.⁶⁹

More on detention for reasons of mental health

In “emergency cases” the Court has, however, accepted that a “wide discretion must in the nature of things be enjoyed by the national authority empowered to order such emergency confinements”, since “it would be impracticable to require a thorough medical examination prior to any arrest or detention”.⁷⁰ In such cases, the Court examines, inter alia: *whether* the domestic legislation grants the national authorities arbitrary power; *whether* it is otherwise incompatible with the expression “the lawful detention of persons of unsound mind”; *and whether* the legislation concerned was applied to the applicant in such a way that there might be a breach of article 5(1)(e) of the Convention.⁷¹ *This implies, in particular, that the Court has to assess whether the interests of the protection of the public prevail over the individual’s right to liberty to the extent of justifying an emergency confinement in the absence of the usual guarantees implied in article 5(1)(e); however, the emergency measure must only be for a short duration.*⁷²

Where the applicant had a history of psychiatric troubles and, according to his wife, remained “deluded and threatening”, the Home Secretary, who acted on medical advice, ordered the applicant’s recall, a measure that was, according to the Court, justified “as an emergency measure and for a short duration”. Examining the applicant’s further detention the Court concluded that it had “no reason to doubt the objectivity and reliability” of the medical judgement submitted to justify this detention.⁷³

With regard to the *extension* of psychiatric detention, the European Court has stressed that “the lawfulness of the extension of the applicant’s placement under domestic law is not in itself decisive”, but that “it must also be established that his detention during the period under consideration was in conformity with the purpose of Article 5 § 1 of the Convention which is to prevent persons from being deprived of their liberty in an arbitrary fashion”.⁷⁴ This means, inter alia, that there must be *no major delay in the renewal of the detention orders*. Whilst the Court has considered that a delay of two weeks could “in no way be regarded as unreasonable or excessive” and thus did not amount to an arbitrary deprivation of liberty,⁷⁵ a period of over two

⁶⁹Ibid., para. 43 at p. 20.

⁷⁰Ibid., para. 41 at p. 19.

⁷¹Ibid., loc. cit.

⁷²Ibid., pp. 20-21, paras. 44-46.

⁷³Ibid., p. 21, para. 46 in conjunction with p. 20, para. 44.

⁷⁴Eur. Court HR, *Case of Erkalo v. the Netherlands*, judgment of 2 September 1998, Reports 1998-VI, p. 2478, para. 56.

⁷⁵Eur. Court HR, *Case of Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A, No. 33, p. 21, para. 49.

and a half months was considered excessive and constituted a violation of article 5(1). In this latter case, the Court concluded that “the public interest involved” could “not be relied upon as a justification for keeping the applicant, who ... was undergoing psychiatric treatment, in a state of uncertainty for over two and a half months”. The Court emphasized that “the onus for ensuring that a request for the extension of a placement order is made and examined in time must be placed on the competent authorities and not on the person concerned”.⁷⁶

Article 5(1) was considered violated when the national judge ordering a person’s confinement in a psychiatric hospital under the Dutch Mentally Ill Persons Act failed to hear the person concerned “before authorizing her confinement, although the legal conditions under which such a hearing might be dispensed with were not satisfied”; the judge should at “the very least ... have stated, in his decision, the reasons which led him to depart from the psychiatrist’s opinion in this respect”.⁷⁷

Article 5(1) was further violated when, contrary to domestic law, no registrar was present at the court hearing following which the applicant was confined in a psychiatric hospital; in other words, the terms “procedure prescribed by law” had not been complied with.⁷⁸

4.7.3 Deprivation of liberty of asylum seekers and for purposes of deportation and extradition

The Human Rights Committee has ruled with regard to article 9(1) that “there is no basis for the ... claim that it is per se arbitrary to detain individuals requesting asylum”, although “every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed”.⁷⁹ In any event,

“detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individual, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, *even if entry was illegal*”.⁸⁰

In this specific case, since the State party had not advanced grounds to justify the author’s “continued detention for a period of four years”, the Committee concluded that the detention was arbitrary and thus contrary to article 9(1).⁸¹

⁷⁶*Eur. Court HR, Case of Erkalo v. the Netherlands, judgment of 2 September 1998, Reports 1998-VI, p. 2479, para. 59.*

⁷⁷*Eur. Court HR, Van der Leer Case v. the Netherlands, judgment of 21 February 1990, Series A, No. 170-A, p. 12, para. 23.*

⁷⁸*Eur. Court HR, Wassink Case v. the Netherlands, judgment of 27 September 1990, Series A, No. 185-A, p. 12, para. 27.*

⁷⁹Communication No. 560/1993, *A. v. Australia* (Views adopted on 3 April 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 143, paras. 9.3 and 9.4.

⁸⁰*Ibid.*, para. 9.4; emphasis added.

⁸¹*Ibid.*, loc. cit.

Article 5(1)(f) of the European Convention authorizes “the lawful arrest or detention of a person to prevent his affecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition”. This means, for instance, that the detention must not pursue an aim different from that for which it was ordered.⁸² Further, in case of extradition, for instance, the deprivation of liberty under this subparagraph “will be justified only for as long as extradition proceedings are being conducted”, and, consequently, “if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under article 5 § 1 (f)”.⁸³ A detention of almost two years has thus been considered “excessive” by the Court, which considered that the reasonable time had already been exceeded after 18 months, when the extradition order was in fact given.⁸⁴

4.7.4 Preventive detention and detention for reasons of ordre public

Cases involving preventive detention for reasons of public security or public order often raise particular concerns in a State governed by the rule of law, in view of the difficulty inherent in defining such terms with sufficient clarity and the resulting legal uncertainty to which it gives rise. However, insofar as article 9 of the Covenant is concerned, the Human Rights Committee has stated in General Comment No. 8 that

“... if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted”.⁸⁵

In the case of *Cámpora Schweizer*, the author was held in accordance with the “prompt security measures” under Uruguayan law. Without pronouncing itself on the compatibility of this legal measure per se with the Covenant, the Committee emphasized that, although

“administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, ... the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances”.⁸⁶

In this case, however, article 9(3) and (4) of the Covenant had been violated because of the particular modalities under which the “prompt security measures” had been “ordered, maintained and enforced”.⁸⁷

⁸²*Eur. Court HR, Case of Quinn v. France, judgment of 22 March 1995, Series A, No. 311*, pp. 18-19, para. 47.

⁸³*Ibid.*, p. 19, para. 48.

⁸⁴*Ibid.*, pp. 19-20, para. 48.

⁸⁵*United Nations Compilation of General Comments*, p. 118, para. 4.

⁸⁶Communication No. 66/1980, *D. A. Cámpora Schweizer v. Uruguay* (Views adopted on 12 October 1982), in UN doc. A/38/40, p. 122, para. 18.1.

⁸⁷*Ibid.*, p. 122, para. 18.1 and p. 123, para. 19.

As to the possibility of justifying, under article 5(3) of the European Convention, pre-trial detention on the ground that there is a risk of prejudice to public order, see further below under section 5.1.

*The basic legal rules regulating arrest and detention are also applicable to **administrative detention**, i.e. detention by the Executive for reasons unrelated to criminal activities, such as, for instance, detention for educational supervision, reasons of mental health, for the purpose of deportation and extradition, and in order to protect ordre public.*

International human rights law also provides important judicial guarantees with respect to administrative detention. Domestic law must provide for the possibility of challenging the lawfulness of such detentions before an ordinary court of law applying due process guarantees.

4.8 The right to be promptly informed of reasons for arrest and detention and of any charges against oneself

Article 9(2) of the International Covenant on Civil and Political Rights provides that “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 7(4) of the American Convention on Human Rights provides that “anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him”, while, according to article 5(2) of the European Convention on Human Rights, “everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him”. The African Charter on Human and Peoples’ Rights contains no specific provision in this respect, but the African Commission on Human and Peoples’ Rights has held that *the right to a fair trial* includes, inter alia, the requirement that persons arrested “shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them”.⁸⁸

The Human Rights Committee has explained that “one of the most important reasons for the requirement of *‘prompt’* information on a criminal charge is *to enable a detained individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority*”.⁸⁹ It concluded that article 9(2) of the Covenant had been violated in a case where the complainant had not been informed upon arrest of the charges against him and was only informed seven days after he had

⁸⁸See e.g. ACHPR, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000; para. 43 of the text published at: <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>.

⁸⁹Communication No. 248/1987, *G. Campbell v. Jamaica* (Views adopted on 30 March 1992), p. 246, para. 6.3; emphasis added.

been detained.⁹⁰ *A fortiori*, a delay of 45 days or more does not meet the requirements of article 9(2).⁹¹

Furthermore, it is not sufficient for the purposes of the Covenant, including article 9(2) thereof, to arrest and detain a person on grounds of a ***presumed connection with subversive activities***; the arrested and detained person must be given explanations as to “the scope and meaning of ‘subversive activities’, which constitute a criminal offence under the relevant legislation”.⁹² According to the Human Rights Committee, such explanations are particularly important where the authors allege that they have been prosecuted solely for their opinions contrary to article 19 of the Covenant, which guarantees the right to freedom of expression.⁹³

The Committee found no violation of article 9(2) of the Covenant where the authors allegedly had to wait for seven and eight hours respectively before being informed of the reasons for arrest, also complaining that they had not understood the charges for lack of a competent interpreter. The Committee concluded that the police formalities had been suspended for three hours until “the interpreter arrived, so that the accused could be duly informed in the presence of legal counsel”; furthermore, the interpreter was fully competent and appointed according to the rules.⁹⁴ Consequently, there was no violation of article 9(2) in this case.⁹⁵ Similarly, where the author alleged that he was not promptly informed of the charges against him but where there was evidence that he had seen a lawyer during the first week of his detention, the Committee concluded that it was “highly unlikely that neither the author nor his ... counsel were aware of the reasons for his arrest”.⁹⁶

Where the author complained that he was not informed about the charges against him until three to four weeks after his arrest, the Committee held that a “general refutation by the State party is not sufficient to disprove the author’s claim”, and, consequently, the delay violated both article 9(2) and 9 (3) of the Covenant.⁹⁷

It is not sufficient under article 9(2) simply to inform the person arrested and detained that the deprivation of liberty has been carried out on the orders of the President of the country concerned.⁹⁸

⁹⁰Communication No. 597/1994, *P. Grant v. Jamaica* (Views adopted on 22 March 1996), in UN doc. *GAOR*, A/51/40 (vol. II), p. 212, para. 8.1.

⁹¹Communication No. 248/1987, *G. Campbell v. Jamaica* (Views adopted on 30 March 1992), p. 246, para. 6.3.

⁹²Communication No. R.8/33, *L. B. Carballal v. Uruguay* (Views adopted on 27 March 1981), in UN doc. *GAOR*, A/36/40, pp. 128-129, paras. 12-13.

⁹³*Ibid.*, loc. cit.

⁹⁴Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 17, para. 12.2.

⁹⁵*Ibid.*, loc. cit.

⁹⁶Communication No. 749/1997, *D. McTaggart v. Jamaica* (Views adopted on 31 March 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 227, para. 8.1.

⁹⁷Communication No. 635/1995, *E. Morrison v. Jamaica* (Views adopted on 27 July 1998), in UN doc. *GAOR*, A/53/40 (vol. II), pp. 123-124, para. 21.2.

⁹⁸Communication No. 414/1990, *P. J. Mika Miba v. Equatorial Guinea* (Views adopted on 8 July 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 99, para. 6.5.

The African Commission on Human and Peoples' Rights has held that the failure or negligence on the part of the security agents of a State party "scrupulously" to comply with the requirement to submit reasons for arrest and to inform the persons arrested promptly of any charges against them is a violation of the right to a fair trial as guaranteed by the African Charter.⁹⁹ Article 6 of the African Charter was violated where the complainant was arrested in the interest of national security under the Preventive Custody Law of 1992 in Ghana; he was, however, never charged with any offence and never stood trial.¹⁰⁰ In a case against the Sudan, the Commission also explained that article 6 of the African Charter "must be interpreted in such a way as to permit arrests only in the exercise of powers normally granted to the security forces in a democratic society"; since the wording of the relevant Decree allowed "individuals to be arrested for vague reasons, and upon suspicion, not proven acts", it was "not in conformity with the spirit of the African Charter" and violated article 6 thereof.¹⁰¹

With regard to article 5(2) of the European Convention, the European Court has held that it

"contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in *simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4*. ... Whilst this information must be conveyed '*promptly*' (in French: '*dans le plus court délai*'), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features."¹⁰²

It is thus not sufficient for the purpose of complying with article 5(2) that the arresting officer simply tells the persons concerned that they are arrested under a particular law *on suspicion of being terrorists*, although it has been considered to be sufficient if "the reasons why they were suspected of being terrorists were ... brought to their attention during their interrogation" by the police; they must consequently be interrogated in sufficient detail "about their suspected involvement in specific criminal acts and their suspected membership of proscribed organisations".¹⁰³

⁹⁹ ACHPR, *Huri-Laws (on behalf of the Civil Liberties Organisation) v. Nigeria*, Communication No. 225/98, decision adopted during the 28th Ordinary Session, 23 October – 6 November 2000, paras. 43-44 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/225-98.html>.

¹⁰⁰ ACHPR, *Albassan Abubakar v. Ghana*, Communication No. 103/93, decision adopted during the 20th session, October 1996, paras. 9-10 of the text of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/103-93.html>; like other international monitoring organs, where the respondent Government does not provide any substantive information in reply to the petitioners' allegations, the African Commission will decide the facts as alleged by the complainant; *ibid.*, para. 10.

¹⁰¹ ACHPR, *Amnesty International and Others*, Communications Nos. 48/90, 50/91, 52/91 and 89/93, (decision not dated), para. 59 of the text published at http://www1.umn.edu/humanrts/africa/comcases/48-90_50-91_52-91_89-93.html.

¹⁰² Eur. Court HR, *Case of Fox, Campbell and Hartley*, judgment of 30 August 1990, Series A, No. 182, p. 19, para. 40; emphasis added.

¹⁰³ *Ibid.*, para. 41.

The European Court has further held that the terms of article 5(2) are “to be interpreted ‘autonomously’, in particular in accordance with the aim and purpose” of article 5, “which are to protect everyone from arbitrary deprivations of liberty”. The term “arrest” thus “extends beyond the realm of criminal-law measures”, and the words “*any* charge” were not intended “to lay down a condition for its applicability, but to indicate an eventuality of which it takes account”.¹⁰⁴ This interpretation is also supported by the close link between article 5(2) and (4), because “any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty”.¹⁰⁵

Consequently, the European Court found a violation of article 5(2) in a case where a woman who was in hospital to receive treatment on a voluntary basis was subsequently placed in isolation and informed “that she was no longer free to leave when she wished because of an order made ten days previously”. The Court considered that neither “the manner” in which the applicant was informed, “nor the time it took to communicate this information to her, corresponded to the requirements” of article 5(2).¹⁰⁶

In a case where the applicant, on the very day of his arrest, had been given a copy of the arrest warrant that “set out not only the reasons for depriving him of his liberty but also the particulars of the charges against him”, it found that article 5(2) had not been violated.¹⁰⁷

In order to comply with the requirement of information States may, as evidenced above, have to resort to interpreters. As expressly stated in Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, “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” information regarding, *inter alia*, the charges against him and the records of his arrest.

*A person deprived of his or her liberty must be **promptly** informed of the reasons therefor, **in a language which he or she understands and in sufficient detail** so as to be enabled to request a prompt decision by a judicial authority on the lawfulness of his or her deprivation of liberty.*

¹⁰⁴ Eur. Court HR, *Van der Leer Case v. the Netherlands*, judgment of 21 February 1990, Series A, No. 170-A, p. 13, para. 27.

¹⁰⁵ Ibid., para. 28.

¹⁰⁶ Ibid., paras. 30-31.

¹⁰⁷ Eur. Court HR, *Lamy Case v. Belgium*, judgment of 30 March 1989, Series A, No. 151, p. 17, para. 32.

4.9 The right to be promptly brought before a judge or other judicial officer

Article 9(3) of the International Covenant on Civil and Political Rights provides that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”. In article 7(5) of the American Convention on Human Rights this right concerns any “person detained”. As to article 5(3) of the European Convention on Human Rights, this right appertains to “everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article”, which concerns “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 or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so”. The text of the African Charter does not specifically regulate this issue. However, according to article 7(1)(a) of the Charter, every individual shall have “the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force” (see also case-law as to art. 6 of the Charter, below).

As noted by the Human Rights Committee, the first sentence of article 9(3) of the Covenant “*is intended to bring the detention of a person charged with a criminal offence under judicial control*”.¹⁰⁸

Although the term “promptly” must, according to the jurisprudence of the Human Rights Committee, “be determined on a case-by-case-basis”, the delay between the arrest of an accused and the time before he is brought before a judicial authority “*should not exceed a few days*”.¹⁰⁹ “In the absence of a justification for a delay of *four days* before bringing the author to a judicial authority”, this delay violated the notion of promptness in article 9(3).¹¹⁰ Furthermore, a one-week delay in a capital case before the author was first brought before a judge “cannot be deemed compatible with” article 9(3).¹¹¹ *A fortiori*, where the complainant has been held for two and a half months or more before being brought before a judge, article 9(3) has also been violated.¹¹²

¹⁰⁸Communication No. 521/1992, *V. Kulomin v. Hungary* (Views adopted on 22 March 1996), in UN doc. *GAOR*, A/51/40 (vol. II), p. 80, para. 11.2; emphasis added.

¹⁰⁹Communication No. 373/1989, *L. Stephens v. Jamaica* (Views adopted on 18 October 1995), in UN doc. *GAOR*, A/51/40 (vol. II), p. 9, para. 9.6; emphasis added.

¹¹⁰Communication No. 625/1995, *M. Freemantle v. Jamaica* (Views adopted on 24 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 19, para. 7.4; emphasis added. See also violation of art. 9(3) where the delay exceeded eight days, Communication No. 373/1989, *L. Stephens v. Jamaica* (Views adopted on 18 October 1995), in UN doc. *GAOR*, A/51/40 (vol. II), p. 9, para. 9.6.

¹¹¹Communication No. 702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 231, para. 5.6.

¹¹²Communication No. 330/1988, *A. Berry v. Jamaica* (Views adopted on 7 April 1994), in UN doc. *GAOR*, A/49/40 (vol. II), pp. 26-27, para. 11.1.

In a case where the victims were arrested and kept in detention in Nigeria for a lengthy period of time under the State Security (Detention of Persons) Act of 1984 and the State Security (Detention of Persons) Amended Decree No. 14 (1994), the African Commission on Human and Peoples' Rights concluded that the facts constituted a prima facie violation of the right not be subjected to arbitrary arrest and detention as guaranteed by article 6 of the African Charter. Under the terms of that Decree, the Government could detain people without charge for a three-month period in the first instance; the Decree likewise allowed the Government arbitrarily to hold people critical of its policies for a period of three months without having to submit any explanations and without there being any possibility for the victims "to challenge the arrest and detention before a court of law". Considering that the Government had submitted no arguments in defence of the Decree, either as to its justification in general or as applied in this particular case, the Commission held that it had violated article 6 of the African Charter.¹¹³

The African Commission has also importantly held that the "right to be tried within a reasonable time by an impartial court or tribunal" as guaranteed by article 7(1)(d) of the African Charter is reinforced by its Resolution on Fair Trial, according to which persons "arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within reasonable time or to be released".¹¹⁴

In the case of *Huri-Laws* against Nigeria, the Commission therefore concluded that Nigeria had violated both articles 7(1)(d) and 26 by failing to bring the two alleged victims promptly before a judge or other judicial officer for trial; the victims had been detained for weeks and months respectively without any charges being brought against them.¹¹⁵

In the case of *Castillo-Páez*, the Inter-American Court of Human Rights concluded that article 7(5) of the American Convention on Human Rights had been violated since the victim "had not been brought before a competent court within 24 hours or otherwise if distance was a factor, nor within fifteen days on suspicion of terrorism, pursuant to Article 7, paragraph 5, of the Convention, and Article 2, paragraph 20(c) of the Constitution of Peru"; indeed, the police officers had denied his arrest and hidden the detainee so that he could not be located by the magistrate, whom they also provided with altered logs of entry of detainees.¹¹⁶ Article 7(5) was of course also violated in the case of *Suárez-Rosero*, where the victim never appeared before a competent judicial authority during the proceedings.¹¹⁷

¹¹³ACHPR, *International Pen and Others v. Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998, paras. 83-84 of the text as published at http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

¹¹⁴ACHPR, *Huri-Laws (on behalf of Civil Liberties Organisation) v. Nigeria*, Communication No. 225/98, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, para. 45 of the text as published at <http://www1.umn.edu/humanrts/africa/comcases/225-98.html>.

¹¹⁵*Ibid.*, para. 46.

¹¹⁶I-A Court HR, *Castillo Páez Case v. Peru*, judgment of November 3, 1997, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report of the Inter-American Court of Human Rights 1997*, p. 263, paras. 56-58.

¹¹⁷I-A Court HR, *Suárez Rosero Case*, judgment of November 12, 1997, *ibid.* at pp. 296-297, paras. 53-56.

The case of Castillo Petruzzi et al.

In the case of *Castillo Petruzzi et al.*, the Inter-American Court expressed the view that laws that allow the authorities to hold a person suspected of the crime of treason in preventive custody for 15 days, with the possibility of a 15-day extension, without bringing that person before a judicial authority, are contrary to article 7 of the Convention.¹¹⁸ The detention in this case “occurred amid a terrible disruption of public law and order that escalated in 1992 and 1993 with acts of terrorism that left many victims in their wake”, and, “in response to these events, the State adopted emergency measures, one of which was to allow those suspected of treason to be detained without a lawful court order”.¹¹⁹ To Peru’s allegation that the declared state of emergency involved a suspension of article 7, the Court replied that it had

“repeatedly held that the suspension of guarantees must not exceed the limits strictly required and that ‘any action on the part of the public authorities that goes beyond those limits, would ... be unlawful.’ The limits imposed upon the actions of a State come from ‘the general requirement that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it.’”¹²⁰

In this case, “approximately 36 days ... elapsed between the time of detention and the date on which the alleged victims were brought before a judicial authority”, and this time was, in the view of the Court “excessive and contrary to the provisions of the Convention”.¹²¹

As to article 5(3) of the European Convention, no violation of article 5(3) “can arise if the arrested person is released ‘promptly’ before any judicial control of his detention would have been feasible”; “if the arrested is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer”.¹²²

As to the assessment of the term “promptness”, it “has to be made in the light of the object and purpose of” article 5, which is to protect “the individual against arbitrary interferences by the State with his 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 [this article and] is intended to minimise the risk of arbitrariness”; moreover, “judicial control is implied by the rule of law, ‘one of the fundamental principles of a democratic society’ ... and ‘from which the whole Convention draws its inspiration’”.¹²³

¹¹⁸I-A Court HR, *Castillo Petruzzi et al. Case v. Peru, judgment of May 30, 1999*, in OAS doc. OEA/Ser.L/V/III.47, doc. 5, *Annual Report of the Inter-American Court of Human Rights 1999*, p. 255, para. 110.

¹¹⁹Ibid., para. 109.

¹²⁰Ibid., loc. cit.; footnote omitted.

¹²¹Ibid., p. 256, para. 111.

¹²²Eur. Court HR, *Case of Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A, No. 145*, pp. 31-32, para. 58.

¹²³Ibid., para. 58 at p. 32.

Comparing the English and French texts of the provision, the Court concluded that

“the degree of flexibility attaching to the notion of ‘promptness’ is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. *Whereas promptness is to be assessed in each case according to its special features ... the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 § 3*, that is to the point of effectively negating the State’s obligation to ensure a prompt release or a prompt appearance before a judicial authority”.¹²⁴

In the case of *Brogan and Others*, which concerned the arrest and detention by virtue of powers granted under special legislation of persons suspected of involvement in terrorism in Northern Ireland, the issue to be decided by the Court was whether, “having regard to the special features relied on by the Government, each applicant’s release can be considered as ‘prompt’ for the purposes of” article 5(3); it is clear that none of the applicants had been brought before a judge or judicial officer during his time in custody.¹²⁵ The Court did accept that

“subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 § 3, keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer”.¹²⁶

However, the difficulties of judicial control invoked by the Government could not “justify, under Article 5 § 3, dispensing altogether with ‘prompt’ judicial control”,¹²⁷ because “the scope for flexibility in interpreting and applying the notion of ‘promptness’ is very limited”.¹²⁸ It followed that “even the shortest of the four periods of detention, namely the four days and six hours spent in police custody” by one applicant, fell “outside the strict constraints as to time permitted by the first part of Article 5”. In the words of the Court,

“to attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word ‘promptly’. An interpretation to this effect would import into Article 5 § 3 a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought ‘promptly’ before a judicial authority or released ‘promptly’ following his arrest. The undoubted fact that arrest and detention of the applicants were

¹²⁴Ibid., pp. 32-33, para. 59; emphasis added.

¹²⁵Ibid., p. 33, para. 60.

¹²⁶Ibid., para. 61.

¹²⁷Ibid., loc. cit.

¹²⁸Ibid., p. 33, para. 62.

inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 § 3.”¹²⁹

Lastly, article 5(4) of the European Convention was also violated in a case where a conscript was placed in detention on remand during military manoeuvres and did not appear before the Military Court until five days after his arrest; the manoeuvres, in which the military members of the court participated, could not be allowed to justify such delay and arrangements should have been made to enable the Military Court “to sit soon enough to comply with the requirements of the Convention, if necessary on Saturday or Sunday”.¹³⁰

4.9.1 The legitimate decision-making organ

In the case of *Kulomin*, whose pre-trial detention had been extended several times by the *public prosecutor*, the Human Rights Committee stated that it

“considers that 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”.¹³¹

Consequently, in that particular case, the Committee was “not satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an ‘officer authorized by law to exercise judicial power’ within the meaning of” article 9(3) of the Covenant.¹³²

“Before an ‘officer’ can be said to exercise ‘judicial power’ within the meaning of [article 5(3) of the European Convention,] he or she must satisfy certain conditions providing a guarantee to the person detained against any arbitrary or unjustified deprivation of liberty”.¹³³ Consequently,

“the ‘officer’ must be independent of the executive and the parties. ... In this respect, objective appearances at the time of the decision on detention are material: if it appears at that time that the ‘officer’ may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality may be open to doubt. ... The ‘officer’ must hear the individual brought before him in person and review, by reference to legal criteria, whether or not the detention is justified. If it is not so justified, the ‘officer’ must have the power to make a binding order for the detainee’s release...”.¹³⁴

¹²⁹Ibid., pp. 33-34, para. 62.

¹³⁰*Eur. Court HR, Case of Koster v. the Netherlands, judgment of 28 November 1991, Series A, No. 221, p. 10, para. 25.*

¹³¹Communication No. 521/1992, *Kulomin v. Hungary* (Views adopted on 22 March 1996), in UN doc. GAOR, A/51/40 (vol. II), p. 81, para. 11.3; emphasis added.

¹³²Ibid., loc. cit.

¹³³*Eur. Court HR, Case of Assenov and Others v. Bulgaria, judgment of 28 October 1998, Reports 1998-VIII, p. 3298, para. 146.*

¹³⁴Ibid., loc. cit.

It follows that, where an “officer” does not have the power “to make legally binding decisions as to the detention or release of a suspect”, he cannot be considered to be “sufficiently independent” for the purposes of article 5(3).¹³⁵ Further, where prosecutors approving the investigator’s decision on the question of detention can subsequently act against the detainee in criminal proceedings, they have been considered not to be “sufficiently independent or impartial for the purposes of” article 5(3).¹³⁶ Similarly, where a District Attorney ordered the applicant’s detention on remand, conducted the investigation and subsequently acted as prosecuting authority in drawing up the indictment, article 5(3) was found to have been violated.¹³⁷ According to the European Court,

“the Convention does not rule out the possibility of the judicial officer who orders the detention carrying out other duties, but this impartiality is capable of appearing open to doubt ... if he is entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority”.¹³⁸

A person arrested or detained on a criminal charge must be promptly brought before a judge or other officer, who is independent and impartial and who has the power to make a binding order for release; the term “promptly” must be interpreted strictly and cannot be deprived of its essence even in crisis situations.

5. The Right to Trial within a Reasonable Time or to Release pending Trial

In addition to the requirement of “promptness” dealt with in section 4.9 above, article 9(3) of the International Covenant on Civil and Political Rights, article 7(5) of the American Convention on Human Rights and article 5(3) of the European Convention on Human Rights provide that everyone detained shall be entitled to trial within “a reasonable time” or to release pending trial. ***This is a logical protection in view both of the fact that everyone charged with a crime has the right to be presumed innocent until proved guilty and of the fact that deprivation of liberty must be an exceptional measure.***

¹³⁵Ibid., p. 3299, para. 148.

¹³⁶Ibid., p. 3299, para. 149.

¹³⁷*Enr. Court HR, Huber Case v. Switzerland, judgment of 23 October 1990, Series A, No. 188, p. 17, para. 41.*

¹³⁸Ibid., p. 18, para. 43.

5.1 The notion of “reasonable time”

The Human Rights Committee has held that “what constitutes ‘reasonable time’ is a matter of assessment for each particular case”.¹³⁹ However, a lack of “adequate budgetary appropriations for the administration of criminal justice ... does not justify unreasonable delays in the adjudication of criminal cases. Nor does the fact that investigations into a criminal case are, in their essence, carried out by way of written proceedings, justify such delays”.¹⁴⁰ In other words, considerations of “evidence-gathering” do not justify a detention lasting some four years after the victim’s arrest, and violate article 9(3) of the Covenant.¹⁴¹ In another case the Committee found a violation of article 9(3) because the author had been detained for 31 months simply on charges of belonging to a political party considered illegal under the country’s then one-party constitution.¹⁴² Furthermore, a detention of four years and four months without any trial date being set was contrary to article 9(3) of the Covenant.¹⁴³ In a case where almost four years elapsed between the judgement of the Court of Appeal and the beginning of the retrial, a period during which the author was kept in detention, both article 9(3) and article 14(3)(c) were found to have been violated.¹⁴⁴

In the absence of “satisfactory” explanations from the State party as to why the author was detained on remand without being tried for one year and nine months, the Committee concluded that this delay too was “unreasonable” and violated article 9(3).¹⁴⁵

The complaints submitted under the International Covenant concerning undue delay in being brought to trial have often been considered simultaneously under articles 9(3) and 14(3)(c).¹⁴⁶ Further examples will therefore also be considered under the latter provision, which will be dealt with in Chapter 6 on *The Right to a Fair Trial: Part I – From Investigation to Trial*.

¹³⁹Communication No. 336/1988, *N. Fillastre v. Bolivia* (Views adopted on 5 November 1991), in UN doc. *GAOR*, A/47/40, p. 306, para. 6.5.

¹⁴⁰*Ibid.*, loc. cit.

¹⁴¹*Ibid.*

¹⁴²Communication No. 314/1988, *P. Chiiiko Bwalya v. Zambia* (Views adopted on 14 July 1993), in UN doc. *GAOR*, A/48/40 (vol. II), p. 54, para. 6.3.

¹⁴³Communication No. 386/1989, *F. Kone v. Senegal* (Views adopted on 21 October 1994), in UN doc. *GAOR*, A/50/40 (vol. II), p. 8, para. 8.6.

¹⁴⁴Communication No. 447/1991, *L. Shalto v. Trinidad and Tobago* (Views adopted on 4 April 1995), in UN doc. *GAOR*, A/50/40 (vol. II), p. 19, para. 7.2.

¹⁴⁵Communication No. 733/1997, *A. Perkins v. Jamaica* (Views adopted on 19 March 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 210, para. 11.3.

¹⁴⁶See, for example, Communication No. 705/1996, *D. Taylor v. Jamaica* (Views adopted on 2 April 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 179, para. 7.1; the Committee found a violation both of article 9(3) and of article 14(3)(c) since there had been a lapse of 27 months between arrest and trial.

With regard to the right to trial within a reasonable time or to release pending trial guaranteed in article 5(3) of the European Convention, the European Court of Human Rights has held that “it is the provisional detention of accused persons which must not ... be prolonged beyond a reasonable time”, and that the end of the period with which this provision is concerned is the day “on which the charge is determined, even if only by a court of first instance”. It follows that it is not the day on which the judgement becomes final.¹⁴⁷ Depending on the circumstances, however, the final date of the period to be taken into consideration may instead be the day of the accused’s release after having deposited his security, for instance.¹⁴⁸

“The reasonableness of an accused person’s continued detention must be assessed in each case according to its special features”, and “the factors which may be taken into consideration are extremely diverse”; there is consequently a “possibility of wide differences in opinion in assessment of the reasonableness of a given detention”.¹⁴⁹ Accordingly,

“it falls in the first place to the national judicial authorities to ensure that the pre-trial detention of an accused person does not exceed a reasonable time. To this end, they must examine all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set these out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the detainee in his applications for release and his appeals that the Court is called upon to decide whether or not there has been a violation of article 5 § 3.

The *persistence of reasonable suspicion* that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. *Where such grounds are ‘relevant’ and ‘sufficient’, the Court must also ascertain whether the competent national authorities displayed ‘special diligence’ in the conduct of the proceedings. ...*¹⁵⁰

¹⁴⁷Eur. Court HR, *Wemhoff Case v. the Federal Republic of Germany*, judgment of 27 June 1968, Series A, No. 7, p. 22, para. 5 and p. 23, para. 9.

¹⁴⁸Eur. Court HR, *Case of Van der Tang v. Spain*, judgment of 13 July 1995, Series A, No. 321, p. 18, para. 58.

¹⁴⁹Eur. Court HR, *Wemhoff Case v. the Federal Republic of Germany*, judgment of 27 June 1968, Series A, No. 7, p. 24, para. 10.

¹⁵⁰Eur. Court HR, *Case of Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Report 1998-VIII, p. 3300, para. 154; emphasis added.

The case of Assenov

In the case of *Assenov*, the applicant had been charged with sixteen or more burglaries and it was feared that he would re-offend if released, but the European Court concluded that he had been denied a “trial within a reasonable time” in violation of article 5(3); while it had taken two years for the case to come to trial, the Court noted that during one of those years “virtually no action was taken in connection with the investigation: no new evidence was collected and Mr. Assenov was questioned only once”.¹⁵¹ The Court added, moreover, that, “given the importance of the right to liberty, and the possibility, for example, of copying the relevant documents rather than sending the original file to the authority concerned on each occasion, the applicant’s many appeals for release should not have been allowed to have the effect of suspending the investigation and thus delaying his trial”. An additional consideration was the fact that, since the applicant was a minor, it was “more than usually important that the authorities displayed special diligence in ensuring that he was brought to trial within a reasonable time”.¹⁵²

Danger of absconding: With regard to the danger of an accused person’s absconding, the European Court has emphasized that this danger “cannot be gauged solely on the basis of the severity of the sentence risked”, but “must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial”.¹⁵³ For this reason to be given credit, the domestic courts must explain why there is a danger of absconding and not simply confirm the detention in “an identical, not to say stereotyped, form of words, without in any way explaining why there was a danger of absconding”,¹⁵⁴ and why they have not sought to “counter it by, for instance, requiring the lodging of a security and placing him under court supervision”.¹⁵⁵

Suspected involvement in serious offences: In a case involving pre-trial detention of a person accused of drug trafficking, the European Court agreed “that the alleged offences were of a serious nature” and that “the evidence incriminating the applicant was cogent”; it emphasized, nonetheless, that “the existence of a strong suspicion of the involvement of the person concerned in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention”.¹⁵⁶

¹⁵¹Ibid., p. 3301, paras. 157-158.

¹⁵²Ibid., p. 3301, para. 157.

¹⁵³*Eur. Court HR, Case of Ya?ci and Sargin v. Turkey, judgment of 8 June 1995, Series A, No. 319-A, p. 19, para. 52.*

¹⁵⁴Ibid., loc. cit. In this case there was a breach of article 5(3) of the Convention, ibid., p. 19, para. 55.

¹⁵⁵*Eur. Court HR, Case of Tomasi v. France, judgment of 27 August 1992, Series A, No. 241-A, p. 37, para. 98.*

¹⁵⁶*Eur. Court HR, Case of Van der Tang v. Spain, judgment of 13 July 1995, Series A, No. 321, p. 19, para. 63.*

Risk of relapse into crime: The risk of repetition of offences is another ground that may justify detention on remand, and in the case of *Toth* this ground, as well as the danger of the applicant's absconding, constituted "relevant and sufficient" grounds for justifying his detention on remand, which lasted a little more than two years and one month.¹⁵⁷ The European Court noted that the "contested (domestic) decisions took account of the nature of the earlier offences and the number of sentences imposed as a result", and concluded "that the national courts could reasonably fear that the accused would commit new offences".¹⁵⁸

Prejudice to public order: The European Court has accepted that, "by reason of their particular gravity and public reaction to them, certain offences may give rise to public disquiet capable of justifying pre-trial detention, at least for a time". In explaining this view, it stated that

"in exceptional circumstances – and subject, obviously, to there being sufficient evidence ... – this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises ... the notion of prejudice to public order caused by an offence. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually prejudice public order. In addition, detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence..."¹⁵⁹

In the case of *Tomasi* – who was accused of participation in a terrorist attack killing one person, although finally acquitted – the Court accepted that it was "reasonable to assume that there was a risk of prejudice to public order at the beginning [of the detention], but [that] it must have disappeared after a certain time".¹⁶⁰

The question arises, however, whether, in a democratic society governed by the rule of law, pre-trial detention, however brief, can ever be legally justified on the basis of a legal notion so easily abused as that of public order.

Pressure on witnesses and risk of collusion: A further ground justifying pre-trial detention is the risk of pressure being brought to bear on the witnesses and of collusion between co-accused; however, although such risk is genuine at the outset of the detention, it may gradually diminish, or even disappear altogether.¹⁶¹ It will be for the national courts and ultimately the European Court of Human Rights to assess such risks.

¹⁵⁷ Eur. Court HR, *Case of Toth v. Austria*, judgment of 12 December 1991, Series A, No. 224, p. 19, paras. 69-70 and 73.

¹⁵⁸ Ibid., p. 19, para. 70.

¹⁵⁹ Eur. Court HR, *Case of Tomasi v. France*, judgment of 27 August 1992, Series A, No. 241-A, p. 36, para. 91.

¹⁶⁰ Ibid., loc. cit.

¹⁶¹ Ibid., pp. 36-37, paras. 92-95.

Conduct of the domestic authorities: When the grounds invoked to justify the detention are, in principle, both “relevant” and “sufficient”, the European Court may still have to assess the conduct of the domestic authorities themselves to justify the time spent in detention on remand under article 5(3).¹⁶² In this respect it has pointed out that “the right of an accused in custody to have his case examined with all necessary expedition must not hinder the efforts of the courts to carry out their tasks with proper care”.¹⁶³

The Court thus found that there was no breach of article 5(3) in a case where the applicant had been held in pre-trial detention for about *three years and two months*, after his case involving drug-trafficking was joined with another criminal investigation, thus making it part of a complex process. The Court was satisfied that “the risk of the applicant’s absconding persisted throughout the whole of his detention on remand, the protracted length of which ... was not attributable to any lack of special diligence on the part of the Spanish authorities”.¹⁶⁴

A pre-trial detention of *five years and seven months* was however considered to violate article 5(3) of the Convention where the French courts had not acted “with the necessary promptness” and the length of the contested detention did not “appear to be essentially attributable either to the complexity of the case or to the applicant’s conduct”.¹⁶⁵ As can be seen, the conduct of the detained person may thus also be a factor to consider in assessing the reasonableness of the pre-trial detention.¹⁶⁶

5.2 Alternatives to detention on remand: guarantees to appear at trial

Article 9(3) of the International Covenant, article 7(5) of the American Convention and article 5(3) of the European Convention provide that release from detention may be conditioned by guarantees to appear for trial.

With regard to article 9(3) of the Covenant, the Human Rights Committee has consistently held that

“pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party”.¹⁶⁷

¹⁶²Ibid., pp. 37-39, paras. 99-103.

¹⁶³*Eur. Court HR, Case of Van der Tang v. Spain, judgment of 13 July 1995, Series A, No. 321, p. 21, para. 72.*

¹⁶⁴Ibid., p. 22, para. 76.

¹⁶⁵*Eur. Court HR, Case of Tomasi v. France, judgment of 27 August 1992, Series A, No. 241-A, p. 39, para. 102.*

¹⁶⁶*Eur. Court HR, Case of Clooth v. Belgium, judgment of 12 December 1991, Series A, No. 225, pp. 15-16, paras. 41-44.*

¹⁶⁷Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 17, para. 12.3.

The Committee is also of the opinion that “the mere fact that the accused is a **foreigner** does not of itself imply that he may be held in detention pending trial”.¹⁶⁸ Furthermore, “the mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in” article 9(3); consequently, in a case where the State party provided no information to substantiate its concern that the accused would leave the country and as to “why it could not be addressed by setting an appropriate sum of bail and other conditions of release”, the Committee concluded that article 9(3) had been violated.¹⁶⁹

The European Court has emphasized that, “when the only remaining [reason] for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance”; where, however, the accused person has not acted in such way as to suggest that he would be prepared to furnish such guarantees and where, moreover, the judicial authorities cannot be criticized for the conduct of the case, the Court has concluded that there has been no violation of article 5(3) of the Convention.¹⁷⁰

*A person detained on a criminal charge has the right to trial within a reasonable time or to release pending trial. The **reasonableness of pre-trial detention** is assessed in the light of all circumstances of the particular case, such as:*

- *the gravity of the offences;*
- *the risk of absconding;*
- *the risk of influencing witnesses and of collusion with co-defendants;*
- *the detainee’s behaviour;*
- *the conduct of the domestic authorities,*
including the complexity of the investigation.

Whenever feasible, release should be granted pending trial, if necessary by ordering guarantees that the accused person will appear at his or her trial.

*Throughout detention **the right to presumption of innocence** must be guaranteed.*

¹⁶⁸Ibid., loc. cit.; emphasis added.

¹⁶⁹Ibid.

¹⁷⁰Eur. Court HR, *Wemhoff Case v. the Federal Republic of Germany*, judgment of 27 June 1968, Series A, No. 7, p. 25, para. 15.

6. The Right to Have the Lawfulness of the Detention Decided Speedily or Without Delay by a Court

Article 9(4) of the Covenant reads as follows:

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

Article 7(6) of the American Convention reads:

“Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person on his behalf is entitled to seek these remedies.”

Article 5(4) of the European Convention provides that

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

It is noteworthy that *these important legal guarantees are applicable to all deprivations of liberty, whether in criminal or in administrative cases.*¹⁷¹ The Human Rights Committee has also held that a disciplinary penalty imposed on a conscript “may fall within the scope of application of” article 9(4):

“... if it takes the form of restrictions that are imposed over and above the exigencies of normal military service and deviate from the normal conditions of life within the armed forces of the State party concerned. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question”.¹⁷²

¹⁷¹As to article 9(4) of the Covenant, see General Comment No. 8, in *United Nations Compilation of General Comments*, pp. 117-118.

¹⁷²Communication No. 265/1987, *A. Vuolanne v. Finland* (Views adopted on 7 April 1989), in UN doc. GAOR, A/44/40, pp. 256-257, para. 9.4.

The Vuolanne and Hammel cases

Article 9(4) was applicable in the case of *Vuolanne*, where the author had been held in solitary confinement for ten days and nights, a fact that was “in itself outside the usual service and exceeds the normal restrictions that military life entails”.¹⁷³ Although the disciplinary punishment had been imposed by an administrative authority, the State party was under an obligation “to make available to the person detained the right of recourse to a court of law”, although, in this particular case, it did not matter “whether the court would be civilian or military”.¹⁷⁴ In the *Hammel* case, where the author had no possibility of taking proceedings before a court to determine the lawfulness of his detention for the purpose of expulsion, the Committee likewise concluded that article 9(4) had been violated.¹⁷⁵

The right to challenge the lawfulness of one’s deprivation of liberty *must be effectively available*, and the Committee held that there had been a violation of article 9(4) where the person deprived of liberty had been held *incommunicado* and thereby been “effectively barred from challenging his arrest and detention”.¹⁷⁶

Similarly, in a case where the author could, in principle, have applied to the courts for a writ of habeas corpus, but where it was uncontested that he had no access to legal representation throughout his detention, the Committee concluded that article 9(4) of the Covenant had been violated.¹⁷⁷ On the other hand, where there was no evidence that either the author or his legal representative applied for such a writ, the Committee was unable to conclude that the former “was denied the opportunity to have the lawfulness of his detention reviewed in court without delay”.¹⁷⁸

Lastly, where the writ of habeas corpus has been inapplicable to persons deprived of their liberty, the Committee has found a violation of article 9(4) since they were denied an effective remedy to challenge their arrest and detention.¹⁷⁹

¹⁷³Ibid., p. 257, para. 9.5.

¹⁷⁴Ibid., para. 9.6.

¹⁷⁵Communication No. 155/1983, *E. Hammel v. Madagascar* (Views adopted on 3 April 1987), in UN doc. GAOR, A/42/40, p. 138, para. 20.

¹⁷⁶Communication No. 84/1981, *H. G. Dermit on behalf of G. I. and H. H. Dermit Barbato* (Views adopted on 21 October 1982), in UN doc. GAOR, A/38/40, para. 10 at p. 133.

¹⁷⁷Communication No. 330/1988, *A. Berry v. Jamaica* (Views adopted on 7 April 1994), in UN doc. GAOR, A/49/40 (vol. II), pp. 26-27, para. 11.1.

¹⁷⁸Communication No. 373/1989, *L. Stephens v. Jamaica* (Views adopted on 18 October 1995), in UN doc. GAOR, A/51/40 (vol. II), p. 9, para. 9.7.

¹⁷⁹See, for example, Communication No. R.2/9, *E. D. Santullo Valcada v. Uruguay* (Views adopted on 26 October 1979), in UN doc. GAOR, A/35/40, p. 110, para. 12, and Communication No. R.1/4, *W. T. Ramírez v. Uruguay* (Views adopted on 23 July 1980), para. 18 at p. 126.

6.1 The legal procedures complying with this requirement

It is clear from the terms of the treaty provisions quoted above that the legality of the detention must be determined by a *court*. Consequently, an appeal against a detention order to the Minister of the Interior, for instance, does not comply with the requirements of article 9(4) of the International Covenant on Civil and Political Rights. Although the Committee considers that an appeal provides “for some measure of protection and review of the legality of the detention”, it “does not satisfy the requirements of” article 9(4),

“which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control”.¹⁸⁰

Thus, where the author had been detained under the Finnish Aliens Act under orders of the police, the lawfulness of the detention could not be reviewed by a court until, after seven days, the detention order had been confirmed by the Minister of the Interior. In the Committee’s view such delay violated article 9(4), according to which a detained person must be able “to take proceedings before a court, in order that that court may decide *without delay* on the lawfulness of his detention and order his release if the detention is not lawful”.¹⁸¹

The case of A. v. Australia

Article 9(4) was violated in a case concerning a Cambodian citizen who had applied for refugee status in Australia, where “the courts’ control and power to order the release of an individual was limited to an assessment of whether this individual was a ‘designated person’ within the meaning of the Migration Amendment Act”; if “the criteria for such determination were met, the courts had no power to review the continued detention of an individual or to order his/her release”.¹⁸²

However, in the opinion of the Committee:

“Court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, *what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal.*”

¹⁸⁰Communication No. 291/1988, *M. I. Torres v. Finland* (Views adopted on 2 April 1990), in UN doc. *GAOR*, A/45/40 (vol. II), pp. 99-100, para. 7.2.

¹⁸¹*Ibid.*, at p. 100.

¹⁸²Communication No. 560/1993, *A. v. Australia* (Views adopted on 3 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 143, para. 9.5.

The case of A. v. Australia (cont.d)

By stipulating that the court must have the power to order release ‘if the detention is not lawful’, article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. This conclusion is supported by article 9, paragraph 5, which obviously governs the granting of compensation for detention that is ‘unlawful’ either under the terms of domestic law or within the meaning of the Covenant.”¹⁸³

Since, in this particular case, the available court review was “limited to a formal assessment of the self-evident fact” that the author was a “designated person” within the meaning of Australian migration law, the Committee concluded that his right to have his detention reviewed by a court, as guaranteed by article 9(4) of the Covenant, was violated.¹⁸⁴

The Inter-American Court of Human Rights consistently examines article 7(6) of the American Convention on Human Rights jointly with article 25, regarding the right to judicial protection, which reads as follows:

- “1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
 - a. To ensure that any person claiming such remedy shall have his right determined by the competent authority provided for by the legal system of the State;
 - b. To develop the possibilities of judicial remedy; and
 - c. To ensure that the competent authorities shall enforce such remedies when granted.”

The Inter-American Court has consistently held that “the right to a simple and prompt recourse or any other effective remedy filed with the competent court that protects that person from acts that violate his basic rights

¹⁸³Ibid., pp. 143-144, para. 9.5; emphasis added.

¹⁸⁴Ibid., at p. 144.

‘is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention. ... Article 25 is closely linked to the general obligation contained in Article 1(1) of the American Convention, in that it assigns duties of protection to the States Parties through their domestic legislation’.¹⁸⁵

Furthermore,

“the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, **but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress**’.¹⁸⁶

In the view of the Court, “this conclusion is true in ordinary and extraordinary circumstances”, and, as will be seen in Chapter 16 of this Manual, not even a declaration of state of emergency can be allowed “to entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency”.¹⁸⁷

In the case of *Castillo Petruzzi et al.*, the Inter-American Court found a violation of both article 7(6) and article 25, since the applicants, who were subsequently convicted of treason by a “faceless” military tribunal, had no possibility of recourse to judicial guarantees: one decree-law which regulated the crime of treason “denied persons suspected of terrorism or treason the right to bring actions seeking judicial guarantees”, and a second decree-law amended the *Habeas Corpus* and *Amparo* Act to the effect that “the writ of habeas corpus was impermissible when ‘petitioner’s case is in its examining phase or when petitioner is on trial for the very facts against which remedy is being sought’”.¹⁸⁸

In the case of *Suárez Rosero*, the Court again emphasized that the remedies governed by article 7(6) “must be effective, since their purpose ... is to obtain without delay a decision ‘on the lawfulness of [his] arrest or detention,’ and, should they be unlawful, to obtain, also without delay, an ‘order [for] his release’”; the Court further invoked its Advisory Opinion on *Habeas Corpus in Emergency Situations*, where it held that

“in order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, **it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him** (emphasis added). Here habeas corpus performs a vital role in ensuring that a person’s life and physical integrity are respected, in preventing his disappearance or the keeping of his

¹⁸⁵ I-A Court HR, *Castillo Petruzzi et al. Case v. Peru, judgment of May 30, 1999*, in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report of the Inter-American Court of Human Rights 1999*, p. 276, para. 184.

¹⁸⁶ Ibid., p. 277, para. 185; emphasis added.

¹⁸⁷ Ibid., para. 186.

¹⁸⁸ Ibid., pp. 275-276, paras. 179-180 and p. 277, para. 188.

whereabouts secret and in protecting him against torture or other cruel, inhuman or degrading punishment or treatment. ...”¹⁸⁹

In this particular case, the writ of habeas corpus was disposed of by the President of the Supreme Court more than fourteen months after it was filed, and, contrary to articles 7(6) and 25 of the American Convention, Mr. Suárez Rosero did not, consequently, “have access to simple, prompt and effective recourse”.¹⁹⁰

Lastly, article 7(6) of the American Convention was violated in a case where the Peruvian military refused to abide by the decision of the Public Law Chamber of the Superior Court of Justice in Lima, which had upheld a petition for habeas corpus; the military ignored the decision and went ahead with the arrest.¹⁹¹

The notion of “lawfulness” in article 5(4) of the European Convention on Human Rights “has the same meaning as in paragraph 1” of that article, and the question as to “whether an ‘arrest’ or ‘detention’ can be regarded as ‘lawful’ has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1”.¹⁹² Article 5(4) thus entitles an arrested or detained person “to bring proceedings for the review by a court of the *procedural and substantive* conditions which are essential for the ‘lawfulness’, in the sense of” article 5(1).¹⁹³ This means that the review must “moreover be conducted *in conformity with the aim of Article 5*: to protect the individual against arbitrariness, in particular with regard to the time taken to give a decision”.¹⁹⁴

Article 5(4) further “requires that a person detained on remand must be able to take proceedings *at reasonable intervals* to challenge the lawfulness of his detention” and, “in view of the assumption under the Convention that such detention is to be of strictly limited duration, ... *periodic review at short intervals is called for...*”.¹⁹⁵

Consequently, article 5(4) was violated where the person was held in pre-trial detention for two years but could only have the legality of the continued detention examined once, and then without an oral hearing.¹⁹⁶ On the other hand, it was not violated in a case where the applicants had chosen not to avail themselves of the writ of habeas corpus which existed to challenge the lawfulness of arrests and detentions under

¹⁸⁹I-A Court HR, *Suárez Rosero Case v. Ecuador*, judgment of November 12, 1997, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report of the Inter-American Court of Human Rights 1997*, p. 298, para. 63.

¹⁹⁰Ibid., paras. 64-66.

¹⁹¹I-A Court HR, *Cesti Hurtado Case v. Peru*, judgment of September 29, 1999, in OAS doc. OEA/Ser.L/V/III.47, doc. 6, *Annual Report of the Inter-American Court of Human Rights 1999*, p. 443, para. 133; for full facts see pp. 437-443.

¹⁹²Eur. Court HR, *Case of Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A, No. 145, p. 34, para. 65.

¹⁹³Eur. Court HR, *Case of Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Reports 1998-VIII, p. 3302, para. 162.

¹⁹⁴Eur. Court HR, *Keus Case v. the Netherlands*, judgment of 25 October 1990, Series A, No. 185-C, p. 66, para. 24; emphasis added.

¹⁹⁵Eur. Court HR, *Case of Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Reports 1998-VIII, p. 3302, para. 162; emphasis added.

¹⁹⁶Ibid., p. 3303, para. 165.

the Prevention of Terrorism (Temporary Provisions) Act 1984 relating to the situation in Northern Ireland.¹⁹⁷

The principle of equality of arms: According to the case-law of the European Court, “the possibility for a prisoner ‘to be heard either in person or, where necessary, through some form of representation’ features in certain instances among the ‘fundamental guarantees of procedure applied in matters of deprivation of liberty’”; this is “the case in particular where the prisoner’s appearance can be regarded as a means of ensuring respect for *equality of arms*, one of the main safeguards inherent in judicial proceedings conducted in conformity with the Convention”.¹⁹⁸ In order to ensure equality of arms it may thus be “necessary to give the applicant the opportunity to appear at the same time as the prosecutor so that he [can] reply to his arguments”, and, where this has not been done, article 5(4) has been violated.¹⁹⁹ Similarly, article 5(4) requires “an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses” “where a substantial term of imprisonment may be at stake and where characteristics pertaining to [the applicant’s] personality and level of maturity are of importance in deciding on his dangerousness”.²⁰⁰

Where the applicant’s counsel was, during the first thirty days of custody, “in accordance with the law as judicially interpreted, unable to inspect anything in the file, and in particular the reports made by the investigating judge and the ... police”, the European Court concluded that the procedure “failed to ensure equality of arms” and was not, therefore, “truly adversarial”; “whereas Crown Counsel was familiar with the whole file, the procedure did not afford the applicant an opportunity of challenging appropriately the reasons relied upon to justify a remand in custody”.²⁰¹

Article 5(4) “does not compel the Contracting States to set up a second level of jurisdiction for the examination of applications for release from detention”, but, where this is done, the State concerned “must in principle accord to the detainees the same guarantees on appeal as at first instance”, thereby also guaranteeing him or her “truly adversarial” proceedings.²⁰²

Differentiation in procedural requirements: The requirements of article 5(4) may differ somewhat depending on the specific ground on which the person concerned has been detained under article 5(1)(a)-(f). For instance, contrary to decisions on deprivations of liberty taken by *administrative authorities*, following which the individual concerned “is entitled to have the lawfulness of the decision reviewed by a court”,²⁰³ the review required by article 5(4) “is incorporated in the decision depriving

¹⁹⁷ Eur. Court HR, *Case of Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A, No. 145, pp. 34-35, paras. 63-65.

¹⁹⁸ Eur. Court HR, *Case of Kampanis v. Greece*, judgment of 13 July 1995, Series A, No. 318-B, p. 45, para. 47; emphasis added.

¹⁹⁹ Ibid., p. 48, para. 58.

²⁰⁰ Eur. Court HR, *Case of Hussain v. the United Kingdom*, judgment of 21 February 1996, Reports 1996-I, p. 271, paras. 59-60. Yet the Court has also accepted that the submission of written comments would have constituted “an appropriate means” of having the applicant benefit from an adversarial procedure; see Eur. Court HR, *Sanchez-Reisse Case v. Switzerland*, judgment of 21 October 1986, Series A, No. 107, p. 19, para. 51; article 5(4) was violated in this case.

²⁰¹ Eur. Court HR, *Lamy Case v. Belgium*, judgment of 30 March 1989, Series A, No. 151, pp. 16-17, para. 29.

²⁰² Eur. Court HR, *Case of Toth v. Austria*, judgment of 12 December 1991, Series A, No. 224, p. 23, para. 84.

²⁰³ Eur. Court HR, *Luberti Case v. Italy*, judgment of 23 February 1984, Series A, No. 75, p. 15, para. 31.

a person of his liberty when that decision is made by a court at the close of judicial proceedings”, for instance when a prison sentence is imposed after “conviction by a competent court” in accordance with article 5(1)(a) of the Convention.²⁰⁴

Periodic review of lawfulness of detention: As noted by the Court, however, article 5(4) “sometimes requires the possibility of subsequent review of the lawfulness of detention by a court”, for instance with regard to the detention of persons of unsound mind within the meaning of article 5(1)(e), “where the reasons initially warranting confinement may cease to exist”. In the view of the Court, “it would be contrary to the object and purpose of Article 5 to interpret paragraph 4 thereof ... as making this category of confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court”.²⁰⁵

According to the reasoning of the European Court, the same principle applies also “to the detention ‘after conviction by a competent court’ mentioned in paragraph 1 (a), but only in certain specific circumstances”, including, for example:

- ❖ “the placing of a recidivist at the Government’s disposal in Belgium”;
- ❖ “the continuing detention of a person sentenced to an ‘indeterminate’ or ‘discretionary’ life sentence in Great Britain”; and
- ❖ “the detention for security reasons of a person with an underdeveloped and permanently impaired mental capacity in Norway”.²⁰⁶

In these kinds of circumstances, in particular, there must consequently exist a possibility for persons deprived of their liberty to have the lawfulness of their detention reviewed by a court at regular intervals.

With regard to persons of unsound mind who are “compulsorily confined in a psychiatric institution for an indefinite or lengthy period”, they are also “in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the ‘lawfulness’ – within the meaning of the Convention ... – of [their] detention, whether that detention was ordered by a civil or criminal court or by some other authority”.²⁰⁷ However, such review should be “wide enough to bear on those conditions which, according to the Convention, are essential for the ‘lawful’ detention of a person on the ground of unsoundness of mind, especially as the reasons capable of initially justifying such a detention may cease to exist”.²⁰⁸

²⁰⁴*Eur. Court HR, Case of Iribarne Pérez v. France, judgment of 24 October 1995, Series A, No. 325-C, p. 63, para. 30.*

²⁰⁵*Ibid.*, loc. cit.

²⁰⁶*Ibid.*

²⁰⁷*Eur. Court HR, Case of X. v. the United Kingdom, judgment of 5 November 1981, Series A, No. 46, para. 52 at p. 23.*

²⁰⁸*Ibid.*, p. 25, para. 58.

Detention for reasons of mental health: The case of X. v. the United Kingdom

In the case of *X v. the United Kingdom*, article 5(4) was violated since, in spite of the habeas corpus proceedings, there was no “appropriate procedure allowing a court to examine whether the patient’s disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety”.²⁰⁹ Given the Home Secretary’s executive discretion in ordering the applicant’s return to the psychiatric hospital, the review exercised by the domestic courts in the habeas corpus proceedings solely concerned “the conformity of the exercise of that discretion with the empowering statute”.²¹⁰

Detention of juvenile for educational supervision: The case of Bouamar

Where a *juvenile* had been deprived of his liberty and placed in remand prison for the purpose of *educational supervision*, the European Court accepted that the Juvenile Court was “undoubtedly a ‘court’ from the organisational point of view”, albeit emphasizing “that the intervention of a single body of this kind will satisfy Article 5 § 4 only on condition that ‘the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question’”.²¹¹ In determining whether a proceeding provides adequate guarantees, the Court must have regard “to the particular nature of the circumstances in which such proceeding takes place”.²¹²

While reiterating that the scope of the obligation under article 5(4) “is not identical in all circumstances of [*sic*] for every kind of deprivation of liberty”, the Court held that, nevertheless, “in a case of the present kind”, involving a minor, “it is essential not only that the individual concerned should have the opportunity to be heard in person but that he should also have the effective [assistance] of his lawyer”. In this case the applicant had appeared in person in Court only once, but none of his lawyers had attended the proceedings and, consequently, the applicant, “who was very young at the time”, had not been afforded “the necessary safeguards”.²¹³ Furthermore, no remedies were available that satisfied the conditions of article 5(4), since the further proceedings, including on appeal, suffered from the same defect and the ordinary appeals and the appeals on points of law “had no practical effect”. Consequently, there was a breach of article 5(4) of the Convention.²¹⁴

²⁰⁹Ibid., loc. cit.

²¹⁰Ibid., p. 24, para. 56.

²¹¹*Eur. Court HR, Bouamar Case, judgment of 29 February 1988, Series A, No. 129, p. 23, para. 57.*

²¹²Ibid., loc. cit.

²¹³Ibid., p. 24, para. 60.

²¹⁴Ibid., pp. 24-25, paras. 61-64.

6.2 The notions of “speedily” and “without delay”

The Human Rights Committee has emphasized that, “as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible”, although this does not mean “that precise deadlines for the handing down of judgements may be set which, if not observed, would necessarily justify the conclusion that a decision was not reached ‘without delay’”.²¹⁵ On the other hand, “the question of whether a decision was reached without delay must be assessed on a case by case basis”.²¹⁶ However, where the Committee did not know the reasons why there was a three-month delay in the rendering of the judgement concerned, it decided not to make a finding under article 9(4) of the Covenant.²¹⁷ In the same case the Committee was satisfied that the review of the same author’s detention under the Extradition Act by the Helsinki City Court at two-week intervals satisfied the requirements of article 9(4) of the Covenant.²¹⁸

According to the jurisprudence of the European Court, article 5(4) of the European Convention entitles a detainee, after a “reasonable interval”, to take proceedings by which the lawfulness of his or her continued detention is decided “speedily” by a “court”²¹⁹. In the view of the Court,

“the nature of detention on remand calls for short intervals; there is an assumption in the Convention that detention on remand is to be of strictly limited duration (Article 5 § 3), because its *raison d’être* is essentially related to the requirements of an investigation which is to be conducted with expedition”.²²⁰

In the case of *Bezićheri*, an interval of one month was not considered “unreasonable”.²²¹ With regard to the approximately *five and a half months* that elapsed from the time the applicant lodged his application until the investigating judge dismissed it, the Court concluded that the term “speedily” had not been complied with; moreover, the fact that the judge allegedly had a heavy work-load at the time was not relevant, since “the Convention requires the Contracting States to organize their legal systems so as to enable the courts to comply with its various requirements”.²²²

²¹⁵Communication No. 291/1988, *M. I. Torres v. Finland* (Views adopted on 2 April 1990), in UN doc. *GAOR*, A/45/40 (vol. II), p. 100, para. 7.3.

²¹⁶*Ibid.*, loc. cit.

²¹⁷*Ibid.*

²¹⁸*Ibid.*, p. 100, para. 7.4.

²¹⁹*Eur. Court HR, Case of Bezićheri v. Italy, judgment of 25 October 1989, Series A, No. 164*, p. 10, para. 20.

²²⁰*Ibid.*, para. 21 at p. 11.

²²¹*Ibid.*, loc. cit.

²²²*Ibid.*, p. 12, paras. 22-26.

The same argument was invoked, among others, in a case where approximately two months elapsed between the institution of proceedings and the delivery of the judgement. Part of this delay was caused by administrative problems due to the vacation period. However, in addition to the above-mentioned reasoning, the Court also emphasized that

“it is incumbent on the judicial authorities to make the necessary administrative arrangements, even during a vacation period, to ensure that urgent matters are dealt with speedily and this is particularly necessary when the individual’s personal liberty is at stake. Appropriate provisions for this purpose do not appear to have been made in the circumstances of the present case.”²²³

The five weeks that elapsed between the filing of the application for judicial review and the additional three weeks that were required to write the judgement did not comply with the notion of “speedily” in article 5(4) which, consequently, had been violated.²²⁴

*Everyone deprived of his or her liberty has the right to challenge the lawfulness of his or her arrest or detention before a court so that the court may decide **without delay/speedily** on the lawfulness of the detention or order the person’s release if the detention is not lawful.*

*This right applies to all forms of deprivation of liberty, including **administrative detention**.*

*This judicial remedy must be **effectively available** to the detainee.*

***Incommunicado** detention is not a valid ground for refusing a detainee the right to challenge the lawfulness of his or her detention before a court of law.*

*The legality of the detention must be determined by a **court** which is **independent** and **impartial**. Appeals to government ministers do not constitute a sufficient remedy for the purposes of challenging the lawfulness of deprivations of liberty.*

*The court must have the power to review both the **procedural** and **substantive** grounds for the deprivation of liberty and be empowered to make a binding order for release of the detained person in the event that his or her deprivation of liberty is unlawful.*

*Every person deprived of his or her liberty is entitled to have the lawfulness of the continued detention subjected to **periodic reviews** for the purpose of testing whether the reasons for the deprivation of liberty remain valid; the exception to this rule is detention pursuant to a criminal conviction by a competent court.*

²²³ Eur. Court HR, Case of E. v. Norway, judgment of 29 August 1990, Series A, No. 181, p. 28, para. 66.

²²⁴ Ibid., p. 28, paras. 65-67.

The detained person must be allowed access to a lawyer and to appear in court to argue his or her case on equal terms with the prosecuting or other authorities; this right also implies that the detained person must have access to all relevant information concerning his or her case (equality of arms).

*The court must act **without delay/speedily**, that is, as expeditiously as possible. What is considered to be “without delay” or “speedily” depends on the circumstances of each case. A delay must not be unreasonable and a lack of resources or vacation periods are not acceptable justifications for delay.*

7. The Right of Access to and Assistance of a Lawyer

As provided in Principle 11(1) of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, “a detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law”. This right is, of course, a corollary to the principle of *equality of arms* that was previously dealt with in connection with article 5(4) of the European Convention on Human Rights.

Where the complainant had not had access to legal representation from December 1984 to March 1985, the Human Rights Committee concluded that there was a violation of article 9(4) of the Covenant “since he was not in due time afforded the opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention”.²²⁵ The same provision was violated in a case where the author had had no access to legal representation for two and a half months.²²⁶ The lack of access to a lawyer, whether counsel of his own choice or a public defender, was also an element in the Committee’s decision to conclude that there had been a violation of article 9(3) in the case of *Wolf*, since the author had not been brought promptly before a judge or other judicial officer authorized by law to exercise judicial power.²²⁷

²²⁵Communication No. 248/1987, *G. Campbell v. Jamaica* (Views adopted on 30 March 1992), in UN doc. GAOR, A/47/40, p. 246, para. 6.4.

²²⁶Communication No. 330/1988, *A. Berry v. Jamaica* (Views adopted on 7 April 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 26, para. 11.1.

²²⁷Communication No. 289/1988, *D. Wolf v. Panama* (Views adopted on 26 March 1992), in UN doc. GAOR, A/47/40, p. 289, para. 6.2.

However, alleged denial of access to a lawyer during detention, for instance, must be substantiated. Where the author did not show that he had ever requested legal representation during the first year of his detention and that his request was refused, and where he did not claim that he had no legal representation during the preliminary hearing, the Committee rejected the claim as inadmissible.²²⁸

The right to legal assistance will be dealt with in further depth in Chapter 6 regarding *The Right to a Fair Trial: Part I – From Investigation to Trial*.

A detained person has the right to consult with, and be assisted by, a lawyer in connection with the proceedings taken to test the legality of her or his detention.

8. The Right to Compensation in the Event of Unlawful Deprivation of Liberty

Article 9(5) of the International Covenant on Civil and Political Rights provides that “anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”, and this provision is applicable to all unlawful or arbitrary arrests and detentions.²²⁹ Article 5(5) of the European Convention provides that “everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation”.

In the case of *Monja Jaona*, where the author had been subjected to arbitrary arrest and detention contrary to article 9(1) of the Covenant, the Committee underlined *expressis verbis* that the State party was “under an obligation to take effective measures to remedy the violations which Monja Jaona [had] suffered, to grant him compensation under article 9, paragraph 5, ... on account of his arbitrary arrest and detention, and to take steps to ensure that similar violations do not occur in the future”.²³⁰

²²⁸Communication No. 732/1997, *B. Whyte v. Jamaica* (Views adopted on 27th July 1998), in UN doc. GAOR, A/53/40 (vol. II), p. 200, para. 7.4.

²²⁹See General Comment No. 8 (16) in UN doc. GAOR, A/37/40, p. 95, para. 1 and p. 96, para. 4.

²³⁰Communication No. 132/1982, *Monja Jaona v. Madagascar* (Views adopted on 1 April 1985), in UN doc. GAOR, A/40/40, p. 186, para. 16.

Article 5(5) of the European Convention

“is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 and 4. It does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. In the context of Article 5 § 5, ... the status of ‘victim’ may exist even where there is no damage, but there can be no question of ‘compensation’ where there is no pecuniary or non-pecuniary damage to compensate.”²³¹

However, where the applicants have been arrested and detained lawfully under domestic law but in violation of article 5 of the Convention, there has been a violation of article 5(5) if they had no enforceable claim for compensation before the domestic courts.²³²

Everyone has the right to compensation for unlawful deprivation of liberty by reason of violations of international and/or national law. Such compensation may depend on the demonstration of damage.

9. Incommunicado detention

The treatment of persons deprived of their liberty will be covered in Chapter 8, including such issues as the right of access to family and questions of solitary confinement. However, in the present context, one particular issue deserves highlighting, namely that of *incommunicado* detention. The practice of holding detainees *incommunicado*, that is to say, keeping them totally isolated from the outside world without even allowing them access to their family and lawyer, does not per se appear to be outlawed by international human rights law, although the Human Rights Committee has stated in its General Comment No. 20, on article 7 of the Covenant, that “provisions should ... be made against incommunicado detention”²³³

What is clear from the jurisprudence, however, is that *incommunicado* detention is not allowed to interfere with the effective enforcement of the legal guarantees of people deprived of their liberty. In a case where the authors had been held *incommunicado* during the first 44 days of detention, the Committee concluded that both articles 9(3) and 10(1) of the Covenant had been violated because they had not been brought promptly before a judge and because of the *incommunicado* detention.²³⁴

²³¹*Eur. Court HR, Wassink Case v. the Netherlands, judgment of 27 September 1990, Series A, No. 185-A, p. 14, para.38.*

²³²*Eur. Court HR, Case of Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A, No. 145-B, p. 35, paras. 66-67.*

²³³See *United Nations Compilation of General Comments*, p. 139 at p. 140, para. 11.

²³⁴Communication No. 176/1984, *L. Peñarrieta et al. v. Bolivia* (Views adopted on 2 November 1987), in UN doc. *GAOR*, A/43/40, p. 207, para. 16.

In view of the fact that people arrested and detained are at particular risk of being subjected to torture or other ill-treatment, and even of being made to disappear and killed in the first hours and days following their deprivation of liberty, the question arises whether it should ever be lawful to permit incommunicado detention.

Brief *incommunicado* detention, that is, deprivation of liberty for a short period of time in complete isolation from the outside world, including family and lawyer, does not *per se* appear to be illegal under international human rights law, but it cannot be used in order to bar the detainee from exercising his or her rights as an arrested or detained person.

10. Concluding Remarks

This chapter has provided an account of the basic international legal rules that regulate States' power to resort to arrests and detentions and the legal guarantees that exist aimed at preventing unlawful and arbitrary deprivations of liberty. At the general level, adherence to these rules is a *sine qua non* in a democratic society governed by the rule of law, and, at the individual level, compliance therewith is an indispensable condition for ensuring respect for the rights and freedoms of the individual human being, including, in particular, respect for his or her physical and mental integrity. By effectively guaranteeing everyone's right to personal liberty and security at all times, States will also be promoting their own internal security, without which human rights cannot be enjoyed to the full.

.....Chapter 6
**THE RIGHT TO A FAIR
TRIAL: PART I – FROM
INVESTIGATION TO TRIAL....**

Learning Objectives

- *To familiarize course participants with some of the principal international legal rules concerning the individual rights that must be secured during criminal investigations and the application of these rules by the international monitoring organs;*
- *To sensitize participants to the importance of applying these legal rules in order to protect a broad range of human rights in a society based on the rule of law;*
- *To create an awareness among the participating judges, prosecutors and lawyers of their primordial role in enforcement of the rule of law, including individual rights during criminal investigations;*
- *To create an awareness of the fact that enforcement of the fair trial rules is not only conducive to enhancing the protection of human rights *largo sensu*, but also conducive to encouraging economic investment and promoting national and international peace and security.*

Questions

- *Are you already conversant with the international legal rules and jurisprudence relating to criminal investigations?*
- *Do they perhaps even form part of the national legal system within which you work?*
- *If so, what is their legal status and have you ever been able to apply them?*
- *In the light of your experience, do you have any particular concerns – or have you experienced any specific problems – when ensuring a person’s human rights at the pre-trial stage?*
- *If so, what were these concerns or problems and how did you address them, given the legal framework within which you are working?*
- *Which issues would you like to have specifically addressed by the facilitators/ trainers during this course?*

Relevant Legal Instruments

Universal Instruments

- The Universal Declaration of Human Rights, 1948
- The International Covenant on Civil and Political Rights, 1966
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- The Statute of the International Criminal Court, 1998

- The Code of Conduct for Law Enforcement Officials, 1979
- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988
- The Standard Minimum Rules for the Treatment of Prisoners, 1955
- The Guidelines on the Role of Prosecutors, 1990
- The Basic Principles on the Role of Lawyers, 1990
- The Rules of Procedure of the International Criminal Tribunals for the former Yugoslavia and Rwanda

Regional Instruments

- The African Charter on Human and Peoples' Rights, 1981
 - The American Convention on Human Rights, 1969
 - The European Convention on Human Rights, 1950
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1. Introduction

The present chapter will first deal with the overarching principle of *equality before the law*, which conditions both civil and criminal proceedings from the outset, as well as with the principle of *presumption of innocence*, which is of fundamental importance in relation to criminal proceedings. These notions are thus of equal relevance for Chapter 7, but will not be recapitulated in that context. This chapter will then specifically examine some of the human rights that belong to the stage of criminal investigations, up to the beginning of the trial itself, where applicable. It should be noted, however, that the question of administration of juvenile justice will be dealt with specifically in Chapter 10.

It must be emphasized that this chapter does not provide an exhaustive list of rights to be guaranteed at the pre-trial stage, but merely focuses on some human rights that are considered to be of particular importance in connection with criminal investigations.¹ Some of these rights are also essential at the trial stage and will again be examined in Chapter 7. The selection of issues to be dealt with in this rather than the next chapter has been made from a practical point of view, bearing in mind the sequence of events normally occurring in connection with the investigation into criminal activities, and the possible ensuing trial to determine guilt. As the rights enjoyed at the pre-trial and the trial stages are closely interrelated, some overlapping is unavoidable, but has, as far as is possible, been reduced to a minimum.

2. The Effective Protection of the Right to a Fair Trial: A Global Challenge

Every person has the right to a fair trial both in civil and in criminal cases, and the effective protection of all human rights very much depends on the practical availability at all times of access to competent, independent and impartial courts of law which can, and will, administer justice fairly. Add to this the professions of prosecutors and lawyers, each of whom, in his or her own field of competence, is instrumental in making the right to a fair trial a reality, and we have the legal pillar of a democratic society respectful of the rule of law.

¹For an important collection of rules relating to all stages of the investigation and trial, see *Amnesty International Fair Trials Manual*, London, 1998, 187 pp.

However, an independent and impartial Judiciary capable of ensuring fair trial proceedings is not only of importance to the rights and interests of human beings, but is likewise essential to other legal persons, including economic entities, whether smaller enterprises or large corporations, which often depend on courts of law, inter alia, to regulate disputes of various kinds. For instance, domestic and foreign enterprises will be reluctant to invest in countries where the courts are not perceived as administering justice impartially. Furthermore, it is beyond doubt that in countries where aggrieved persons or other legal entities can have free access to the courts in order to claim their rights, social tension can more easily be managed and the temptation to take the law into one's own hands is more remote. By contributing in this way to defusing social tensions, the courts of law will contribute to enhancing security not only at the national but also at the international level, since internal tensions often have a dangerous spillover effect across borders.

Yet a glance at the jurisprudence of the international monitoring organs makes it clear that the right to a fair trial is frequently violated in all parts of the world. Indeed, the vast majority of cases dealt with by the Human Rights Committee under the Optional Protocol, for instance, concern alleged violations of pre-trial or trial rights. In what follows, a brief survey of the most relevant aspects of the international jurisprudence will accompany the description of the relevant legal rules.

3. The Legal Texts

The key legal texts on fair trial are to be found in article 14 of the International Covenant on Civil and Political Rights, article 7 of the African Charter on Human and Peoples' Rights, article 8 of the American Convention on Human Rights, and article 6 of the European Convention on Human Rights. The relevant provisions of these articles will be dealt with below under the appropriate headings, while the complete texts will be distributed as handouts.

Additional rules to which reference will be made below are inter alia contained in the following United Nations instruments: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Universal Declaration of Human Rights; the Code of Conduct for Law Enforcement Officials; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; the Standard Minimum Rules for the Treatment of Prisoners; the Guidelines on the Role of Prosecutors and the Basic Principles on the Role of Lawyers; the Rules of Procedure of the International Criminal Tribunals for the former Yugoslavia and Rwanda; and the Statute of the International Criminal Court.

4. The Right to Equality before the Law and Equal Treatment by the Law

The right to equality before the law and equal treatment by the law, or, in other words, the principle of non-discrimination, conditions the interpretation and application not only of human rights law *stricto sensu*, but also of international humanitarian law.² According to article 26 of the International Covenant on Civil and Political Rights, for instance, “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. Similar provisions are contained in article 3 of the African Charter on Human and Peoples’ Rights and article 24 of the American Convention on Human Rights. Further, article 20(1) of the Statute of the International Criminal Tribunal for Rwanda and article 21(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia provide that “all persons shall be equal before” these Tribunals.

On the other hand, the principle of equality or the prohibition of discrimination does not mean that all distinctions are forbidden, and in this respect the Human Rights Committee has held that differential treatment between people or groups of people “must be based on reasonable and objective criteria”.³ However, further details as to the interpretation of the principle of equality and the prohibition of discrimination will be provided in Chapter 13 below.

The specific right to equality before the courts is a fundamental principle underlying the right to a fair trial, and can be found *expressis verbis* in article 14(1) of the International Covenant on Civil and Political Rights, according to which “all persons shall be equal before the courts and tribunals”.⁴ Although not contained in the corresponding articles on fair trial in the regional conventions, the right to equality before the courts is comprised by the general principle of equality protected thereby.

²See e.g. articles 1, 2 and 7 of the Universal Declaration of Human Rights; articles 2(1), (3), 4(1) and 26 of the International Covenant on Civil and Political Rights; article 2(2) of the International Covenant on Economic, Social and Cultural Rights; articles 2, 3, 18(3) and 28 of the African Charter on Human and Peoples’ Rights; articles 1, 24 and 27(1) of the American Convention on Human Rights; article 14 of the European Convention on Human Rights; articles 2 and 15 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women; article 2 of the 1989 Convention on the Rights of the Child; and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination. Of the four 1949 Geneva Conventions, see e.g. articles 3 and 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War; articles 9(1) and 75(1) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I); and articles 2(1) and 4(1) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

³Communication No. 694/1996, *Waldman v. Canada* (Views adopted on 3 November 1999), in UN doc. GAOR, A/55/40 (vol. II), pp. 97-98, para. 10.6.

⁴See also article 5(a) of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination, which provides for “the right to equal treatment before the tribunals and all other organs administering justice”; article 21(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia, according to which “all persons shall be equal before the International Tribunal”; article 21(1) of the Statute of the International Criminal Tribunal for Rwanda; and article 67(1) of the Statute of the International Criminal Court.

The principle of equality before the courts means *in the first place* that, regardless of one's gender, race, origin or financial status, for instance, *every person appearing before a court has the right not to be discriminated against either in the course of the proceedings or in the way the law is applied to the person concerned*. Further, whether individuals are suspected of a minor offence or a serious crime, the rights have to be equally secured to everyone. *Secondly*, the principle of equality means that *all persons must have equal access to the courts*.

Equal access to courts: The Oló Bahamonde case

The principle of equality was to the fore in the case of *Oló Bahamonde* examined under article 14(1) of the International Covenant on Civil and Political Rights, where the author complained that he had unsuccessfully tried to obtain redress before the domestic courts for the alleged persecution to which he was subjected by governmental authorities. The Committee observed in this respect

“... that the notion of equality before the courts and tribunals encompasses the very access to the courts, and that a situation in which an individual's attempts to seize the competent jurisdictions of his/her grievances are systematically frustrated runs counter to the guarantees of article 14, paragraph 1”.⁵

Equal access to courts by women: Another essential aspect of the right to equality is that *women must have equal access to courts in order to be able effectively to claim their rights*. Two important cases illustrate this basic rule well. In the first, where a woman was not entitled to sue the tenants of two apartment buildings that she owned, the Human Rights Committee found that there was a violation of articles 3, 14(1) and 26 of the Covenant. According to the Peruvian Civil Code only the husband, not the married woman, was entitled to represent matrimonial property before the courts, a state of affairs that is contrary to international human rights law.⁶ In the second, where prohibitive costs of litigation prevented a woman from gaining access to a court in order to request a judicial separation from her husband, and where there was no legal aid available for these complex proceedings, the European Court of Human Rights found a violation of article 6(1) of the European Convention.⁷

While women's right of access to the courts will be dealt with more fully in Chapter 11 below, these examples show the breadth of the protection afforded by the principle of equality.

⁵Communication No. 468/1991, *A. N. Oló Bahamonde v. Equatorial Guinea* (Views adopted on 20 October 1993), UN doc. GAOR, A/49/40 (vol. II), p. 187, para. 9.4.

⁶Communication No. 202/1986, *G. Ato del Avellanal v. Peru* (Views adopted on 28 October 1988), UN doc. GAOR, A/44/40, pp. 198-199, paras. 10.1-12.

⁷*Eur. Court HR, Airey Case v. Ireland, judgment of 9 October 1979, Series A, No. 32*, pp. 11-16, paras. 20-28.

The principle of equality must be guaranteed throughout the pre-trial and trial stages, in that every suspected or accused person has the right not to be discriminated against in the way the investigations or trials are conducted or in the way the law is applied to them.

The principle of equality also means that every human being must have equal access to the courts in order to claim their rights. In particular, women must have access to courts on an equal footing with men, in order to be able to claim their rights effectively.

5. The Right to be Presumed Innocent: the Overall Guarantee from Suspicion to Conviction or Acquittal

The right to be presumed innocent until proved guilty is another principle that conditions the treatment to which an accused person is subjected throughout the period of criminal investigations and trial proceedings, up to and including the end of the final appeal. Article 14(2) of the International Covenant on Civil and Political Rights provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”. Article 7(1)(b) of the African Charter on Human and Peoples’ Rights, article 8(2) of the American Convention on Human Rights and article 6(2) of the European Convention on Human Rights all also guarantee the right to presumption of innocence, and article 11(1) of the Universal Declaration of Human Rights safeguards the same right for everyone “charged with a penal offence ... until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”. More recently, the principle of presumption of innocence has in particular been included in article 20(3) of the Statute of the International Criminal Tribunal for Rwanda, article 21(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia, and in article 66(1) of the Statute of the International Criminal Court.

As noted by the Human Rights Committee in General Comment No. 13, the principle of presumption of innocence means that

“the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial”.⁸

⁸General Comment No. 13 (Article 14), in *UN Compilation of General Comments*, p. 124, para. 7.

Adverse public comments by authorities: In the case of *Gridin*, the authorities failed to exercise the restraint that article 14(2) of the International Covenant requires in order to preserve the accused person’s presumption of innocence. The author had inter alia alleged that high-ranking law enforcement officials had made public statements portraying him as guilty of rapes and murders and that these statements had been given wide media coverage. The Committee noted that the Supreme Court had “referred to this issue, but failed to specifically deal with it when it heard the author’s appeal”.⁹ Consequently, there was a violation of article 14(2) in this case.

Anonymous judges: The right to be presumed innocent guaranteed in article 14(2) of the Covenant was also violated in the case of *Polay Campos*, where the victim was tried by a special tribunal of “faceless judges” who were anonymous and did not constitute an independent and impartial court.¹⁰

Change of venue: The right to be presumed innocent as guaranteed by article 14(2) of the International Covenant was not violated in a case where the author had complained that the trial judge’s refusal to change its venue deprived him of his right to a fair trial and his right to be presumed innocent. The Committee noted that his request had been “examined in detail by the judge at the start of the trial” and that the judge had pointed out “that the author’s fears related to expressions of hostility towards him which well preceded the trial, and that the author was the only one, out of five co-accused, to have requested a change in venue”.¹¹ She then listened to the parties’ submissions, “satisfied herself that the jurors had been selected properly”, and thereafter “exercised her discretion and allowed the trial to proceed” without changing the venue.¹² In these circumstances the Committee did not consider that the decision not to change the venue violated the author’s right to a fair trial or the right to presumption of innocence. It held, in particular, that “an element of discretion is necessary in decisions such as the judge’s on the venue issue, and barring any evidence of arbitrariness or manifest inequity of the decision”, it was “not in a position to substitute its findings for those of the trial judge”.¹³

“The right to be presumed innocent until proved guilty by a competent court or tribunal” under article 7(1)(b) of the African Charter on Human and Peoples’ Rights was violated in a case where leading representatives of the Nigerian Government had pronounced the accused persons guilty of crimes during various press conferences as well as before the United Nations. The accused were subsequently all convicted and

⁹Communication No. 770/1997, *Gridin v. Russian Federation* (Views adopted on 20 July 2000), UN doc. GAOR, A/55/40 (vol. II), p. 176, para. 8.3.

¹⁰Communication No. 577/1994, *R. Espinosa de Polay v. Peru* (Views adopted on 6 November 1997), UN doc. GAOR, A/53/40 (vol. II), p. 43, para. 8.8.

¹¹Communication No. 591/1994, *I. Chung v. Jamaica* (Views adopted on 9 April 1998), UN doc. GAOR, A/53/40 (vol. II), p. 61, para. 8.3.

¹²*Ibid.*, loc. cit.

¹³*Ibid.*

executed following a trial before a court that was not independent as required by article 26 of the Charter.¹⁴

The right to presumption of innocence in article 6(2) of the European Convention on Human Rights has been held to constitute “one of the elements of a fair criminal trial that is required by paragraph 1” of that article, and is a right which, like other rights contained in the Convention, “*must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory*”.¹⁵

The presumption of innocence will thus be violated, for instance, “if a judicial decision concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law”, and it is sufficient, “even in the absence of any formal finding, that there is some reasoning suggesting that the court regards the accused as guilty”.¹⁶

Adverse public comments by authorities: The case of Allenet de Ribemont

The “presumption of innocence may be infringed not only by a judge or court but also by other public authorities”.¹⁷ In the case of *Alletnet de Ribemont*, the applicant had just been arrested by the police, when a press conference was held implicating him in the murder of a French Member of Parliament. The press conference, which in principle concerned the French police budget for the coming years, was attended by the Minister of the Interior, the Director of the Paris Criminal Investigation Department, and the Head of the Crime Squad. The applicant himself had at this stage not yet been charged with any crime. The European Court found a violation of article 6(2) in this case, noting that “some of the highest-ranking officers in the French police referred to Mr Allenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder”. In the view of the Court this “was clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority”.¹⁸

¹⁴ ACHPR, *International Pen and Others (on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisations) v. Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998, paras. 94-96 of the text of the decision as published at the following web site: http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

¹⁵ Eur. Court HR, *Case of Allenet de Ribemont v. France*, judgment of 10 February 1995, Series A, No. 308, p. 16, para. 35; emphasis added.

¹⁶ Ibid., loc. cit.

¹⁷ Ibid., p. 16, para. 36.

¹⁸ Ibid., p. 17, para. 41.

Assessment of costs and the implication of guilt: The European Court has held that article 6(2) “does not confer on a person ‘charged with a criminal offence’ a right to reimbursement of his legal costs where proceedings taken against him are discontinued”, but that a decision to refuse ordering the reimbursement to the former accused of his necessary costs and expenses following the discontinuation of criminal proceedings against him “may raise an issue under article 6 § 2 if supporting reasoning, which cannot be dissociated from the operative provisions, amounts in substance to a determination of the guilt of the former accused without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence”.¹⁹

The Court thus found a violation of article 6(2) of the European Convention in the *Minelli* case, where the Chamber of the Assize Court of the Canton of Zürich, in deciding the costs occasioned by a *private* prosecution, had concluded that, in the absence of statutory limitation, the applicant would “very probably” have been convicted of defamation on the basis of a published article which contained accusations of fraud against a particular company.²⁰ In the view of the European Court, “the Chamber of the Assize Court showed that it was satisfied of the guilt of” the applicant, who “had not had the benefit of the guarantees contained in” article 6(1) and (3); the Chamber’s appraisals were thus “incompatible with respect for the presumption of innocence”.²¹ It did not help in this respect that the Federal Court had “added certain nuances” to the aforementioned decision, since it was “confined to clarifying the reasons for that decision, without altering their meaning or scope”. By rejecting the applicant’s appeal, the Federal Court confirmed the decision of the Chamber in law and simultaneously “approved the substance of the decision on the essential points”.²²

The outcome was however different in the case of *Leutscher*, where the applicant had been convicted *in absentia* of several counts of tax offences but where, on appeal, the prosecution was considered time-barred by the Court. In response to the applicant’s request for reimbursement of various costs and fees, the Court of Appeal noted with regard to the counsel’s fees that there was nothing in the file that gave “any cause to doubt that this conviction was correct”.²³ However, the European Court of Human Rights concluded that article 6(2) had not been violated by these facts: the Court of Appeal had a “wide measure of discretion” to decide, on the basis of equity, whether the applicant’s costs should be paid out of public funds, and, in doing so, it was “entitled to take into account the suspicion which still weighed against the applicant as a result of the fact that his conviction had been quashed on appeal only because the prosecution was found to have been time-barred when the case was brought to trial”.²⁴ In the view of the Court, the disputed statement could not be construed as a reassessment of the applicant’s guilt.²⁵

¹⁹ Eur. Court HR, *Case of Leutscher v. the Netherlands*, judgment of 26 March 1996, Reports 1996-II, p. 436, para. 29.

²⁰ Eur. Court HR, *Minelli Case v. Switzerland*, judgment of 25 March 1983, Series A, No. 62, p. 18, para. 38.

²¹ *Ibid.*, loc. cit.

²² *Ibid.*, p. 19, para. 40.

²³ *Ibid.*, p. 432, para. 14.

²⁴ *Ibid.*, p. 436, para. 31.

²⁵ *Ibid.*, loc. cit.

The right to be presumed innocent until proved guilty conditions both the stage of criminal investigations and the trial proceedings; it is for the prosecuting authorities to prove beyond reasonable doubt that an accused person is guilty of the offence. Adverse public statements by officials may compromise the presumption of innocence.

6. Human Rights during Criminal Investigations

Even in the course of a criminal investigation, the persons affected thereby continue to enjoy their fundamental rights and freedoms, albeit with some limitations inherent in the deprivation of liberty for those affected by the measure. While some rights, such as the right to freedom from torture, are, as will be seen below, valid for everyone at all times, the right to respect for one's private and family life may, however, increasingly be jeopardized, for instance through sophisticated means of wire tapping. Some examples from the international jurisprudence will illustrate this problem. It should again be recalled that this section will not provide an exhaustive account of the rights guaranteed during criminal investigations, but will focus only on some of the basic rights which must be protected at this important stage.

6.1 The right to respect for one's private life, home and correspondence

The right to respect for one's privacy, family, home and correspondence is guaranteed, albeit in different terms, by article 17 of the International Covenant on Civil and Political Rights, article 11 of the American Convention on Human Rights and article 8 of the European Convention on Human Rights. Limitations on its exercise may however be imposed in certain circumstances. Article 17(1) of the International Covenant thus provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation"; while article 11 of the American Convention is similarly worded, opening, however, with the words: "no one may be the object of arbitrary and abusive interference with ...". According to article 8 of the European Convention, "there shall be no interference by a public authority with the exercise of" the right to respect for one's private and family life, home or correspondence

"... except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The problems associated with the right to privacy will be examined in relation to *wire tapping*, *searches* and *interference with correspondence*, which are measures that are usually resorted to at an early stage of judicial investigations in order to prove suspicions of criminal activity, and which may or may not subsequently lead to the bringing of formal charges.

6.1.1 Wire tapping

While neither the Human Rights Committee nor the Inter-American Court of Human Rights has as yet dealt with the question of interception of telephone conversations for the purpose of judicial investigation into crime, this issue has been to the fore in several cases dealt with by the European Court of Human Rights. The European Court has consistently held that such telephone tapping amounts to “an interference by a public authority” with the applicant’s right to respect for his or her correspondence and private life as guaranteed by article 8 of the European Convention, an interference which, in order to be justified, must, as seen above, be “in accordance with the law”, pursue one or more of the legitimate aims referred to in article 8(2), and lastly, must also be “necessary in a democratic society” for one or more of these legitimate aims.²⁶

Without examining in detail the Court’s jurisprudence regarding the notion of “in accordance with the law”, it is sufficient in this context to point out that recourse to telephone tapping must have a basis in domestic law, a law which must not only be “*accessible*” but also “*foreseeable*” as to “the meaning and nature of the applicable measures”.²⁷ In other words, article 8(2) “does not merely refer back to domestic law but also relates to *the quality of the law*, requiring it to be compatible with the rule of law”.²⁸ This means, in particular, “that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by” article 8(1), because, especially “where a power of the executive is exercised in secret, the risks of arbitrariness are evident”.²⁹ Although “the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly”, the law must nevertheless

“be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence”.³⁰

²⁶See e.g. *Eur. Court HR, Huvig Case v. France, judgment of 24 April 1990, Series A, No. 176-B*, p. 52, para. 25.

²⁷*Ibid.*, pp. 52-55, paras. 26-29; emphasis added.

²⁸*Ibid.*, p. 54, para. 29; emphasis added.

²⁹See e.g. *Eur. Court HR, Malone Case v. the United Kingdom, judgment of 2 August 1984, Series A, No. 82*, p. 32, para. 67.

³⁰*Ibid.*, loc. cit.

The requirement of legal protection implies, in other words, that domestic law must provide adequate legal safeguards against abuse and that, for instance, where the law confers a power of discretion on the authorities concerned, the law must also “indicate the scope of that discretion”.³¹

The Huvig case

In the *Huvig* case the applicants had been subjected to telephone tapping for about two days by the judge investigating charges of tax evasion and false accounting. The European Court accepted that the disputed measures had a legal basis in French law, namely the Code of Criminal Procedure, as interpreted by the French courts, and, furthermore, that the law was accessible. However, in terms of the quality of the law the Court concluded that it did “not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities”; consequently, the applicants “did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society”.³² In other words, the legal system did not “afford adequate safeguards against various possible abuses” in that, for instance, “the categories of people liable to have their telephones tapped by judicial order and the nature of the offences which may give rise to such an order” were “nowhere defined”, and there was nothing obliging a judge “to set a time limit on the duration of telephone tapping”.³³ Further, the law did not specify “the circumstances in which recordings may or must be erased or the tapes be destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court”.³⁴ It followed that, since the applicants had not enjoyed the minimum degree of protection required under the rule of law in a democratic society, there had been a breach of article 8 in this case.

The European Court has also found breaches of article 8 in other similar cases such as the *Kruslin* and *Malone* cases, judgments which, as in the *Huvig* case, were founded on the basis that the practices in question did not comply with the requirements flowing from the expression “in accordance with the law” in article 8(2) of the Convention.³⁵

³¹Ibid., para. 68 at p. 33.

³²*Eur. Court HR, Huvig Case v. France, judgment of 24 April 1990, Series A, No. 176-B*, p. 56-57, para. 35.

³³Ibid., p. 56, para. 34.

³⁴Ibid., loc. cit.

³⁵*Eur. Court HR, Malone Case v. the United Kingdom, judgment of 2 August 1984, Series A, No. 82*, and *Eur. Court HR, Kruslin Case v. France, judgment of 24 April 1990, Series A, No. 176-A*. In the case of *Klass and Others*, however, the Court found no breach of article 8: see *Eur. Court HR, Case of Klass and Others, judgment of 6 September 1976, Series A, No. 28*.

The Lampert case

It can be seen from a reading of the judgment in the more recent case of *Lampert* that in 1991 France adopted an amendment to the Code of Criminal Procedure concerning the confidentiality of telecommunications messages, which laid down “clear, detailed rules” and specified “with sufficient clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities”.³⁶ Yet article 8 was also violated in this case on the basis that the applicant “did not enjoy the effective protection of national law, which does not make any distinction according to whose line is being tapped”.³⁷

What had happened in this case was that the applicant was charged with handling the proceeds of aggravated theft after some of his conversations had been intercepted as he called another person whose telephone was being tapped. The applicant’s lawyer appealed against two extensions of the duration of the telephone tapping, but on appeal the Court of Cassation ruled, in particular, “that the applicant had ‘no *locus standi* to challenge the manner in which the duration of the monitoring of a third party’s telephone line was extended’”.³⁸ The European Court accepted that the interference with the applicant’s right to respect for his privacy and correspondence “was designed to establish the truth in connection with criminal proceedings and therefore to prevent disorder”.³⁹ However, the fact that the Court of Cassation had refused the applicant *locus standi* to challenge the extension of the duration of the wire tapping could, in the view of the European Court, “lead to decisions whereby a very large number of people are deprived of the protection of the law, namely all those who have conversations on a telephone line other than their own”; that “would in practice render the protective machinery largely devoid of substance”. It followed that the applicant had not had “available to him the ‘effective control’ to which citizens are entitled under the rule of law and which would have been capable of restricting the interference in question to what was ‘necessary in a democratic society’”.⁴⁰

While there is always a danger in extrapolating from the European jurisprudence, it would seem reasonable to conclude that under the International Covenant too, as well as the American Convention, the right of the judicial authorities to resort to interception of telephone conversations will be relatively strictly interpreted in favour of the right to respect for one’s privacy, and that, as a minimum, such interference in the exercise of this right must be clearly based in the domestic law, imposed for a specific and legitimate purpose, and be accompanied by adequate safeguards and remedies for the persons whose telephone is tapped.

³⁶*Eur. Court HR, Case of Lampert v. France, judgment of 24 August 1998, Reports 1998-V*, p. 2240, para. 28. This is one interesting example among many reflecting the impact that the jurisprudence of the European Court of Human Rights has on domestic legislation.

³⁷*Ibid.*, p. 2242, para. 39.

³⁸*Ibid.*, p. 2235, paras. 8-10 and p. 2236, para. 14; second emphasis added.

³⁹*Ibid.*, p. 2240, para. 29.

⁴⁰*Ibid.*, p. 2241-2242, paras. 38-40.

6.1.2 Searches

International human rights law provides no detailed rules about the lawfulness of searches, but in this respect too the European case-law may provide some guidance. It is worthy of note, however, that the following case did not concern the issuance of a search warrant to the police but the granting of a warrant to a private party in civil proceedings.

In the *Chappel* case, which did not concern a criminal case but a copyright action, the European Court had to examine the compatibility with article 8 of the European Convention of a search carried out in the applicant's business premises for the purpose of securing evidence to defend the plaintiff's copyright against unauthorized infringement. The Government accepted that there had been an interference with the exercise of the applicant's right to respect for his private life and home, and the applicant, for his part, agreed that the search was legitimate under article 8(2) for the protection of "the rights of others".⁴¹ The question that had to be determined by the Court was thus whether the measure was carried out "in accordance with the law" and whether it was "necessary in a democratic society". The relevant search order was a so-called "Anton Piller order", which is an interlocutory court order intended to preserve evidence pending trial; it is granted on an *ex parte* application without the defendant's being given notice and without his being heard.

The Court was satisfied in this case that the search was based on English law that complied with the conditions both of *accessibility* and of *foreseeability*. As to the former condition, the relevant legal texts and case-law were all published and thus accessible, and as to the latter, "the basic terms and conditions for the grant of this relief were, at the relevant time, laid down with sufficient precision for the 'foreseeability' criterion to be regarded as satisfied"; this was so although there could be "some variations" between the content of the individual orders.⁴²

When examining whether the measure concerned was "necessary in a democratic society", the Court observed, moreover, that the order was accompanied "by safeguards calculated to keep its impact within reasonable bounds", i.e. (1) it was "granted for a short period only"; (2) "restrictions were placed on the times at which and the number of persons by whom the Plaintiffs' search could be effected"; and further, (3) "any materials seized could be used only for a specified purpose".⁴³ In addition, the plaintiffs or their solicitor had given a series of undertakings and "a variety of remedies was available to the applicant in the event that he considered the order to have been improperly executed".⁴⁴

The Court did however accept that there were some "shortcomings in the procedure followed" when the order was carried out, in that, for instance, it must have been distracting for Mr. Chappel to have the searches by the police and the plaintiffs carried out at the same time; yet they were not deemed "so serious that the execution of the order" could, "in the circumstances of the case, be regarded as disproportionate to

⁴¹ Eur. Court HR, *Case of Chappel v. the United Kingdom*, judgment of 30 March 1989, Series A, No. 152-A, p. 21, para. 51.

⁴² Ibid., para. 56 at p. 24.

⁴³ Ibid., p. 25, para. 60.

⁴⁴ Ibid., loc. cit.

the legitimate aim pursued”.⁴⁵ Consequently, there was no violation of article 8 in this case.

6.1.3 Interference with correspondence

Interference with correspondence by national authorities can constitute a problem for persons deprived of their liberty and numerous complaints have been submitted to the European Court of Human Rights in this regard. Where they have been submitted by prisoners *convicted* of criminal offences, they will be dealt with in Chapter 8. In the case of *Pfeifer and Plankl*, however, *the applicants corresponded with each other while in detention on remand*, and in one letter, the investigating judge crossed out and rendered illegible certain passages which he considered to contain “jokes of an insulting nature against prison officers”.⁴⁶ The Court considered that the deletion of the passages constituted an unjustified interference with the applicants’ correspondence. It agreed with the European Commission of Human Rights “that the letter consisted rather of criticisms of prison conditions and in particular the behaviour of certain prison officers” and noted that, although “some of the expressions used were doubtless rather strong ones, ... they were part of a private letter which under the relevant legislation ... should have been read by Mr. Pfeifer and the investigating judge only”.⁴⁷ It next referred to its judgment in the case of *Silver and Others*, where it had held “that it was not ‘necessary in a democratic society’ to stop private letters ‘calculated to hold the authorities up to contempt’ or containing ‘material deliberately calculated to hold the prison authorities up to contempt’ ...”; although the deletion of passages in the case of *Pfeifer and Plankl* was “admittedly a less serious interference”, it was nonetheless “disproportionate” in the circumstances of the case and violated article 8 of the Convention.⁴⁸

The case of *Schönenberg and Durmaz* concerned *correspondence between a lawyer and a person held in detention on remand*. The applicant, a taxi-driver, was arrested in Geneva in connection with suspected drug offences and subsequently transferred to Zürich. A few days later the wife of Mr. Durmaz asked Mr. Schönenberg to take charge of her husband’s defence. On the same day Mr. Schönenberg sent a letter with enclosure to the district prosecutor’s office, as required by the Swiss legislation, requesting that the letter be forwarded to the addressee. In his letter, Mr. Schönenberg told Mr. Durmaz that he had been instructed by the latter’s wife to undertake his defence and sent him forms giving him authority to act. He also, inter alia, wrote that it was his duty to point out that he was entitled to refuse to make statements and that anything he said could be used against him.⁴⁹ The district prosecutor withheld this letter with enclosure and never informed Mr Durmaz about it; by virtue of an order, the prosecutor’s office subsequently decided not to communicate the letter to Mr. Durmaz; instead, a Zürich lawyer was appointed to represent him.⁵⁰

⁴⁵Ibid., p. 27, para. 66.

⁴⁶*Eur. Court HR, Case of Pfeifer and Plankl v. Austria, judgment of 25 February 1992, Series A, No. 227, p. 18, para. 47.*

⁴⁷Ibid., para. 47 at p. 19.

⁴⁸Ibid., loc. cit. and p. 19, para. 48.

⁴⁹*Eur. Court HR, Case of Schönenberg and Durmaz, judgment of 20 June 1988, Series A, No. 137, p. 8-9, paras. 8-9.*

⁵⁰Ibid., p. 9, paras. 10-11.

The Court accepted that the aim of the withholding of this letter was “the prevention of disorder or crime” and relied in this respect on its case-law according to which “the pursuit of this objective may ‘justify wider measures of interference in the case of a ... [convicted] prisoner than in that of a person at liberty’”; in the view of the Court, “the same reasoning may be applied to a person, such as Mr. Durmaz, being held on remand and against whom inquiries with a view to bringing criminal charges are being made since in such a case there is often a risk of collusion”.⁵¹ However, the Court ultimately concluded that the contested interference was not justifiable as being “necessary in a democratic society”, rejecting the Government’s arguments that the letter gave Mr. Durmaz advice relating to pending criminal proceedings which was of such nature as to jeopardize their proper conduct and that the letter was not sent by a lawyer instructed by Mr. Durmaz. It noted in this respect that

“Mr. Schönenberg sought to inform the second applicant of his right ‘to refuse to make any statement’, advising him that to exercise it would be to his ‘advantage’. ... In that way, he was recommending that Mr. Durmaz adopt a certain tactic, lawful in itself since, under the Swiss Federal Court’s case-law – whose equivalent may be found in other Contracting States – it is open to an accused person to remain silent. ... Mr. Schönenberg could also properly regard it as his duty, pending a meeting with Mr. Durmaz, to advise him of his right and of the possible consequences of exercising it. In the Court’s view, advice given in these terms was not capable of creating a danger of connivance between the sender of the letter and its recipient and did not pose a threat to the normal conduct of the prosecution.”⁵²

The Court further attached “little importance” to the Government’s argument that the lawyer concerned had not been instructed by Mr. Durmaz, since he “was acting on the instructions of Mrs. Durmaz and had moreover so apprised the ... district prosecutor by telephone”. In the view of the Court,

“these various contacts amounted to preliminary steps intended to enable the second applicant to have the benefit of the assistance of a defence lawyer of his choice and, thereby, to exercise a right enshrined in another fundamental provision of the Convention, namely article 6. ... In the circumstances, the fact that Mr. Schönenberger had not been formally appointed is therefore of little consequence.”⁵³

There had consequently been a breach of article 8 in this case, which thus provides an important reminder that the relationship between a person suspected, accused or charged with a criminal offence and his legal counsel, albeit potential, is a privileged one, which the domestic authorities must carefully safeguard. However, this issue will be further dealt with in section 6.4 below.

Under international human rights law, interferences with a person’s right to privacy in the course of criminal investigations must be lawful and serve a legitimate purpose in relation to which the measure concerned must be proportionate.

⁵¹Ibid., p. 13, para. 25.

⁵²Ibid., pp. 13-14, para. 28.

⁵³Ibid., p. 14, para. 29.

6.2 The right to be treated with humanity and the right to freedom from torture

The treatment of detainees and prisoners will be dealt with in further detail in Chapter 8, but in view of the frequency of recourse to torture and other ill-treatment of persons deprived of their liberty in the context of criminal investigations, it is indispensable to emphasize here that the right to freedom from torture, cruel or inhuman treatment or punishment is guaranteed by all the major treaties and by the Universal Declaration of Human Rights (art. 7 of the International Covenant on Civil and Political Rights; art. 4 of the African Charter on Human and Peoples' Rights; art. 5(2) of the American Convention on Human Rights; art. 3 of the European Convention on Human Rights, which does not contain the term “cruel”; and art. 4 of the Universal Declaration). In some legal instruments this right is reinforced, for persons deprived of their liberty, by the right to be treated with humanity and with respect for the inherent dignity of the human person (art. 10(1) of the Covenant; art. 5(2) of the American Convention). Given the gravity of the practice of torture, from which no part of the world is free, treaties aimed at efficiently promoting the abolition of this illegal practice have been elaborated under the auspices of the United Nations and two regional organizations, namely, the OAS and the Council of Europe.⁵⁴

The rights of persons during investigation are also dealt with in article 55 of the Statute of the International Criminal Court. Article 55(1)(b) thus provides that a person under investigation shall “not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment”.

In the course of criminal investigations and judicial proceedings, the universal and non-derogable prohibition on torture and other inhuman or degrading treatment or punishment is consequently *to be respected at all times, without exception even in the direst of circumstances*.⁵⁵ This means that persons arrested, detained, or otherwise in the hands of police or prosecuting authorities for purposes of interrogation into alleged criminal activities, either as suspects or as witnesses, have the right always to be treated with humanity and without being subjected to any psychological or physical violence, duress or intimidation. As will be shown below, the use of any confession extracted under duress is unlawful under international human rights law. This is in particular stated *expressis verbis* in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

⁵⁴See the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; the Inter-American Convention to Prevent and Punish Torture, 1985; and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987.

⁵⁵See e.g. article 4(2) of the International Covenant on Civil and Political Rights; article 27(2) of the American Convention on Human Rights; article 15(2) of the European Convention on Human Rights; article 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and article 5 of the Inter-American Convention to Prevent and Punish Torture.

Legal instruments have also been drafted aimed at the professional groups involved in criminal investigations. The 1979 Code of Conduct for Law Enforcement Officials provides inter alia in its article 5 that “no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment”. The 1990 Guidelines on the Role of Prosecutors contain in particular the following important provision:

“16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”

Also, article 54(1)(c) of the Statute of the International Criminal Court provides that one of the duties of the Prosecutor with respect to investigations is to “fully respect the right of persons arising under this Statute”, which means, inter alia, the right specified in article 55(1)(c) concerning the prohibition of duress and torture.

Furthermore, as stated in preambular paragraph 7 of the 1985 Basic Principles on the Independence of the Judiciary, “judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens”, and it is therefore also the duty of judges to be particularly alert to any sign of maltreatment or duress of any kind that might have taken place in the course of criminal investigations and deprivation of liberty, and to take the necessary measures whenever faced with a suspicion of maltreatment.⁵⁶

Judges, prosecutors and lawyers must be particularly alert for any sign of torture, including rape, and other forms of sexual abuse and ill-treatment of *women and children* in custody. Torture and ill-treatment of these vulnerable groups while in the hands of police officers and prison officials are commonplace in many countries, and in order to bring such illegal practices to an end, it is indispensable that the members of the legal professions at all times play an active role in their prevention, investigation and punishment.

Torture and other forms of ill-treatment are prohibited at all times, including during criminal investigations, and can never be justified; these are acts that must be prevented, investigated and punished.

Judges, prosecutors and lawyers must be particularly alert for any sign of torture or ill-treatment of women and children in custody.

⁵⁶Provisions against torture can also be found in article 6 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

6.3 The right to be notified of the charges in a language one understands

Article 14(3)(a) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge against him, everyone shall be entitled “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”. Article 6(3)(a) of the European Convention is similarly worded, while, according to article 8(2)(b) of the American Convention on Human Rights, the accused is entitled to “prior notification in detail ... of the charges against him”. The African Charter on Human and Peoples’ Rights contains no express provision guaranteeing the right to be informed of criminal charges against oneself. However, the African Commission on Human and Peoples’ Rights has held that persons arrested “shall be informed promptly of any charges against them”.⁵⁷ With regard to a person under arrest, Principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that he “shall be promptly informed of any charges against him”.

The right to be informed of charges *in a language one understands* implies, of course, that the domestic authorities must provide adequate interpreters and translators in order to fulfil this requirement, which is essential for the purpose of allowing a suspect to defend him or herself adequately. This more general right to provide interpretation during investigation is specifically included in Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, according to which

“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.”

The duty to inform a suspect of his or her rights in general during investigation “in a language the suspect speaks and understands” is also included, for instance, in article 42 (A) of the Rules of Procedure and Evidence of the Rwanda and Yugoslavia Criminal Tribunals, which guarantee, furthermore, the right of a suspect “to have the free legal assistance of an interpreter” if he “cannot understand or speak the language to be used for questioning”.

According to the Human Rights Committee, the right to be informed in article 14(3)(a) “applies to all cases of criminal charges, *including those of persons not in detention*”, and the term “‘promptly’ requires that information is given in the

⁵⁷ ACHPR, *Media Rights Agenda (on behalf of Niran Maloulu) v. Nigeria*, Communication No. 224/98, adopted during the 28th session, 23 October – 6 November 2000, para. 43 of the text of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>.

manner described as soon as the charge is first made by a competent authority”.⁵⁸ The Committee has in this respect specified that

“this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates *both the law and the alleged facts on which it is based*”.⁵⁹

In the view of the Committee, this also means that the “detailed information about the charges against the accused must not be provided immediately upon arrest, *but with the beginning of the preliminary investigation or the setting of some other hearing which gives rise to a clear official suspicion against the accused*”.⁶⁰ The duty to inform the accused under article 14(3)(a) of the Covenant is thus also “more precise than that for arrested persons under” article 9(2) of the Covenant and, as long as the accused has been promptly brought before a judge as required by article 9(3), “the details of the nature and cause of the charge need not necessarily be provided to an accused person immediately upon arrest”.⁶¹ In an earlier case the Committee held, however, that “the requirement of prompt information ... only applies once the individual has been *formally* charged with a criminal offence”, and that it does not, consequently, “apply to those remanded in custody pending the result of police investigations”, a situation covered by article 9(2) of the Covenant.⁶²

The question is, however, whether the reasoning in this latter case is consistent with the Committee’s views as expressed in its General Comment or the earlier cases referred to.

In applying the principle of prompt information, the Committee concluded that article 14(3)(a) had not been violated in a case where the author complained that he had been detained for six weeks before being charged with the offence for which he was later convicted. The Committee concluded simply that it transpired from the material before it that the author had been “informed of the reasons for his arrest and the charges against him by the time the preliminary hearing started”.⁶³

Article 14(3)(a) had however been violated in a case where the victim had not been informed of the charges against him prior to his being tried *in camera* by a military court that sentenced him to 30 years’ imprisonment and 15 years of special security measures; furthermore, he had never been able to contact the lawyer assigned to him.⁶⁴

⁵⁸General Comment No. 13 (Article 14), in *United Nations Compilation of General Comments*, p. 124, para. 8; emphasis added.

⁵⁹*Ibid.*, loc. cit.; emphasis added.

⁶⁰Communication No. 561/1993, *D. Williams v. Jamaica* (Views adopted on 8 April 1997), UN doc. *GAOR*, A/52/40 (vol. II), p. 151, para. 9.2; emphasis added.

⁶¹Communication No.702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997), UN doc. *GAOR*, A/52/40 (vol. II), p. 232, para. 5.9.

⁶²Communication No. 253/1987, *P. Kelly v. Jamaica* (Views adopted on 8 April 1991), UN doc. *GAOR*, A/46/40, p. 247, para. 5.8; emphasis added.

⁶³Communication No. 561/1993, *D. Williams v. Jamaica* (Views adopted on 8 April 1997), UN doc. *GAOR*, A/52/40 (vol. II), p. 151, para. 9.2.

⁶⁴Communication No. R.14/63, *R. S. Antonaccio v. Uruguay* (Views adopted on 28 October 1981), UN doc. *GAOR*, A/37/40, p. 120, para. 20 as compared with p. 119, para. 16.2.

A particular problem is posed by trials *in absentia*. Without outlawing such proceedings altogether under article 14, the Committee has held that they “are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice”; yet special precautions are called for in this respect, and “the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him” under article 14(3)(a), although there must also be “certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused”.⁶⁵

The case of Mbenge

The limits on the responsibility of domestic authorities to trace an accused person had not been reached in the case of *Mbenge*, where the State party had “not challenged the author’s contention that he had known of the trials only through press reports after they had taken place”. Although the two relevant judgements stated “explicitly that summonses to appear had been issued by the clerk of the court”, there was “no indication ... of any steps actually taken by the State party in order to transmit the summonses to the author, whose address in Belgium [was] correctly reproduced in” one of the judgements and “was therefore known to the judicial authorities”.⁶⁶ Indeed, the fact that, according to the judgement in the second trial, the summons had been issued only three days before the beginning of the hearings before the court, confirmed the Committee in its conclusion “that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus enabling him to prepare his defence”. It had consequently violated article 14(3)(a), (b), (d) and (e) of the Covenant.⁶⁷

Article 8(2)(b) of the American Convention on Human Rights was violated in the *Castillo Petruzzi et al.* case, where “the accused did not have sufficient advance notification, in detail, of the charges against them”; indeed, the indictment was presented on 2 January 1994, and the attorneys were only allowed to view the file on 6 January “for a very brief time”, with the judgement being rendered the following day.⁶⁸

⁶⁵Communication No. 16/1977, *D. Monguya Mbenge v. Zaire* (Views adopted on 25 March 1983), UN doc. GAOR, A/38/40, p. 138, paras. 14.1-14.2.

⁶⁶*Ibid.*, para. 14.2.

⁶⁷*Ibid.*, loc. cit.

⁶⁸*I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, p. 202, paras. 141-142 read in conjunction with p. 201, para. 138.

Under article 6(3)(a) of the European Convention on Human Rights, the European Court held that it was sufficient in order to comply with this provision that the applicants were given a “charge-sheet” within respectively ten hours and one hour and a quarter after their arrest; these charge-sheets contained information about the charge (breach of the peace) as well as the date and place of its commission.⁶⁹

However, article 6(3)(a) was violated in a case where the applicant, who was of foreign origin, had informed the Italian authorities of his difficulties in understanding the judicial notification that had been served on him, asking them to send the information to him in his mother tongue or in one of the official languages of the United Nations. He received no answer to his letter and the authorities continued to draw up the documents in Italian. The Court observed that “the Italian judicial authorities should have taken steps to comply with [the applicant’s request] so as to ensure observance of the requirements of [article 6(3)(a)] unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian to understand from the notification the purport of the letter notifying him of the charges brought against him”.⁷⁰

Every person charged with a criminal offence must be informed promptly in a language which he or she understands of the charges against him, with details being given as to the facts and the law on which the charge is based.

This information must be given in good time before the trial so as to allow the accused person to effectively prepare his or her defence.

6.4 The right to legal assistance

The right to prompt legal assistance upon arrest and detention is essential in many respects, both in order to guarantee the right to an efficient defence and for the purpose of protecting the physical and mental integrity of the person deprived of his or her liberty. While all relevant human rights treaties guarantee the right of an accused to legal counsel of one’s own choosing (art. 14(3)(d) of the International Covenant, art. 7(1)(c) of the African Charter and art. 6(3)(c) of the European Convention), article 8(2)(d) of the American Convention on Human Rights provides moreover that during criminal proceedings every accused person has the right “**to communicate freely and privately with his counsel**” (emphasis added). Neither the International Covenant, the African Charter nor the European Convention contains a similar express protection of the confidentiality of the client-lawyer relationship.

However, Rule 93 of the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners provides that

⁶⁹ Eur. Court. HR, *Case of Steel and Others v. the United Kingdom*, judgment of 23 September 1998, Reports 1998-VII, p. 2741, para. 85.

⁷⁰ Eur. Court HR, *Case of Brožicek v. Italy*, judgment of 19 December 1989, Series A, No. 167, p. 18, para. 41.

“For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.”

Principle 18 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides further details in this respect:

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 consultation 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.”

According to Principle 15 of the Body of Principles, “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”. The Human Rights Committee itself has stated in its General Comment No. 20 on article 7 that provisions “should ... be made against incommunicado detention”.⁷¹

The right to legal assistance, including legal assistance without payment where the suspect has insufficient funds, is also guaranteed by Rule 42(A)(i) of the Rules of Procedure and Evidence of the Rwanda and Yugoslavia Tribunals. Moreover, Rule 67(A) of the Rules of Detention of the Yugoslavia Tribunal provides that “each detainee shall be entitled to communicate fully and without restraint with his defence counsel, with the assistance of an interpreter where necessary” and, further, that “all such correspondence and communications shall be privileged”. Lastly, Rule 67(D) of these Rules of Detention stipulates that interviews “with legal counsel and interpreters shall be conducted in the sight but not within the hearing, either direct or indirect, of the staff of the detention unit”. Similar provisions are contained in Rule 65 of the Rules of Detention of the Rwanda Court.

⁷¹ *United Nations Compilation of General Comments*, p. 140, para. 11.

The right of access to legal assistance must be *effectively* available, and, where this has not been the case, the Human Rights Committee has concluded that article 14(3) was violated.⁷² This provision was of course also violated where the person concerned did not have access to any legal assistance at all during the first ten months of his detention and, in addition, was not tried in his presence.⁷³ However, this, like many other cases dealt with by the Human Rights Committee, was an extreme case, since it concerned the situation of detainees held in the shadow of a dictatorship.

In its Resolution on the Right to Recourse and Fair Trial, the African Commission on Human and Peoples' Rights reinforced the right to defence contained in article 7(1)(c) of the African Charter by holding that in the determination of charges against them, individuals shall in particular be entitled to “communicate in confidence with counsel of their choice”. This right was violated in the case of *Media Rights Agenda*, acting on behalf of Mr. Niran Malaolu, who was neither allowed access to a lawyer, nor represented by a lawyer of his own choice.⁷⁴

The European Court of Human Rights has observed that “the European Convention does not expressly guarantee the right of a person charged with a criminal offence to communicate with defence counsel without hindrance”; but instead it *inter alia* referred to article 93 of the Standard Minimum Rules for the Treatment of Prisoners adopted by the Committee of Ministers of the Council of Europe by resolution (73) 5, which reads as follows:

“An untried prisoner shall be entitled, *as soon as he is imprisoned*, to choose his legal representative, or shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him, and to receive, confidential instructions. At his request he shall be given all necessary facilities for this purpose. In particular, he shall be given the free assistance of an interpreter for all essential contacts with the administration and for his defence. Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official.”⁷⁵

The Court further stated that it “considers that an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from” article 6(3)(c) of

⁷²See, among many other cases, Communication No. R.2/8, *B. Weismann Lanza and A. Lanza Perdomo v. Uruguay* (Views adopted on 3 April 1980), in UN doc. GAOR, A/35/40, p. 118, para. 16; and Communication No. R.1/6, *M. A. Millán Sequeira v. Uruguay* (Views adopted on 29 July 1980), p. 131, para. 16.

⁷³Communication No. R.7/28, *I. Weinberger v. Uruguay* (Views adopted on 29 October 1980), in UN doc. GAOR, A/36/40, p. 119, para. 16.

⁷⁴ACHPR, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000, paras. 55-56 of the text of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>.

⁷⁵*Eur. Court HR, Case of S. v. Switzerland, judgment of 28 November 1991, Series A, No. 220*, p. 15, para. 48; emphasis added.

the Convention. “If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.”⁷⁶

The case of S. v. Switzerland

In the case of *S. v. Switzerland*, the applicant complained of a violation of article 6(3)(c) in that the Swiss authorities had exercised surveillance of his meetings with his lawyer and only authorized the lawyer to consult a fraction of the case-file. It also appears from the facts that some letters from the applicant to his lawyer had been intercepted and that on one occasion the policemen supervising the meeting had even taken notes. The Government argued before the Court that the surveillance was justified for reasons of “collusion” since there was a danger that the two lawyers for the co-accused would co-ordinate their defence strategy.

The Court concluded, however, that the applicant’s right under article 6(3)(c) to communicate with his lawyer was violated, because, “notwithstanding the seriousness of the charges against the applicant”, the possibility of collusion could not “justify the restriction in issue and no other reason [had] been adduced cogent enough to do so”. In the view of the Court there was “nothing extraordinary in a number of defence counsel collaborating with a view to co-ordinating their defence strategy”, and neither “the professional ethics” of the Court-appointed defence counsel “nor the lawfulness of his conduct were at any time called into question in this case”. Furthermore, “the restriction in issue lasted over seven months”.⁷⁷

As can be seen, the case-law of the international monitoring organs proves that the rules on fair trial contained in the international human rights treaties, although principally appearing to aim at ensuring fair court proceedings as such, may also be applicable to the pre-trial stages of criminal investigation, at least to the extent necessary to ensure a subsequent fair hearing before an independent and impartial court of law.

This follows inter alia from the case-law of the Human Rights Committee with regard to the right of access to a lawyer under article 14, which will be dealt with in further depth in Chapter 7. Further, so far as article 6 of the European Convention on Human Rights is concerned, the European Court has held that in particular article 6(3) “may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions”.⁷⁸ With regard to article 6(3)(c), which concerns the right to defend oneself in person or through legal assistance of one’s own choosing, the manner of its application “during the preliminary investigation depends on the special features of the proceedings

⁷⁶Ibid., para. 48 at p. 16.

⁷⁷Ibid., para. 49.

⁷⁸*Eur. Court HR, Case of John Murray v. the United Kingdom, judgment of 8 February 1996, Reports 1996-I, p. 54, para. 62.*

involved and on the circumstances of the case”.⁷⁹ In the case of *Murray*, the European Court explained its position in the following terms:

“63. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right, which is not explicitly set out in the Convention, may be subject to restrictions for good cause. The question, in each case, is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing.”⁸⁰

Early access to a lawyer: The Murray case

In the case of *Murray*, the applicant was refused access to a lawyer during the first 48 hours of his detention, a measure decided under Section 15 of the Northern Ireland (Emergency Provisions) Act 1987 “on the basis that the police had reasonable grounds to believe that the exercise of the right of access would, inter alia, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent such an act”.⁸¹ The applicant was cautioned under the Criminal Evidence (Northern Ireland) Order 1988 that, if he chose to remain silent, inferences might be drawn in support of evidence against him. The European Court considered that the scheme contained in the said Order

“... is such that it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observes ... that, under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him.”⁸²

It then concluded that, “under such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation”, and that “to deny access to a lawyer for the first 48 hours of police questioning, in a situation where the rights of the defence may well be irretrievably prejudiced, is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6”.⁸³

⁷⁹Ibid., loc. cit.

⁸⁰Ibid., pp. 54-55, para. 63.

⁸¹Ibid., p. 55, para. 64.

⁸²Ibid., para. 66.

⁸³Ibid., loc. cit.

Upon his or her deprivation of liberty, a person has the right of access to legal counsel without delay and to be able to confer with counsel in private. To have prompt access to a lawyer at an early stage of police investigations may be essential in order to avoid lasting prejudice with regard to the rights of the defence.

6.5 The right not to be forced to testify against oneself/The right to remain silent

Article 14(3)(g) of the International Covenant guarantees the right of everyone “not to be compelled to testify against himself or to confess guilt”, and article 8(2)(g) of the American Convention provides for the right of everyone “not to be compelled to be a witness against himself or to plead guilty”, a provision that is strengthened by article 8(3) according to which “a confession of guilt by the accused shall be valid only if it is made without coercion of any kind”. The African Charter and the European Convention contain no similar provision. The effective protection of this right is of particular importance in the course of the preliminary investigations, when the temptation may be greatest to exert pressure on the suspected persons in order to have them confess guilt. It is noteworthy that Guideline 16 of the Guidelines on the Role of Prosecutors also provides that prosecutors shall refuse evidence that has been obtained through recourse to unlawful methods.⁸⁴

The right not to be compelled to incriminate oneself and to confess guilt is also contained in article 55(1)(a) of the Statute of the International Criminal Court and in articles 20(4)(g) and 21(4)(g) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia.

Article 14(3)(g) of the Covenant has been violated on several occasions, such as where the author had been “forced by means of torture to confess guilt”. He had in fact been held *incommunicado* for three months, a period during which he was “subjected to extreme ill-treatment and forced to sign a confession”.⁸⁵ While grave situations of this kind are clearly incompatible with the prohibition on forced self-incrimination, there are, as will be seen below, other circumstances when it might be more difficult to assess the lawfulness of the compulsion to which an accused person has been subjected.

From the right not to be compelled to testify against oneself flows *the right to remain silent*, although the four human rights treaties examined in this Manual do not expressly provide for this right either during police questioning or during trial

⁸⁴See Principle 16 quoted *in extenso*, section 6.2 above.

⁸⁵Communication No. 139/1983, *H. Conteris* (Views adopted on 17 July 1985), UN doc. GAOR, A/40/40, p. 202, para. 10 read in conjunction with p. 201, para. 9.2. For another case of forced self-incrimination, see Communication No. 159/1983, *R. Cariboni v. Uruguay* (Views adopted on 27 October 1987), UN doc. GAOR, A/43/40, para. 10 at p. 190.

proceedings. However, Rule 42(A)(iii) of the Rules of Procedure and Evidence of both the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia makes express reference to this right, as does article 55(2)(b) of the Statute of the International Criminal Court. Furthermore, the European Court of Human Rights has unequivocally held that

“there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are *generally recognized international standards* which lie at the heart of the notion of a fair procedure under Article 6. ... By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and to securing the aims of Article 6.”⁸⁶

Is the right to remain silent absolute? View of the European Court of Human Rights

In this particular case, the applicant was arrested under the Prevention of Terrorism (Temporary Provisions) Act 1989 and cautioned by the police officer pursuant to article 3 of the Criminal Evidence (Northern Ireland) Order 1988 that, although he did not have to say anything unless he wished to do so, his silence might be treated in court as supporting any relevant evidence against him; he was subsequently cautioned several times. The applicant was arrested coming down the stairs in a house in which alleged IRA terrorists were apprehended together with their victim. During his trial for the offence of conspiracy to murder, the applicant remained silent but was again cautioned that the court, in deciding whether he was guilty, might take into account against him “to the extent that it considers proper” his “refusal to give evidence or to answer any questions”.⁸⁷ He was found guilty of the offence of aiding and abetting the unlawful imprisonment of the man against whom there was a conspiracy to murder, but acquitted on the other charges.

The European Court refrained in this case from giving “an abstract analysis of the scope of” the right to remain silent and the privilege against self-incrimination and, in particular, of what constitutes in this context “improper compulsion”, because what was at stake was

“whether these immunities are absolute in the sense that the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, is always to be regarded as ‘improper compulsion’”.⁸⁸

⁸⁶ Eur. Court HR, *Case of John Murray v. the United Kingdom*, judgment of 8 February 1996, Reports 1996-I, p. 49, para. 45; emphasis added.

⁸⁷ Ibid., p. 38, para. 20.

⁸⁸ Ibid., p. 49, para. 46.

*Is the right to remain silent absolute?
View of the European Court of Human Rights (cont.d)*

While it was “self-evident” to the Court “that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused’s silence or on a refusal to answer questions or to give evidence himself”, it was “equally obvious that these immunities cannot and should not prevent that the accused’s silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution”. It followed that, “wherever the line between these two extremes is to be drawn”, the question whether the right to be silent “is absolute must be answered in the negative”.⁸⁹ It thus also followed that it “cannot be said ... that an accused’s decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him”. Agreeing with the respondent Government, the Court further observed that “established international standards in this area, while providing for the right to silence and the privilege against self-incrimination are silent on this point”.⁹⁰ This also meant that the question whether

“... the drawing of adverse inferences from an accused’s silence infringes article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation”.⁹¹

The European Court carefully analysed the powers of the national trial judge and concluded that he could only draw “common-sense inferences which [he] considers proper, in the light of the evidence against the accused”. In addition, the trial judge had “a discretion whether, on the facts of the particular case, an inference should be drawn”, and, finally, the exercise of discretion was “subject to review by the appellate courts”.⁹² Against the background of this particular case, the European Court eventually denied that “the drawing of *reasonable* inferences from the applicant’s behaviour had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence”.⁹³

It is, however, too early to know whether the above European interpretation of the right to silence will be shared by the Human Rights Committee and/or the other regional monitoring organs.

⁸⁹Ibid., para. 47.

⁹⁰Ibid., loc. cit.

⁹¹Ibid., pp. 49-50, para. 47.

⁹²Ibid., para. 51 at p. 51.

⁹³Ibid., loc. cit.; emphasis added.

The Statute of the International Criminal Court: It is noted in this respect that article 55(2)(b) of the Statute of the International Criminal Court provides that a suspect shall be informed prior to questioning that he has a right to “remain silent, ***without such silence being a consideration in the determination of guilt or conscience***” (emphasis added). Whilst the terms of this Statute cannot be considered to be an authoritative interpretation of the human rights treaties examined in this Manual, it constitutes a legal document with considerable juridical weight. This important subject gives rise to the following questions:

- ❖ Can the European Court’s ruling in the *Murray* case be considered to be consistent with article 55(2)(b) of the Statute of the International Criminal Court?
- ❖ Does the reliance on the role played by “common sense implications” provide a sufficient guarantee against possible miscarriages of justice?
- ❖ Is this notion sufficiently clear to have a place in the evaluation of evidence in criminal proceedings?
- ❖ What if, for instance, the suspect refused to speak out of fear of reprisals by the co-accused and other persons?

A suspect must at no time, and in no circumstances, be compelled to incriminate himself or herself or to confess guilt; a suspect has the right to remain silent at all times.

6.6 The duty to keep records of interrogation

It is essential, both in order to prevent and if need be to prove the occurrence of treatment prohibited by international human rights law, and consequently also for the future judicial proceedings, that records of interrogations be kept and that they remain accessible both to prosecuting authorities and to the defence. On this issue, the Human Rights Committee stated in its General Comment No. 20 regarding article 7 of the International Covenant that “the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings”.⁹⁴

Principle 23 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment deals with the duty to record in the following terms:

- “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.”

⁹⁴United Nations Compilation of General Comments, p. 140, para. 11.

Rule 43 of the Rules of Procedure and Evidence of the International Criminal Tribunals for Rwanda and the former Yugoslavia provides that interrogations of suspects “shall be audio-recorded or video-recorded”, in accordance with a special procedure detailed therein. The suspect shall be supplied with a copy of the transcript of this recording (Rule 43(iv)).

Detailed records of interrogations must be kept at all times and must be made available to the suspect and his or her legal counsel.

6.7 The right to adequate time and facilities to prepare one’s defence

Article 14(3)(b) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge against him, everyone shall be entitled “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”. Article 8(2)(c) of the American Convention on Human Rights guarantees the accused “adequate time and means for the preparation of his defence”, while article 6(3)(b) of the European Convention on Human Rights speaks of “adequate time and facilities for the preparation of his defence”. Article 7(1) of the African Charter on Human and Peoples’ Rights globally guarantees “the right to defence, including the right to be defended by counsel of his choice”. Articles 20 and 21 respectively of the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia were heavily inspired by article 14 of the International Covenant and both provide that the accused shall “have adequate time and facilities for the preparation of his [or her] defence and to communicate with counsel of his or her own choosing” (arts. 20(4)(b) and 21(4)(b)). Since this right will be examined in fuller detail in Chapter 7, only a limited number of examples from the international jurisprudence will be examined here, since they more particularly concern the lack of time and facilities to prepare one’s defence at an early stage of the investigations.

As emphasized by the Human Rights Committee, “the right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms”.⁹⁵ In General Comment No. 13 on article 14, the Committee also explained that the meaning of “*adequate time*” depends on the circumstances of each case, but the *facilities* must include access to *documents and other evidence* which the accused requires to prepare his case, as well as the opportunity to engage and communicate with *counsel*. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer.⁹⁶ This provision moreover “requires counsel to communicate

⁹⁵Communication No. 349/1989, *C. Wright v. Jamaica* (Views adopted on 27 July 1992), UN doc. GAOR, A/47/40, p. 315, para. 8.4; and similar wording in Communication No. 702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997), UN doc. GAOR, A/52/40, p. 232, para. 5.10.

⁹⁶*United Nations Compilation of General Comments*, p. 124, para. 9; emphasis added.

with the accused in conditions giving *full respect for the confidentiality of their communications*”, and lawyers “should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter”.⁹⁷

Where the author claimed that he did not have adequate time and facilities for the preparation of his defence, the Committee noted that he was actually “represented at trial by the same counsel who had represented him at the preliminary examination”, and further, that “neither the author nor counsel ever requested the Court for more time in the preparation of the defence”; consequently, there was no violation of article 14(3)(b).⁹⁸ *If the defence considers that it has not had sufficient time and facilities to prepare itself, it is thus important that it requests an adjournment of the proceedings.*

The Committee has however emphasized that “in cases in which *a capital sentence* may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial”, and that “this requirement applies to *all* the stages of the judicial proceedings”; again, however, “the determination of what constitutes ‘adequate time’ requires an assessment of the individual circumstances of each case”.⁹⁹

The case of Wright

In the case of *Wright*, the author contended that he had not had adequate time for the preparation of the defence, “that the attorney assigned to the case was instructed on the very day on which the trial began”, and that, therefore, “he had less than one day to prepare the case”.¹⁰⁰ The Committee accepted that “there was considerable pressure to start the trial as scheduled” because of the arrival of a witness from the United States and that it was “uncontested” that, as submitted by the author, the lawyer was appointed “on the very morning the trial was scheduled to start” and, accordingly, “had less than one day to prepare” the author’s defence; yet it was “equally uncontested that no adjournment of the trial was requested by” the author’s counsel.¹⁰¹ Consequently, the Committee did “not consider that the inadequate preparation of the defence may be attributed to the judicial authorities of the State party”, adding that “if counsel had felt that they were not properly prepared, *it was incumbent upon them to request the adjournment of the trial*”.¹⁰² It followed that there was no violation of article 14(3)(b) in this case. The applicant was convicted of murder and sentenced to be executed.

⁹⁷Ibid., loc. cit.; emphasis added.

⁹⁸Communication No. 528/1993, *M. Steadman v. Jamaica* (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 26, para. 10.2.

⁹⁹Communication No. 349/1989, *C. Wright v. Jamaica* (Views adopted on 27 July 1992), UN doc. GAOR, A/47/40, p. 315, para. 8.4; emphasis added.

¹⁰⁰Ibid., p. 311, para. 3.4.

¹⁰¹Ibid., pp. 315-316, para. 8.4.

¹⁰²Ibid., loc. cit.; emphasis added. For a similar reasoning in a death penalty case see also Communication No. 702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997), UN doc. GAOR, A/52/40, p. 232, para. 5.10.

In the light of the outcome in the *Wright* case, it might be asked whether, in death penalty cases or in other cases where a heavy prison sentence may be imposed on the accused at the end of his or her trial, it is fair to lay the *entire* burden for compliance with article 14(3)(b) on the defence. In the interests of justice, might the judge concerned perhaps have a duty to see to it that the accused is indeed ensured adequate time and facilities for the preparation of his defence?

The case of Smith

In the case of *Smith*, another death penalty case, the Committee concluded that article 14(3)(b) had in fact been violated. In this case the author also complained that his trial was unfair, and that he had inadequate time to prepare his defence since he could only consult with his lawyer on the opening day of his trial and that, as a result, a number of key witnesses could not be called. According to the Committee it was “uncontested that the trial defence was prepared on the first day of the trial”; one of the author’s court-appointed lawyers asked another lawyer to replace him, and another had withdrawn the day prior to the beginning of the trial. The attorney who actually defended the author was present in court at 10 a.m. when the trial opened and asked for an adjournment until 2 p.m. “so as to enable him to secure professional assistance and to meet with his client, as he had not been allowed by the prison authorities to visit him late at night the day before”.¹⁰³ The request was granted and the lawyer consequently “had only four hours to seek an assistant and to communicate with the author, which he could only do in a perfunctory manner”.¹⁰⁴ This, the Committee concluded, was “insufficient to prepare adequately the defence in a capital case” and there was moreover “the indication that this affected counsel’s possibility of determining which witnesses to call”.¹⁰⁵ Consequently, these facts constituted a violation of article 14(3)(b) of the Covenant.¹⁰⁶

In the *Smith* case the defence actually asked for a brief adjournment. What do you think the Committee would have decided if such an adjournment had not been requested by the defence lawyer?

Incommunicado detention: Article 14(3)(b) was also violated in the case of *Marais*, who was unable to communicate with his lawyer and to prepare his defence, except for two days during the trial itself. Although the lawyer had “obtained a permit from the Examining Magistrate to see his client, he was repeatedly prevented from doing so”, his client being held *incommunicado*.¹⁰⁷ Both article 14(3)(b) and article 14(3)(d) were violated in the case of *Yasseen and Thomas*, where Yasseen had no legal

¹⁰³Communication No. 282/1988, *L. Smith v. Jamaica* (Views adopted on 31 March 1993), UN doc. A/48/40 (vol. II), p. 35, para. 10.4.

¹⁰⁴*Ibid.*, loc. cit.

¹⁰⁵*Ibid.*

¹⁰⁶*Ibid.*

¹⁰⁷Communication No. 49/1979, *D. Marais, Jr. v. Madagascar* (Views adopted on 24 March 1983), UN doc. G.AOR, A/38/40, p. 148, para. 17.3 and p. 149, para. 19.

representation for the first four days of his trial, at the end of which a death sentence was imposed.¹⁰⁸

In numerous cases brought against Uruguay in the 1970s and the beginning of the 1980s this particular provision was violated, among others, and common features of these cases were that the authors had been arrested and detained on suspicion of being involved in subversive or terrorist activities, held *incommunicado* for long periods, subjected to torture or other ill-treatment and subsequently tried and convicted by military courts.¹⁰⁹ Article 14(3)(b) was also violated in the case of *Wight* against Madagascar, who was “kept incommunicado without access to legal counsel” during a ten-month period “while criminal charges against him were being investigated and determined”.¹¹⁰ Further, in the case of *Peñarrieta et al.*, the Committee concluded that article 14(3)(b) had been violated because the authors had had no access to legal counsel “during the initial 44 days of detention”, i.e. when they were kept *incommunicado* following their arrest.¹¹¹

Incommunicado detention that lasts for weeks or even months is a particularly serious violation of the right to respect for several human rights, among them the right to prepare one’s defence. However, even brief periods of *incommunicado* detention may have serious adverse effects on the detained person’s rights, including his right to defend himself, and, as stated by the Human Rights Committee, provisions should therefore “also be made against incommunicado detention”.¹¹²

Access to documents: With regard to *access to documents* by the accused and/or his or her legal counsel, the Committee has specified that article 14(3)(b) “does not explicitly provide for a right of a charged person to be furnished with copies of all relevant documents in a criminal investigation, but does provide that he shall ‘have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing’”. In one case the author had been able, for almost two months prior to the court hearing of his case, either “personally or through his lawyer”, to examine “documents relevant to his case at the police station”, although he had chosen “not to do so, but requested that copies of all documents be sent to him”. Article 14(3)(b) of the Covenant had not, consequently, been violated in this case.¹¹³

Furthermore, according to the Committee’s case-law, “the right to fair trial does not entail that an accused who does not understand the language used in Court, has the right to be furnished with translations of all relevant documents in a criminal investigation, *provided that the relevant documents are made available to his*

¹⁰⁸Communication No. 676/1996, *A. S. Yasseen and N. Thomas v. Guyana* (Views adopted on 30 March 1998), UN doc. GAOR, A/53/40 (vol. II), p. 161, para. 7.8.

¹⁰⁹See, for example, Communication No. R.13/56, *L. Celiberti de Casariego v. Uruguay* (Views adopted on 29 July 1981), UN doc. GAOR, A/36/40, p. 188, para. 11; Communication No. 43/1979, *A. D. Caldas v. Uruguay* (Views adopted on 21 July 1983), UN doc. GAOR, A/38/40, p. 196, para. 14; and Communication No. R.17/70, *M. Cubas Simones v. Uruguay* (Views adopted on 1 April 1982), UN doc. GAOR, A/37/40, pp. 177-178, para. 12.

¹¹⁰Communication No. 115/1982, *J. Wight v. Madagascar* (Views adopted on 1 April 1985), UN doc. GAOR, A/40/40, p. 178, para. 17.

¹¹¹Communication No. 176/1984, *L. Peñarrieta et al. v. Bolivia* (Views adopted on 2 November 1987), UN doc. GAOR, A/43/40, p. 207, para. 16.

¹¹²General Comment No. 20 on article 7, *United Nations Compilation of General Comments*, p. 140, para. 11.

¹¹³Communication No. 158/1983, *O. F. v. Norway* (decision adopted on 26 October 1984), UN doc. GAOR, A/40/40, p. 211, para. 5.5.

counsel".¹¹⁴ Where a British citizen tried in Norway had a Norwegian lawyer of his own choice, who had access to the entire file and who had moreover the assistance of an interpreter in his meetings with the author, neither the right to a fair trial in article 14(2) nor the right to have adequate facilities to prepare his defence as provided by article 14(3)(b) was violated. An additional factor in this case was that if the lawyer had considered that he had not enough time to familiarize himself with the file, he could have requested an adjournment, which he did not do.¹¹⁵

Article 8(2)(c) of the American Convention on Human Rights was violated in the case of *Castillo Petruzzi et al.* where "the conditions under which the defence attorneys had to operate were wholly inadequate for a proper defence, as they did not have access to the case file until the day before the ruling of first instance was delivered". In the view of the Inter-American Court of Human Rights, "the effect was that the presence and participation of the defence attorneys were mere formalities", and consequently, it could "hardly be argued that the victims had adequate means of defence".¹¹⁶

An accused person must always have adequate time and facilities to prepare his or her defence, including effective access to documents and other evidence which are essential for his or her defence.

Incommunicado detention interferes with the right to ensure an efficient defence and should be outlawed.

7. Concluding Remarks

Without being exhaustive, this chapter has described some of the essential human rights that must be guaranteed during pre-trial investigation into criminal activities. These comprise a number of rights essential to preserving not only a suspect's physical and mental integrity, but also his or her right to secure an effective defence throughout these early proceedings and subsequently during the trial itself. In order for these rights to be effectively realized, all legal professions, that is to say, judges, prosecutors and lawyers alike, have an essential role to play. The police and prosecutorial authorities have a professional duty under international law to protect these rights, as do the domestic judges, who must at all times be alert to any sign that such important rights as the right to freedom from torture, the right to effective access to legal counsel, the right not to be compelled to testify against oneself and the right to

¹¹⁴Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 18, para. 14.1; emphasis added.

¹¹⁵Communication No. 451/1991, *B. S. Harvard v. Norway* (Views adopted on 15 July 1994), UN doc. GAOR, A/49/40 (vol. II), p. 154, para. 9.5.

¹¹⁶I-A Court HR, *Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, p. 202, para. 141.

prepare an effective defence have not been respected. Add to these rights the basic rights to equality before the law and to presumption of innocence, and it can be concluded that international human rights law provides an important foundation for the creation of a judicial system that will function on the basis of respect for the rule of law and individual rights, for the ultimate purpose of administering justice fairly and efficiently.

.....Chapter 7

THE RIGHT TO A FAIR TRIAL: PART II – FROM TRIAL TO FINAL JUDGEMENT

Learning Objectives

- *To familiarize course participants with some of the international legal rules concerning the rights of persons charged with criminal offences throughout the trial stage, and the application of these rules by international monitoring organs;*
- *To sensitize participants to the importance of applying these legal rules in order to protect a broad range of human rights in a society based on the rule of law;*
- *To create an awareness among the participating judges, prosecutors and lawyers of their primordial role in enforcement of the rule of law, including the right to a fair trial in all circumstances, including crisis situations.*

Questions

- *Are you already conversant with the international legal rules relating to a fair trial?*
- *Do these rules already form part of the national legal system within which you are working?*
- *If so, what is their legal status and have you ever been able to apply them?*
- *In the light of your experience, do you have any particular concerns – or have you experienced any specific problems – when ensuring a person’s human rights at the pre-trial or trial stage?*
- *If so, what were these concerns or problems and how did you address them, given the legal framework within which you work?*

Questions (cont.d)

- *Which issues would you like to have specifically addressed by the facilitators/trainers during this course?*
- *Would you have any advice to give to judges, prosecutors and lawyers exercising their professional responsibilities in difficult situations, in order to help them secure the application of fair trial rules?*

Relevant Legal Instruments

Universal Instruments

- International Covenant on Civil and Political Rights, 1966
- Statute of the International Criminal Court, 1998

- Guidelines on the Role of Prosecutors, 1990
- Basic Principles on the Role of Lawyers, 1990

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- European Convention on Human Rights, 1950

1. Introduction

This chapter, which is a logical continuation of Chapter 6, which dealt with some of the fundamental human rights that must be guaranteed at the stage of criminal investigations, will be devoted to the international legal rules that apply to the trial stage. It will also deal with some important related issues, such as the limits on punishment, the right to appeal, the right to compensation in the event of miscarriage of justice, and the question of fair trial and special tribunals. A brief reference will also be made to the right to a fair trial in public emergencies, a subject that will be considered in further depth in Chapter 16.

What is important to bear in mind throughout this chapter, however, are the two fundamental rules that were dealt with in Chapter 6, namely, *the right to equality before the law and the right to presumption of innocence*, which also condition the trial proceedings from their beginning to the delivery of the final judgement.

Lastly, some issues considered in Chapter 6 will again surface in the present chapter, owing to the fact that the pre-trial and trial stages are intrinsically linked. However, overlapping has been kept to a strict minimum.

2. The Legal Provisions

The major legal provisions on fair trial are to be found in article 14 of the International Covenant on Civil and Political Rights, article 7 of the African Charter on Human and Peoples' Rights, article 8 of the American Convention on Human Rights and article 6 of the European Convention on Human Rights. The relevant provisions of these articles will be dealt with below under the appropriate headings. Additional rules to which reference will be made below are, among others, the Guidelines on the Role of Prosecutors, the Basic Principles of the Role of Lawyers and the Statutes of the International Criminal Court and the International Criminal Tribunals for Rwanda and the former Yugoslavia.

3. Human Rights during Trial

3.1 The right to be tried by a competent, independent and impartial tribunal established by law

The right to be tried by an independent and impartial tribunal must be applied at all times and is a right contained in article 14(1) of the International Covenant on Civil and Political Rights, which provides that “in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be

entitled to a fair and public hearing by a **competent, independent and impartial tribunal** established by law” (emphasis added). Although article 7(1) of the African Charter on Human and Peoples’ Rights speaks only of a “competent” (art. 7(1)(b)) or “impartial” (art. 7(1)(d)) court or tribunal, article 26 of the Charter imposes a legal duty on the States parties also “to guarantee the independence of the Courts”. Article 8(1) of the American Convention refers to “a competent, independent, and impartial tribunal, previously established by law”, and article 6(1) of the European Convention on Human Rights to “an independent and impartial tribunal established by law”. Lastly, article 40 of the Statute of the International Criminal Court provides that “the judges shall be independent in the performance of their functions” and that they “shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence”. However, since the question of independence and impartiality of tribunals is considered in some depth in Chapter 4, it will not be further examined here.

3.2 The right to a fair hearing

The notion of a “*fair*” hearing is contained both in article 14(1) of the International Covenant on Civil and Political Rights and in article 6(1) of the European Convention on Human Rights, while article 8(1) of the American Convention on Human Rights speaks of “*due guarantees*” (emphasis added). The African Charter on Human and Peoples’ Rights provides no specification in this respect, but it should be pointed out that, according to article 60 of the Charter, the African Commission on Human and Peoples’ Rights “shall draw inspiration” from other international instruments for the protection of human and peoples’ rights, a provision that enables the Commission to be inspired, inter alia, by the provisions of article 14 of the International Covenant on Civil and Political Rights when interpreting the trial guarantees laid down in article 7 of the Charter. Articles 20(2) and 21(2) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia both provide that the accused shall be entitled to a fair and public hearing in the determination of charges against him or her, although with the proviso that the protection of victims and witnesses may require measures which “shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim’s identity” (arts. 21 and 22 of the respective Statutes). The rights of the accused as contained in these Statutes are heavily inspired by article 14 of the International Covenant.

With regard to the minimum guarantees contained in article 14(3) of the Covenant with respect to criminal proceedings, the Human Rights Committee has pointed out in General Comment No. 13 that their observance “is not always sufficient to ensure the fairness of a hearing as required by paragraph 1”¹ of article 14, which may thus impose further obligations on the States parties. In particular, when it comes to cases in which a capital sentence may be imposed, “the obligation of States parties to observe rigorously *all* the guarantees for a fair trial set out in article 14 of the Covenant *admits of no exception*”.²

Below, a few examples from universal and regional jurisprudence will show the diversity of situations in the course of trial proceedings that may amount to a violation of the right to a fair hearing. More details as to the fairness of hearings will be given in subsection 3.2.2 regarding “The right to equality of arms and adversarial proceedings”.

The right to a fair trial in article 14(1) of the Covenant was violated in a case where the trial court failed “to control the hostile atmosphere and pressure created by the public in the court room, which made it impossible for defence counsel to properly cross-examine the witnesses and present” the author’s defence. Although the Supreme Court referred to this issue, it “failed to specifically address it when it heard the author’s appeal”.³ The right to a fair trial under article 14(1) was further violated in a case where the prosecutor entered a *nolle prosequi* plea in a trial after the author had pleaded guilty to manslaughter. The Committee considered that, in the circumstances of the case, the “purpose and effect” of the *nolle prosequi* “were to circumvent the consequences” of the author’s guilty plea, in that rather than using it to discontinue the proceedings against the author, it enabled the prosecution to bring a fresh prosecution against the author immediately on exactly the same charge.⁴

¹United Nations Compilation of General Comments, p. 123, para. 5.

²Communication No. 272/1988, *A. Thomas v. Jamaica* (Views adopted on 31 March 1992), in UN doc. GAOR, A/47/40, p. 264, para. 13.1; emphasis added.

³Communication No. 770/1997, *Gridin v. Russian Federation* (Views adopted on 20 July 2000), in UN doc. GAOR, A/55/40 (vol. II), p. 176, para. 8.2. The author alleged inter alia that the court room was crowded with people who were screaming that he should be sentenced to death; *ibid.*, p. 173, para. 3.5.

⁴Communication No. 535/1993, *L. Richards v. Jamaica* (Views adopted on 31 March 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 43, para. 7.2.

*The “Street Children” case:
Fairness from the point of view of the victims*

The so-called “*Street Children*” case against Guatemala concerned the abduction, torture and murder of four “street children”, the killing of a fifth, and the failure of State mechanisms to deal appropriately with these violations and provide the victims’ families with access to justice. Criminal proceedings were instituted but nobody was punished for the crimes committed. The Inter-American Court of Human Rights concluded that the relevant facts constituted a violation of article 1(1) of the American Convention on Human Rights “in relation to its article 8”, since the State had “failed to comply with the obligation to carry out an effective and adequate investigation of the corresponding facts”, i.e. the abduction, torture and murder of the victims.⁵ According to the Court, the domestic proceedings had “two types of serious defect”: *first*, “investigation of the crimes of abduction and torture was completely omitted”, and, *second*, “evidence that could have been very important for the due clarification of the homicides was not ordered, practised or evaluated”.⁶ It was thus “evident” that the domestic judges had “fragmented the probative material and then endeavoured to weaken the significance of each and every one of the elements that proved the responsibility of the defendants, item by item”, and that this contravened “the principles of evaluating evidence, according to which, the evidence must be evaluated as a whole, ... taking into account mutual relationships and the way in which some evidence supports or does not support other evidence”.⁷ In this case the Court also importantly emphasized that

“it is evident from article 8 of the Convention that the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation”.⁸

As can be seen, the due process guarantees thus also condition the very procedure whereby domestic authorities investigate and prosecute human rights violations.

The right to be heard in person: The right to a fair trial as guaranteed by article 6(1) of the European Convention on Human Rights was violated in the case of *Botten*, where the Supreme Court of Norway gave a new judgement, convicting and sentencing the applicant, in spite of not having summoned or heard him in person. This was so, although the proceedings before the Court had included a public hearing at which the applicant was represented by counsel. In the view of the European Court, the “Supreme Court was under a duty to take positive measures” to “summon the applicant and hear evidence from him directly before passing judgement”.⁹

⁵I-A Court HR, *Villagrán Morales et al. Case (The “Street Children” Case) v. Guatemala, judgment of November 19, 1999, Series C, No. 63*, p. 198, para. 233.

⁶Ibid., p. 196, para. 230; for more details see *ibid.*, pp. 196-198, paras. 231-232.

⁷Ibid., p. 198, para. 233.

⁸Ibid., p. 195, para. 227.

⁹*Eur. Court HR, Case of Botten v. Norway, judgment of 19 February 1996, reports 1996-I*, p. 145, para. 53.

The right to a fair trial was further violated in the *Bricmont* case, where the applicant had been convicted on several criminal charges with the Court of Appeal relying on accusations of the civil party, a member of the royal family, who had joined the criminal prosecution in order to seek damages. However, on some of the charges on which the Court of Appeal found the applicant guilty, the latter was convicted after proceedings which violated his defence rights as guaranteed by article 6; indeed, the applicant had had no “opportunity, afforded by an examination or a confrontation, to have evidence taken from the complainant, in his presence, on all the charges”, there having been confrontation only in respect of one count.¹⁰

The right to a fair trial can be violated in many ways, but as a general principle it has always to be borne in mind that the accused person must at all times be given a genuine possibility of answering charges, challenging evidence, cross-examining witnesses, and doing so in a dignified atmosphere.

Failures and shortcomings at the stage of criminal investigations may seriously jeopardize the right to fair trial proceedings and thereby also prejudice the right to be presumed innocent.

3.2.1 The right of access to a court or tribunal

With regard to the right of access to the courts, the European Court of Human Rights has ruled that article 6(1) “secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal”; where a prisoner was refused permission by the United Kingdom Home Secretary to consult a solicitor in order to bring a civil action for libel against a prison officer, this refusal constituted a violation of the applicant’s “right to go before a court as guaranteed by” article 6(1).¹¹ The same issue arose in the case of *Campbell and Fell* where the applicants complained of a delay by the prison authorities in granting them permission to seek legal advice for injuries they had sustained during an incident in a prison. Although they were eventually granted the permission they sought, the Court emphasized that “for evidentiary and other reasons speedy access to legal advice is important in personal-injury cases” and that “hindrance, even of a temporary character, may contravene the Convention”.¹²

It is also of interest to point out that in cases where administrative authorities decide administrative offences which amount to a “criminal charge” under article 6(1) of the European Convention – such as cases of speeding on motorways – and, if the decisions taken by the administrative authorities do not themselves satisfy the requirements of article 6(1) of the Convention, they “must be subject to subsequent control by a ‘judicial body that has full jurisdiction’”.¹³ This means that the judicial body must have “the power to quash in all respects, on *questions of law and fact*”, the

¹⁰Eur. Court HR, *Bricmont Case*, judgment of 7 July 1989, Series A, No. 158, pp. 30-31, paras. 84-85.

¹¹Eur. Court HR, *Golder Case v. the United Kingdom*, judgment of 21 February 1975, Series A, No. 18, p. 18, para. 36 and p. 19, para. 40 at p. 20.

¹²Eur. Court HR, *Case of Campbell and Fell*, judgment of 28 June 1984, Series A, No. 80, p. 46, para. 107.

¹³Eur. Court HR, *Case of Palaoro v. Austria*, judgment of 23 October 1995, Series A, No. 329-B, p. 40, para. 41.

decision of the lower authority.¹⁴ If in these circumstances a Constitutional Court can examine only points of law, it does not fulfil the requirements of article 6(1), and, similarly, if the Administrative Court has no power to quash the decision “on questions of fact and law”, it cannot, in the view of the European Court, be considered as a “tribunal” for the purposes of article 6(1).¹⁵

In numerous other cases which will not be examined here, the European Court has also found a violation of the right of access to courts to have one’s civil rights and obligations, including property rights and the right of access to one’s child, determined.¹⁶

Lastly, it should briefly be recalled here that the right of access to the courts also means, for instance, that men and women must have equal access thereto and that this equality might require the granting of legal aid for the purposes of securing the effectiveness of this right (cf. case-law under art. 14(1) of the International Covenant and art. 6(1) of the European Convention as explained in Chapter 6).¹⁷

The right of access to the courts means that no one must be hindered either by law, administrative procedures or material resources from addressing himself or herself to a court or tribunal for the purpose of vindicating his or her rights.

Women and men are entitled to equal access to the courts.

3.2.2 The right to equality of arms and adversarial proceedings

The notion of *equality of arms* is an essential feature of a fair trial, and is an expression of the balance that must exist “between the prosecution and the defence”.¹⁸ With regard to the concept of “fair trial” in article 14(1) of the International Covenant, the Human Rights Committee has explained that it “must be interpreted as requiring a number of conditions, such as equality of arms and respect for the principle of adversary proceedings”, and that “these requirements are not respected where ... the accused is denied the opportunity personally to attend the proceedings, or where he is unable properly to instruct his legal representative”. In particular, “the principle of equality of arms is not respected where the accused is not served a properly motivated indictment”.¹⁹

¹⁴Ibid., p. 41, para. 43; emphasis added.

¹⁵Ibid., loc. cit.

¹⁶*Eur. Court HR, Case of Allan Jacobsson v. Sweden, judgment of 25 October 1989, Series A. No. 163*, pp. 19-21, paras. 65-77 (property right); and *Eur. Court HR, Case of Eriksson v. Sweden, judgment of 22 June 1989, Series A, No. 156*, pp. 27-29, paras. 73-82 and p. 31, paras. 90-92 (question of access to children).

¹⁷See also Chapter 15 of this Manual with regard to the availability of effective domestic remedies for violations of human rights and fundamental freedoms.

¹⁸Communication No. 307/1988, *J. Campbell v. Jamaica* (Views adopted on 24 March 1993), in UN doc. *GAOR, A/48/40* (vol. II), p. 44, para. 6.4.

¹⁹Communication No. 289/1988, *D. Wolf v. Panama* (Views adopted on 26 March 1992), in UN doc. *GAOR, A/47/40*, pp. 289-290, para. 6.6.

The African Commission on Human and Peoples' Rights has held that "the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all". The Commission added that "***the right to equal treatment by a jurisdiction***, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial". They must, in other words, be able to "argue their cases ... on an equal footing". Secondly, "it entails the equal treatment of all accused persons by jurisdictions charged with trying them". Although "this does *not* mean that identical treatment should be meted out to all accused", the response of the Judiciary should be similar "when objective facts are alike".²⁰ Where, in a death penalty case, the Ngozi Court of Appeal in Burundi refused to accede to the accused person's plea for an adjournment of the proceedings in the absence of a lawyer, although it had earlier accepted an adjournment requested by the prosecutor, the African Commission concluded that the Court of Appeal had "violated the right to equal treatment, one of the fundamental principles of a right to a fair trial".²¹

The European Court of Human Rights has explained the principle of equality of arms as "one of the features of the wider concept of a fair trial" as understood by article 6(1) of the European Convention, which implies that "each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage *vis-à-vis* his opponent"; in this context, "importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice".²²

The principle of equality of arms was thus violated where, in his observations to the Supreme Court, the Attorney-General had stated that he opposed the applicant's appeal; these observations were never served on the defence, which could not comment on them.²³ The European Court noted that "the principle of the equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality", and that "it is a matter for the defence to assess whether a submission deserves a reaction. It is therefore unfair for the prosecution to make submissions to a court without the knowledge of the defence".²⁴

However, rather than referring to the principle of equality of arms, the European Court has sometimes instead emphasized ***the right to adversarial proceedings in both criminal and civil proceedings***, a right which "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of

²⁰ ACHPR, *Avocats Sans Frontières (on behalf of Gaëtan Bwampanye) v. Burundi*, Communication No. 231/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, paras. 26-27 of the text of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/231-99.html> (emphasis added).

²¹ *Ibid.*, para. 29.

²² *Eur. Court HR, Case of Bulut v. Austria*, judgment of 22 February 1996, Reports 1996-II, p. 359, para. 47.

²³ *Ibid.*, para. 49.

²⁴ *Ibid.*, pp. 359-360, para. 49.

and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision".²⁵ In the words of the Court, "various ways are conceivable in which national law may secure that this requirement is met", but "*whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon*".²⁶

Consequently, in the *Lobo Machado* case, which concerned proceedings regarding social rights, the Deputy Attorney-General advocated in an opinion – to which the applicant had no access – that the appeal to the Supreme Court be dismissed; this constituted a breach of article 6(1) which was "aggravated by the presence of the Deputy Attorney-General at the Supreme Court's private sitting".²⁷

The case of Brandstetter

In the case of *Brandstetter*, which concerned defamation proceedings, the Vienna Court of Appeal had relied on submissions of the Senior Public Prosecutor which had not been sent to the applicant and of which he and his lawyer were not even aware. For the Court, it did not help in this case that the Supreme Court had subsequently quashed the relevant appeal court judgement: in its view an "indirect and purely hypothetical possibility for an accused to comment on prosecution arguments included in the text of a judgement can scarcely be regarded as a proper substitute for the right to examine and reply directly to submissions made by the prosecution". Furthermore, "the Supreme Court did not remedy this situation by quashing the first judgment since its decision was based on a ground entirely unrelated to the matter in issue".²⁸

The right to equality of arms or the right to truly adversarial proceedings in civil and criminal matters forms an intrinsic part of the right to a fair hearing and means that there must at all times be a fair balance between the prosecution/plaintiff and the defence. At no stage of the proceedings must any party be placed at a disadvantage vis-à-vis his or her opponent.

²⁵ Eur. Court HR, *Case of Lobo Machado v. Portugal*, judgment of 20 February 1996, Report 1996-I, para. 31 at p. 207.

²⁶ Eur. Court HR, *Case of Brandstetter v. Austria*, judgment of 28 August 1991, Series A, No. 211, pp. 27-28, para. 67; emphasis added.

²⁷ Eur. Court HR, *Case of Lobo Machado v. Portugal*, judgment of 20 February 1996, Report 1996-I, pp. 206-207, paras. 31-32.

²⁸ Eur. Court HR, *Case of Brandstetter v. Austria*, judgment of 28 August 1991, Series A, No. 211, p. 28, para. 68.

3.2.3 The detention of witnesses

The question of equality of arms arose under article 14 of the International Covenant in the case of *Campbell*, where the author complained that he had not had a fair trial and where his ten-year-old son had been detained to ensure that he would testify. The author was charged with assaulting his wife in connection with a marital dispute, and at the trial his son at first testified that he had not seen his father. According to the account given by the author, his son did not change his story, and at the end of the first day of the trial he was therefore taken to the police station, where he stayed overnight. The next day, he finally “allegedly broke down and testified against his father”.²⁹ However, after the end of the court proceedings, the son retracted his testimony in a written statement.

For the Human Rights Committee this was “a grave allegation”, and it emphasized “that the detention of witnesses in view of obtaining their testimony is an exceptional measure, which must be regulated by strict criteria in law and in practice”.³⁰ In this case it was “not apparent from the information ... that special circumstances existed to justify the detention of the author’s minor child”, and, moreover, “in the light of his retraction, serious questions” arose “about possible intimidation and about the reliability of the testimony obtained under these circumstances”. The Committee therefore concluded that “the author’s right to a fair trial was violated”.³¹

Under article 14(1) of the International Covenant it is only lawful to resort to the detention of witnesses in exceptional circumstances. It is uncertain to what extent such a measure would be acceptable under the other treaties.

3.2.4 Judge’s instructions to the jury

Several cases brought before the Human Rights Committee have concerned the alleged inadequacy of judges’ instructions to the jury. In these cases the Committee has consistently held that “it is generally for the appellate courts of States parties to the Covenant to evaluate facts and evidence in a particular case”, and it is not, therefore, “in principle”, for it

*“to review specific instructions to the jury by the judge in a trial by jury, unless it can be ascertained that the instructions to the jury were clearly arbitrary or amounted to a denial of justice, or that the judge manifestly violated his obligation of impartiality”.*³²

²⁹Communication No. 307/1988, *J. Campbell v. Jamaica* (Views adopted on 24 March 1993), in UN doc. *G.AOR*, A/48/40 (vol. II), p. 42, para. 2.3.

³⁰*Ibid.*, p. 44, paras. 6.3-6.4.

³¹*Ibid.*, p. 44, para. 6.4.

³²Communications Nos. 226/1987 and 256/1987, *M. Sawyers and M. and D. McLean v. Jamaica* (Views adopted on 11 April 1991), in UN doc. *G.AOR*, A/46/40, p. 233, para. 13.5; emphasis added.

The Committee has however observed that “the judge’s instructions to the jury must meet particularly high standards as to their thoroughness and impartiality in cases in which a capital sentence may be pronounced on the accused”, and that “this applies, *a fortiori*, to cases in which the accused pleads legitimate self-defence”.³³

In most cases the Committee has found no evidence that the trial judge’s instructions were arbitrary to the extent of amounting to a denial of justice,³⁴ in particular when it appears clear that “the trial judge put the respective versions of the prosecution and the defence fully and fairly to the jury”.³⁵ However, in the case of *Wright*, who was convicted and sentenced to death for murder, the judge’s omission was so serious as to amount to a **denial of justice** contrary to article 14(1) of the Covenant. In this case, a post-mortem showed that the shot from which the victim died had in fact been fired at a time when the author was already in police custody; this expert conclusion was not challenged and was available to the court.³⁶ Given “the seriousness of its implications”, the Committee was of the view that the Court should have brought this information “to the attention of the jury, even though it was not mentioned by counsel”.³⁷

In trials by jury, the judge’s instruction to the jury must be impartial and fair in that both the case of the prosecutor and that of the defence must be presented in such a way as to ensure the right to a fair hearing, which must be free from arbitrariness. A violation of this essential duty amounts to a denial of justice.

3.3 The right to a public hearing

The right to a public hearing in both civil and criminal cases is expressly guaranteed both by article 14(1) of the International Covenant on Civil and Political Rights and by article 6(1) of the European Convention on Human Rights, although the press and public “may be excluded from all or part of” a trial for certain specified reasons, namely, in the interest of morals, public order or national security in a democratic society, in the interest of the parties’ private lives, or where the interest of justice otherwise so requires. To this the European Convention also specifically adds “the interest of juveniles” as a ground for holding court proceedings *in camera*. Article 8(5) of the American Convention on Human Rights provides this right only with regard to criminal proceedings, which “shall be public, except insofar as may be necessary to protect the interests of justice”. Rule 79(A) in the identical versions of the Rules of

³³Communication No. 232/1987, *D. Pinto v. Trinidad and Tobago* (Views adopted on 20 July 1990), in UN doc. GAOR A/45/40 (vol. II), p. 73, para. 12.3.

³⁴See e.g. *ibid.*, loc. cit. and Communication No. 283/1988, *A. Little v. Jamaica* (Views adopted on 1 November 1991), in UN doc. GAOR, A/47/40, p. 282, para. 8.2.

³⁵Communication No. 232/1987, *D. Pinto v. Trinidad and Tobago* (Views adopted on 20 July 1990), in UN doc. GAOR A/45/40 (vol. II), p. 73, para. 12.4.

³⁶Communication No. 349/1989, *C. Wright v. Jamaica* (Views adopted on 27 July 1992), in UN doc. GAOR, A/47/40, p. 315, para. 8.3.

³⁷*Ibid.*, loc. cit.

Procedure and Evidence of the International Criminal Tribunals for Rwanda and the former Yugoslavia also refers to the possibility of the Trial Chamber going into closed session for reasons of public order or morality, safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75, or for the protection of the interests of justice. However, “the Trial Chamber shall make public the reasons for its order” (Rule 79(B)).

In General Comment No. 13, on article 14 of the Covenant, the Human Rights Committee emphasized that “the publicity of hearings is an important safeguard in the interest of the individual and of society at large”. Apart from the “exceptional circumstances” provided for in article 14(1), “a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons”.³⁸ Notwithstanding the non-publicity of the trial itself, “the judgement must, with certain strictly defined exceptions, be made public” under article 14 of the Covenant.³⁹

The duty to hold suits of law in public under article 14(1) is incumbent on the State, and “is not dependent on any request, by the interested party ... Both domestic legislation and judicial practice must provide for the possibility of the public attending, if members of the public so wish”.⁴⁰ This duty further implies that

“Courts must make information on time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, e.g., the potential public interest in the case, the duration of the oral hearing and the time the formal request for publicity has been made. Failure of the court to make large courtrooms available does not constitute a violation of the right to a public hearing, if in fact no interested member of the public is barred from attending an oral hearing.”⁴¹

The principle of publicity means that trials taking place in secret are contrary to article 14(1), such as in the case of eight former Zairian parliamentarians and one businessman whose trial – among other shortcomings – was not held in public and who were sentenced to fifteen years’ imprisonment, with the exception of the businessman, who received a five-year prison sentence.⁴²

Article 14(1) has naturally been violated in cases where the hearing has taken place *in camera* when the State party has failed to justify this measure in accordance with the terms of the Covenant.⁴³

³⁸United Nations *Compilation of General Comments*, pp. 123-124, para. 6.

³⁹*Ibid.*, para. 6 at p. 124.

⁴⁰Communication No. 215/1986, *G. A. van Meurs v. the Netherlands* (Views adopted on 13 July 1990), in UN doc. *GAOR*, A/45/40 (vol. II), p. 59, para. 6.1.

⁴¹*Ibid.*, p. 60, para. 6.2.

⁴²Communication No. 138/1983, *N. Mpandanjila et al. v. Zaire* (Views adopted on 26 March 1986), in UN doc. *GAOR*, A/41/40, p. 126, para. 8.2.

⁴³Communication No. 74/1980, *M. A. Estrella v. Uruguay* (Views adopted on 29 March 1983), in UN doc. *GAOR*, A/38/40, p. 159, para. 10.

The African Commission on Human and Peoples' Rights has held that, regardless of the fact that the right to a public trial is not expressly provided for in the African Charter, it is empowered by articles 60 and 61 of the Charter "to draw inspiration from international law on human and peoples' rights and to take into consideration as subsidiary measures other general or special international conventions, customs generally accepted as law, general principles of law recognized by the African States as well as legal precedents and doctrine". In support of the notion of publicity of hearings, the Commission then invoked the above-quoted terms of the Human Rights Committee's General Comment No. 13 on article 14(1) of the Covenant.⁴⁴ The African Commission next noted that the "exceptional circumstances" which might justify exceptions to the principle of publicity under article 14(1) of the Covenant are "exhaustive".⁴⁵ Where the respondent Government had made only "an omnibus statement in its defence", without specifying which exact circumstances prompted it to exclude the public from a trial, the Commission concluded that the right to a fair trial as guaranteed by article 7 of the African Charter had been violated.⁴⁶

The principle of public proceedings as guaranteed by article 8(5) of the American Convention on Human Rights was at issue in the case of *Castillo Petruzzi et al.*, where "all the proceedings in the case, even the hearing itself, were held out of the public eye and in secret", thus resulting in "a blatant violation of the right to a public hearing recognized in the Convention"; indeed, "the proceedings were conducted on a military base off limits to the public".⁴⁷

Under article 6(1) of the European Convention, proceedings must, with the exceptions mentioned above, be held in public. However, the application of this provision "to proceedings before appellate courts depends on the special features of the proceedings involved", and "account must be taken of the entirety of the proceedings in the domestic legal order and of the role of the appellate court therein".⁴⁸ The Court has thus consistently held that

"provided that there has been a public hearing at first instance, the absence of 'public hearings' at a second or third instance may be justified by the special features of the proceedings at issue. Thus proceedings for leave to appeal or proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Article 6 even when the appellant was not given an opportunity of being heard in person by the appeal or cassation court."⁴⁹

⁴⁴ ACHPR, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000, para. 51 of the text of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>.

⁴⁵ *Ibid.*, para. 52.

⁴⁶ *Ibid.*, paras. 53-54.

⁴⁷ I-A Court HR, *Castillo Petruzzi et al. case v. Peru*, judgment of May 30, 1999, Series C, No. 52, p. 211, paras. 172-173

⁴⁸ Eur. Court HR, *Case of Bulut v. Austria*, judgment of 22 February 1996, Reports 1996-II, p. 357, para. 40.

⁴⁹ *Ibid.*, p. 358, para. 41.

Applying this interpretation in the case of *Bulut*, the European Court found no violation although the Supreme Court used summary proceedings unanimously to refuse consideration of an appeal for lacking merit. The European Court was not satisfied that the grounds of nullity formulated by the applicant “raised questions of fact bearing on the assessment of [his] guilt or innocence that would have necessitated a hearing”.⁵⁰ Nor did the absence of a public hearing violate article 6(1) in the *Axen* case, where the German Federal Court had decided to dispense with a hearing since it unanimously considered the appeal on points of law to be ill-founded; before taking its decision it had however “duly sought the views of the parties”.⁵¹

The case of Weber

The right to a public hearing was however violated in the *Weber* case concerning breach of confidentiality of judicial investigation, where the President of the Criminal Cassation Division of the Vaud Cantonal Court in Switzerland – and then the Cassation Division itself – gave a judgement without such a hearing. It was not sufficient in this case that the subsequent proceedings in the Federal Court were public, since that Court “could only satisfy itself that there had been no arbitrariness” and was not competent to “determine all the disputed questions of fact and law”.⁵²

3.3.1 The right to a public judgement

Article 14(1) *in fine* of the International Covenant provides that “any judgement rendered in a criminal case or in a suit of law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”. Article 6(1) of the European Convention stipulates that judgement “shall be pronounced publicly”. Article 8(5) of the American Convention refers only to the publicity of the proceedings as such, while article 7 of the African Charter is silent on both issues. Articles 22(2) and 23(2) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia provide for the delivery “in public” of the judgement of the Trial Chamber. Finally, according to article 74(5) of the Statute of the International Criminal Court, the “decisions or a summary thereof shall be delivered in open court”.

As observed by the European Court, the object pursued by article 6(1) with regard to the publicity of judgements is “*to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial*”.⁵³ However, the Court has not adopted a literal interpretation of the words “judgement shall be pronounced publicly” but has instead taken into account, in its case-law, the “long-standing

⁵⁰Ibid., para. 42.

⁵¹Eur. Court HR, *Case of Axen v. Federal Republic of Germany*, judgment of 8 December 1983, Series A, No. 72, p. 12, para. 28.

⁵²Eur. Court HR, *Case of Weber v. Switzerland*, judgment of 22 May 1990, Series A, No. 177, p. 20, para. 39.

⁵³Eur. Court HR, *Case of Pretto and Others v. Italy*, judgment of 8 December 1983, Series A, No. 71, para. 27 at p. 13; emphasis added.

tradition” of many States of the Council of Europe in making public the decisions of some or all of their courts; such traditions may thus not necessarily imply the reading out loud of the judgements concerned, but can consist in depositing the judgements in a registry accessible to the public.⁵⁴ The European Court considers, therefore, “that in each case the form of publicity to be given to the ‘judgement’ under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose” of article 6(1).⁵⁵

The case of Pretto and Others

In the case of *Pretto and Others*, where the Italian Court of Cassation had made a ruling in civil proceedings which was not pronounced publicly, the European Court took account “of the entirety of the proceedings conducted in the Italian legal order and of the Court of Cassation’s role therein”, noting that its role was “confined to reviewing in law the decision of the Venice Court of Appeal”. The Court of Cassation “could not itself determine the suit, but only, on this occasion, dismiss the applicant’s appeal or, alternatively, quash the previous judgment and refer the case back to the trial court”.⁵⁶ After holding public hearings, the Court of Cassation dismissed the appeal, whereupon the Appeal Court’s judgement became final; the consequences for the applicant remained unchanged. Although the judgement dismissing the appeal on points of law was not delivered in open court, anyone could consult and obtain a copy thereof on application to the court registry.⁵⁷ In the opinion of the European Court the object of article 6(1) to ensure public scrutiny of the Judiciary was

“at any rate as regards cassation proceedings, no less achieved by a deposit in the court registry, making the full text of the judgement available to everyone, than by a reading in open court of a decision dismissing an appeal or quashing a previous judgement, such reading sometimes being limited to the operative provisions”.⁵⁸

It followed that the absence of public pronouncement of the Court of Cassation’s judgement did not constitute a breach of article 6(1) of the Convention.⁵⁹

⁵⁴Ibid., p. 12, paras. 25-26.

⁵⁵Ibid., para. 26.

⁵⁶Ibid., pp. 12-13, para. 27.

⁵⁷Ibid., para. 27 at p. 13.

⁵⁸Ibid., loc. cit.

⁵⁹Ibid., p. 13, para. 28. See also *Eur. Court HR, Sutter case v. Switzerland, judgment of 22 February 1984, Series A, No. 74*, pp. 14-15, paras. 31-34.

As a minimum, every person charged with a criminal offence has the right to public proceedings in the court of first instance and at all levels of appeal proceedings if the appeal concerns an assessment of both facts and law including the question of guilt.

A judgement in a criminal case must be made public except in exceptional circumstances. At the appeal stage, the duty to make a public pronouncement of judgements may in some cases be satisfied by making the relevant judgements available to the public at the court registry (Europe).

3.4 The right to be tried “without undue delay” or “within a reasonable time”

According to article 14(3)(c) of the International Covenant and articles 20(4)(c) and 21(4)(c) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, every person facing a criminal charge shall have the right “to be tried *without undue delay*” (emphasis added). In the words of article 7(1)(d) of the African Charter, article 8(1) of the American Convention and article 6(1) of the European Convention, everyone has the right to be heard “*within a reasonable time*” (emphasis added).

What it means to be tried “without undue delay”: In General Comment No. 13, the Human Rights Committee stated that the right to be tried without undue delay is a guarantee that “*relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place ‘without undue delay’*”. To make this right effective, a procedure must be available in order to ensure that the trial will proceed ‘without undue delay’, both in first instance and on appeal.”⁶⁰ This view has been further emphasized in the Committee’s jurisprudence, according to which article 14(3)(c) and (5) “are to be read together, so that the right to review of conviction and sentence must be made available without delay”.⁶¹

It is noteworthy that the Committee has also made it clear that “the difficult economic situation” of a State party is not an excuse for not complying with the Covenant, and it has emphasized in this respect “that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe”.⁶²

⁶⁰ *United Nations Compilation of General Comments*, p. 124, para. 10; emphasis added.

⁶¹ Communications Nos. 210/1986 and 225/1987, *E. Pratt and I. Morgan v. Jamaica* (Views adopted on 6 April 1989), in UN doc. GAOR, A/44/40, p. 229, para. 13.3.

⁶² Communication No. 390/1990, *B. Lubuto v. Zambia* (Views adopted on 31 October 1995), in UN doc. GAOR, A/51/40 (vol. II), p. 14, para. 7.3.

It is in principle for the State party concerned to show that the complexity of a case is such as to justify the delay under consideration by the Committee,⁶³ although a mere affirmation that the delay was not excessive is not sufficient;⁶⁴ the Committee will also examine whether the delay, or part of it, can be attributed to the authors, for instance when they decide to change lawyers.⁶⁵

The case of Pratt and Morgan

In the case of *Pratt and Morgan*, the authors were unable to proceed to appeal to the Privy Council because it took the Court of Appeal almost three years and nine months to issue a written judgement. The Committee did not accept the explanation of the State party that this delay “was attributable to an oversight and that the authors should have asserted their right to receive earlier the written judgement”; on the contrary, it considered that the responsibility for this delay lay with the judicial authorities, a responsibility that “is neither dependent on a request for production by the counsel in a trial nor is non-fulfilment of this responsibility excused by the absence of a request from the accused”.⁶⁶ In reaching its conclusion that this delay violated both article 14(3)(c) and (5), the Committee stated that “it matters not in the event that the Privy Council affirmed the conviction of the authors”, since “in all cases, and especially in capital cases, accused persons are entitled to trial and appeal without undue delay, whatever the outcome of those judicial proceedings turns out to be”.⁶⁷

The Human Rights Committee has examined numerous other cases involving alleged violations of this right, and only a few examples of its jurisprudence will be highlighted here. In one case, the Committee concluded that a delay of **29 months** from arrest to trial was contrary to article 14(3)(c); the mere affirmation by the State party that such a delay was not contrary to the Covenant did not constitute a sufficient explanation.⁶⁸ A delay of **two years** between arrest and trial was also considered to violate article 14(3)(c) (and article 9(3)) of the Covenant, and it was therefore not necessary for the Committee to “decide whether the further delays in the conduct of the trial [were] attributable to the State party or not”.⁶⁹ *A fortiori*, proceedings that have

⁶³Communication No. 336/1988, *A. Fillastre v. Bolivia* (Views adopted on 5 November 1991), in UN doc. *GAOR*, A/47/40, p. 306, para. 6.6.

⁶⁴Communication No. 639/1995, *W. Lawson Richards and T. Walker v. Jamaica* (Views adopted on 28 July 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 189, para. 8.2.

⁶⁵Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), p. 17, para. 12.4.

⁶⁶*Ibid.*, p. 230, para. 13.4.

⁶⁷*Ibid.*, para. 13.5.

⁶⁸Communication No. 564/1993, *J. Leslie v. Jamaica* (Views adopted on 31 July 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 28, para. 9.3.

⁶⁹Communication No. 672/1995, *C. Smart v. Trinidad and Tobago* (Views adopted on 29 July 1998), in UN doc. *GAOR*, A/53/40 (vol. II), p. 149, para. 10.2.

lasted *six*⁷⁰ or *about ten years*⁷¹ to complete have been considered to violate article 14(3)(c). The outcome was the same in a case where there was a delay of *31 months* between conviction and appeal.⁷²

On the other hand, a delay of *eighteen months* from the arrest to the opening of the author's trial for murder was not considered to constitute an "undue delay" in the case of *Kelly*, there being "no suggestion that pre-trial investigations could have been concluded earlier, or that the author complained in this respect to the authorities".⁷³ However, in the same case, article 14(3)(c) and (5) was violated since it took the Court of Appeal almost five years to issue a written judgement, thereby effectively preventing the author from petitioning the Privy Council.⁷⁴

In a case concerning the author's request to be reinstated in the Guardia Civil in Peru, a "seemingly endless sequence of instances and repeated failure to implement decisions" resulted in a delay of seven years that was considered "unreasonable" by the Committee, thereby violating "the principle of a fair hearing" in article 14(1) of the Covenant. This case was not considered under article 14(3)(c).⁷⁵

Under article 6(1) of the European Convention on Human Rights, the start of the period to be taken into consideration can be the day a person is either charged, arrested, or committed for trial,⁷⁶ for instance, and the end of this period is normally when the judgement acquitting or convicting the person or persons concerned becomes final.⁷⁷

On the question of reasonableness of the length of the proceedings, whether civil or criminal, the European Court has consistently held that

"it is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the *complexity of the case, the applicant's conduct and that of the competent authorities*".⁷⁸

⁷⁰Communication No. 159/1983, *Cariboni v. Uruguay* (Views adopted on 27 October 1987), in UN doc. GAOR, A/43/40, p. 184 and pp. 189-190, paras. 9.2 and 10.

⁷¹*Ibid.*, loc. cit.

⁷²Communication No. 702/1996, *C. McLawrence v. Jamaica* (Views adopted on 18 July 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 232, para. 5.11.

⁷³Communication No. 253/1987, *P. Kelly v. Jamaica* (Views adopted on 8 April 1991), in UN doc. GAOR, A/46/40, p. 248, para. 5.11.

⁷⁴*Ibid.*, para. 5.12.

⁷⁵Communication No. 203/1986, *R. T. Muñoz Hermoza v. Peru* (Views adopted on 4 November 1988), in UN doc. GAOR, A/44/40, p. 204, para.11.3.

⁷⁶*Eur. Court HR, Case of Kemmache v. France, judgment of 27 November 1991, Series A, No. 218*, p. 27, para. 59 (date of charge); and *Eur. Court HR, Case of Yağci and Sargin v. Turkey, judgment of 8 June 1995, Series A, No. 319-A*, p. 20, para 58 (date of arrest); *Eur. Court HR, Case of Mansur v. Turkey, judgment of 8 June 1995, Series A, No. 319-B*, p. 51, para. 60 (committal for trial).

⁷⁷See e.g. *Eur. Court HR, Case of Yağci and Sargin v. Turkey, judgment of 8 June 1995, Series A, No. 319-A*, p. 20, para 58.

⁷⁸*Eur. Court HR, Case of Kemmache v. France, judgment of 27 November 1991, Series A, No. 218*, p. 20, para. 50 (criminal); and *Eur. Court HR, Martins Moreira Case v. Portugal, judgment of 26 October 1988, Series A, No. 143*, p. 17, para. 45 (civil); emphasis added.

As to *the conduct of the applicant*, it is worthy of note that the European Court has held that article 6 “does not require a person charged with a criminal offence to cooperate actively with the judicial authorities”, and that, further, it does not blame the applicant for taking “full advantage of the resources afforded by national law in their defence”, although this may slow down the proceedings to some extent.⁷⁹ The case might however be different if there is evidence showing that the applicant and his counsel have displayed a “determination to be obstructive”.⁸⁰

The judicial authorities were, however, responsible for the unreasonable delay of the proceedings contrary to article 6 in the case of *Yağci and Sargin*, where, contrary to national law, the courts had held only an average of one hearing per month, and where they waited for almost six months before acquitting the applicants on the basis of newly repealed articles of the Criminal Code which had constituted part of the basis of the criminal charges against them. In all, the proceedings lasted a little less than four years and eight months.⁸¹

It does not help in this respect that Governments invoke their international responsibility to look carefully into all matters in serious cases of drug trafficking in order to justify delays. In this respect the Court has unequivocally held that it “*is for the Contracting States to organize their legal systems in such a way that their courts can meet*” the requirement of reasonableness.⁸²

Similarly, in civil proceedings, it is no defence for the State concerned to argue that its Code of Civil Procedure leaves the initiative to the parties, who are expected to carry out the procedural steps in the manner and within the time prescribed. The European Court has held in this respect that such a rule does not “dispense the courts from ensuring compliance with Article 6 as to the ‘reasonable time’ requirement”.⁸³ The national judge does, in other words, have an obligation to intervene when necessary to expedite proceedings so as not to jeopardize the “effectiveness and credibility” of the administration of justice.⁸⁴

Every person charged with a criminal offence has the right to be tried without undue delay/ within a reasonable time. All States have a duty to organize the Judiciary in such a way that this right can be effectively ensured.

The accused cannot be blamed for delays caused by his or her making use of the right not to speak or to cooperate with the judicial authorities. Judicial delays can only be attributed to the accused in cases of deliberate obstructive behaviour.

⁷⁹ Eur. Court HR, *Case of Yağci and Sargin v. Turkey*, judgment of 8 June 1995, Series A, No. 319-A, p. 21, para. 66.

⁸⁰ Ibid., loc. cit.

⁸¹ Ibid., p. 22, paras. 67-70.

⁸² Eur. Court HR, *Case of Mansur v. Turkey*, judgment of 8 June 1995, Series A, No. 319-B, p. 53, para. 68; emphasis added.

⁸³ Eur. Court HR, *Vernillo Case v. France*, judgment of 20 February 1991, Series A, No. 198, para. 30 at p. 13.

⁸⁴ Cf. ibid., p. 14, para. 38 read in conjunction with p. 14, para. 36. Owing inter alia “to the parties’ responsibilities in the conduct of the trial” the relevant periods in this case were not so long as to constitute a violation of the requirement of reasonableness, see ibid., p. 15, para. 39.

3.5 The right to defend oneself in person or through a lawyer of one's own choice

Article 14(3)(d) of the International Covenant, article 7(1)(c) of the African Charter on Human and Peoples' Rights, article 8(2)(d) of the American Convention on Human Rights and article 6(3)(c) of the European Convention on Human Rights all guarantee the right of anyone charged with a criminal offence to defend himself in person or through legal assistance of his own choice. So do articles 20(4)(d) and 21(4)(d) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia.

In its General Comment No. 13 on article 14, the Human Rights Committee emphasized that

“the accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary”.⁸⁵

The right of access to legal assistance must be *effectively* available, and, where this has not been the case, the Human Rights Committee has concluded that article 14(3) has been violated.⁸⁶ This was the case where a person did not have access to legal assistance during the first ten months of his detention and, in addition, was not tried in his presence.⁸⁷ Where the domestic law has not authorized the author to defend himself in person, the Committee has also found a violation of article 14(3)(d), which allows the accused to choose whether he or she wishes to defend him or herself – be it through an interpreter – or to have the defence conducted by a lawyer.⁸⁸

The right to have a lawyer of one's own choice was violated in the case of *López Burgos* where the victim was obliged to accept the *ex officio* appointment of a colonel as his legal counsel.⁸⁹ On the other hand, the right to choose under article 14(3)(d) “does not entitle the accused to choose counsel provided free of charge”, but, in spite of this restriction, “measures must be taken to ensure that counsel, once assigned, provides effective representation in the interest of justice”, this including “consulting with, and informing, the accused if he intends to withdraw an appeal or to argue, before the appellate instance, that the appeal has no merit”.⁹⁰ Although counsel

⁸⁵ *United Nations Compilation of General Comments*, p. 125, para. 11.

⁸⁶ See among many cases, Communication No. R.2/8, *B. Weismann Lanza and A. Lanza Perdomo v. Uruguay* (Views adopted on 3 April 1980), in UN doc. GAOR, A/35/40, p. 118, para. 16; and Communication No. R.1/6, *M. A. Millán Sequeira v. Uruguay*, (Views adopted on 29 July 1980), *ibid.*, p. 131, para. 16.

⁸⁷ Communication No. R.7/28, *I. Weinberger v. Uruguay* (Views adopted on 29 October 1980), in UN doc. GAOR, A/36/40, p. 119, para. 16.

⁸⁸ Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 18, para. 14.2.

⁸⁹ Communication No. R.12/52, *S. R. López Burgos v. Uruguay* (Views adopted on 29 July 1981), in UN doc. GAOR, A/36/40, p. 183, para. 13.

⁹⁰ Communication No. 356/1989, *T. Collins v. Jamaica* (Views adopted on 25 March 1993), in UN doc. GAOR, A/48/40 (vol. II), p. 89, para. 8.2.

is entitled to recommend that an appeal should not proceed, he should continue to represent the accused if the latter so wishes. Otherwise, the accused should have the opportunity to retain counsel at his own expense.⁹¹ It is thus essential under article 14(3)(d) that the domestic court “should ensure that the conduct of a case by the lawyer is not incompatible with the interests of justice”, and the Committee will itself examine whether there are any indications to show that the lawyer “was not using his best judgement in the interests of his client”.⁹²

The Inter-American Court of Human Rights concluded that article 8(2)(c), (d) and (e) had been violated in the case of *Suárez Rosero*, where the victim had been held in *incommunicado* detention for 36 days, during which time he was unable to consult any lawyer. After the end of his *incommunicado* detention he was allowed to receive visits from his lawyer although he was “unable to communicate with him freely and privately”, the interviews being conducted in the presence of police officers.⁹³ Article 8(2)(d) was also violated in the case of *Castillo Petruzzi* where “the victims were not allowed legal counsel between the time of their detention and the time they gave their statements” to the police, when they “were assigned court-appointed lawyers”. When they were finally allowed “legal counsel of their choosing, the latter’s role was peripheral at best” and they were only allowed to have access to the case file the day before the ruling of the court of first instance.⁹⁴

With regard to article 6(1) taken in conjunction with article 6(3)(c) of the European Convention, the European Court has held that “it is of capital importance that a defendant should appear, both because of his right to a hearing and because of the need to verify the accuracy of his statements and compare them with those of the victim – whose interests need to be protected – and of the witnesses”.⁹⁵ Accordingly, the “legislature must ... be able to discourage unjustified absences”.⁹⁶ Without deciding “whether it is permissible in principle to punish such absences by ignoring the right to legal assistance”, the Court concluded in the *Poitrimol* case that there was a breach of article 6, since the applicant had been deprived of his right to appeal to the Court of Appeal because he had provided no valid excuse for not attending the hearing. In the view of the European Court, the suppression of the right to legal assistance “was disproportionate in the circumstances”, in which the applicant was not even allowed to be represented by his legal counsel.⁹⁷ In conclusion it can be said that, under article

⁹¹Ibid., loc. cit. See also Communication No. 461/1991, *G. Grabam and A. Morrison v. Jamaica* (Views adopted on 25 March 1996), in UN doc. GAOR, A/51/40 (vol. II), pp. 48-49, para. 10.5.

⁹²Communication No. 708/1996, *N. Lewis v. Jamaica* (Views adopted on 17 July 1997), in UN doc. GAOR, A/52/40 (vol. II), pp. 251-252, para. 8.4.

⁹³*I-A Court HR, Suárez Rosero case v. Ecuador, judgment of November 1997*, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, 1997 Annual Report *I-A Court HR*, p.301, para. 83 read in conjunction with p. 292, para. 34.g and h.

⁹⁴*I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, pp. 203-204, paras. 146-149 read in conjunction with p. 202, para. 141.

⁹⁵*Eur. Court HR, Case of Poitrimol v. France, judgment of 23 November 1993, Series A, No. 277-A*, p. 15, para. 35.

⁹⁶Ibid., loc. cit.

⁹⁷Ibid.

6(3)(c) of the European Convention, an accused who deliberately avoids appearing in person still retains his or her right to be defended by a lawyer.⁹⁸

Moreover, in the *Pelladoab* case the Court emphasized that “everyone charged with a criminal offence has the right to be defended by counsel”, but that “for this right to be practical and effective, and not merely theoretical, its exercise should not be made dependent on the fulfilment of unduly formalistic conditions: it is for the courts to ensure that a trial is fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence, is given the opportunity to do so”.⁹⁹

The case of Kamasinski

In the case of *Kamasinski*, where the applicant had a legal aid counsel appointed to represent him in court proceedings concerning fraud and misappropriation, the European Court observed that “a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes”, and that it “follows from the independence of the legal profession from the State that the conduct of the defence is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately financed”. In the view of the Court “the competent national authorities are required under article 6 § 3 (c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some way”.¹⁰⁰ In this case, the Court carefully examined the applicant’s complaints concerning his legal aid counsel but concluded that there was “no indication ... that in the pre-trial stage the Austrian authorities had cause to intervene as concerns the applicant’s legal representation” and that it could not be found on the evidence before the Court that the domestic authorities had “disregarded the specific safeguard of legal assistance” under article 6(3)(c) “or the general safeguard of a fair trial under paragraph 1”.¹⁰¹ However, during the trial itself a dispute occurred between the applicant and his lawyer with the result that the latter asked the court to be discharged from the case, a request the court refused. Although “the Austrian judicial authorities were thus put on notice that, in Mr Kamasinski’s opinion, the conditions for the conduct of the defence were not ideal”, the European Court concluded that article 6(1) and (3)(c) had not been violated.¹⁰²

⁹⁸ Eur. Court HR, *Case of Pelladoab v. the Netherlands*, judgment of 22 September 1994, Series A, No. 297-B, para. 40 at p. 35 and Eur. Court HR, *Case of van Geyselgem v. Belgium*, judgment of 21 January 1999, Reports 1999-I, pp. 140-141, paras. 35-36.

⁹⁹ Eur. Court HR, *Case of Pelladoab v. the Netherlands*, judgment of 22 September 1994, Series A, No. 297-B, p. 35, para. 41.

¹⁰⁰ Eur. Court HR, *Kamasinski Case*, judgment of 19 December 1989, Series A, No. 168, pp. 32-33, para. 65.

¹⁰¹ Ibid., p. 34, para. 69.

¹⁰² Ibid., paras. 70-71.

3.5.1 The right to effective legal assistance in death penalty cases

As consistently held by the Human Rights Committee, it is “axiomatic that legal representation must be made available in capital cases”, and this not only “at the trial in the court of first instance, but also in appellate proceedings”. Moreover, the “legal assistance to the accused in a capital case must be provided in ways that adequately and effectively ensure justice”.¹⁰³ According to the Committee’s jurisprudence under article 14(3)(d):

“The court should ensure that the conduct of a case by a lawyer is not incompatible with the interests of justice. While it is not for the Committee to question counsel’s professional judgement, the Committee considers that in a capital case, when counsel for the accused concedes that there is no merit in the appeal, the Court should ascertain whether counsel has consulted with the accused and informed him accordingly. If not, the Court must ensure that the accused is so informed and given an opportunity to engage other counsel.”¹⁰⁴

In the case of *Morrison*, the author should consequently “have been informed that legal aid counsel was not going to argue any grounds in support of the appeal, so that he could have considered any remaining options open to him”. Since this was not done, article 14(3)(d) was violated.¹⁰⁵

Article 14(3)(d) was violated in the similar *Reid* case where the author had a court-appointed lawyer but had indicated that he wanted to be present himself during the appeal proceedings. This possibility was denied him since he had a lawyer; however, his lawyer subsequently decided that there was no merit in the author’s appeal and advanced no legal arguments in favour of it being granted, “thus effectively leaving him without legal representation”.¹⁰⁶ In the view of the Committee, and considering that this was “a case involving the death penalty”, the State party “should have appointed another lawyer for [the author’s] defence or allowed him to represent himself at the appeal proceedings”.¹⁰⁷ In the *McLeod* case, the legal aid representative had in fact consulted with the author prior to the appeal, but, unbeknown to him, had decided that he would argue no grounds of appeal. There was no indication in this case that the Appeal Court had taken any steps to ensure that the author’s right to be duly informed was respected, and the Committee therefore concluded that his rights under both article 14(3)(b) and article 14(3)(d) had been violated.¹⁰⁸

¹⁰³Communication No. 232/1987, *D. Pinto v. Trinidad and Tobago* (Views adopted on 20 July 1990), in UN doc. *GAOR*, A/45/40, p. 73, para.12.5.

¹⁰⁴Communication No. 663/1995, *M. Morrison v. Jamaica* (Views adopted on 3 November 1998), in UN doc. *GAOR*, A/54/40 (vol. II), p. 155, para. 8.6.

¹⁰⁵*Ibid.*, loc. cit. For a similar case, see also Communication No. 572/1994, *H. Price v. Jamaica* (Views adopted on 6 November 1996), in UN doc. *GAOR*, A/52/40 (vol. II), pp. 155-156, para. 9.2.

¹⁰⁶Communication No. 250/1987, *C. Reid v. Jamaica* (Views adopted on 20 July 1990), in UN doc. *GAOR*, A/45/40 (vol. II), p. 91, para. 11.4.

¹⁰⁷*Ibid.*, loc. cit.

¹⁰⁸Communication No. 734/1997, *A. McLeod v. Jamaica* (Views adopted on 31 March 1998), in UN doc. *GAOR*, A/53/40 (vol. II), pp. 216-217, para. 6.3. See also e.g. Communication No. 528/1993, *M. Steadman v. Jamaica* (Views adopted on 2 April 1997), in UN doc. *GAOR*, A/52/40 (vol. II), pp. 26-27, para. 10.3.

Article 14(3)(d) was further violated in a capital case where the author had indicated that he wished to be present in person during the appeal proceedings and that he did not want legal aid. This wish was ignored and the appeal was pursued in the presence of a legal aid attorney, who argued the appeal on a ground that the author had not wished to pursue. The Committee noted “with concern that the author was not informed with sufficient advance notice about the date of the hearing of his appeal”, a delay that “jeopardized his opportunities to prepare his appeal and to consult with his court-appointed lawyer, whose identity he did not know until the day of the hearing itself”. His “opportunities to prepare the appeal were further frustrated by the fact that the application for leave to appeal was treated as the hearing of the appeal itself, at which he was not authorized to be present”.¹⁰⁹

Failure of lawyer to appear in court: The case of Robinson

This situation arose in the *Robinson* case, where the trial had been postponed several times because the prosecution had problems locating its chief witness. When the witness was finally located and the trial began, the author’s lawyers were not present in court, yet the trial was allowed to proceed and the author had to defend himself. He was convicted of murder and sentenced to death.¹¹⁰ The Committee based itself on the terms of article 14(3)(d), according to which everyone shall have legal assistance assigned to him, in any case where the interests of justice so require.¹¹¹ It reiterated that “it is axiomatic that legal assistance be available in capital cases”, and that this is so “even if the unavailability of private counsel is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings”; moreover, this “requirement is not rendered unnecessary by efforts that might otherwise be made by the trial judge to assist the author in handling his defence in the absence of counsel”.¹¹² It followed that in this case “the absence of counsel constituted unfair trial”.¹¹³

¹⁰⁹Communication No. 338/1988, *L. Simmonds v. Jamaica* (Views adopted on 23 October 1992), in UN doc. GAOR, A/48/40 (vol. II), p. 82, para. 8.4. See also a case where the lawyer failed to follow the accused’s instructions: Communication No. 248/1987, *G. Campbell v. Jamaica* (Views adopted on 30 March 1992, in UN doc. GAOR, A/47/40, p. 247, para. 6.6.

¹¹⁰Communication No. 223/1987, *F. Robinson v. Jamaica* (Views adopted on 30 March 1989), in UN doc. GAOR, A/44/40, pp. 244-245, para. 10.2.

¹¹¹*Ibid.*, p. 245, para. 10.3.

¹¹²*Ibid.*, loc. cit.

¹¹³*Ibid.*

The case of Domukovsky et al.

In the case of *Domukovsky et al.*, the four authors complained that they had not had a fair hearing after they had been removed from the court room and were subsequently absent from the proceedings, which ended in a death sentence being imposed in two cases; they were also refused lawyers of their choice. The Committee considered that article 14(3)(d) had been violated in respect of each author, emphasizing that

“at a trial in which the death penalty can be imposed, which was the situation for each author, the right to a defence is ***inalienable and should be adhered to at every instance and without exception.*** This entails the right to be tried in one’s presence, to be defended by counsel of one’s own choosing, and not to be forced to accept ex-officio counsel.”¹¹⁴

Since the State party had not in this case shown that it had taken “all reasonable measures to ensure the authors’ continued presence at the trial, despite their alleged disruptive behaviour”, and considering that it had not ensured “that each of the authors was at all times defended by a lawyer of his own choosing”, the Committee concluded that article 14(3)(d) had been violated.¹¹⁵

The African Commission on Human and Peoples’ Rights concluded that Burundi had violated the right to a defence in article 7(1)(c) of the African Charter on Human and Peoples’ Rights in a case where the courts had refused to designate a defence lawyer to an accused person who was eventually sentenced to death. The Commission “emphatically” recalled that “the right to legal assistance is a fundamental element of the right to fair trial”, in particular in cases “where the interests of justice demand it”. Given “the gravity of the allegations brought against the accused” person in this case “and the nature of the penalty he faced, it was in the interests of justice for him to have the benefit of the assistance of a lawyer at each stage of the case”.¹¹⁶ Article 7(1)(c) of the African Charter was also violated in a death penalty case against Nigeria where the defence counsel for the seven complainants “was harassed and intimidated to the extent of being forced to withdraw from the proceedings. In spite of this forced withdrawal of counsel, the tribunal proceeded to give judgement in the matter, finally sentencing the accused to death”. In the view of the Commission the defendants were thus “deprived of their right to defence, including their right to be defended by counsel of their choice” contrary to article 7(1)(c) of the African Charter.¹¹⁷

¹¹⁴Communications Nos. 623, 624, 626, 627/1995, *V. P. Domukovsky et al. v. Georgia* (Views adopted on 6 April 1998), in UN doc. GAOR, A/53/40 (vol. II), p. 111, para. 18.9; emphasis added.

¹¹⁵*Ibid.*, loc. cit.

¹¹⁶ACHPR, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication No. 231/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, para. 30 of the text of the decision as published at the following web-site: <http://www1.umn.edu/humanrts/africa/comcases/231-99.html>.

¹¹⁷ACHPR, *Constitutional Rights Project (on behalf of Zamani Lekwot and six Others) v. Nigeria*, Communication No. 87/93, decision adopted during the 16th session, October 1994, para. 29 of the text of the decision as published at the following web-site: <http://www.up.ac.za/chr/ahrd/acomdecisions.html>.

3.5.2 The right to free legal aid

Article 14(3)(d) provides that in the determination of any criminal charge, everyone shall be entitled “to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it”. Article 6(3)(c) of the European Convention on Human Rights also provides for the right of a person not having “sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”. Article 8(2)(e) of the American Convention refers back to the provisions of national law in this respect, while the African Charter on Human and Peoples’ Rights is silent on the question of free legal aid. Articles 20(4)(d) and 21(4)(d) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia have provisions similar to article 14(3)(d) of the International Covenant.

For the granting of free legal aid, article 14(3)(d) of the International Covenant and article 6(3)(c) of the European Convention set two conditions: *first*, the unavailability of sufficient funds to pay for a lawyer and, *second*, that the interests of justice require such aid. As seen in the preceding subsection, the interests of justice would require the granting of legal aid in capital punishment cases where the accused wishes for such aid and cannot pay for it himself. Other less dramatic cases involving the interests of justice may of course also require the granting of free legal aid.

In a case concerning a constitutional appeal, the Human Rights Committee thus held that “where a convicted person seeking constitutional review of irregularities in a criminal trial has insufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interests of justice so [require], legal assistance should be provided by the State”; such review would require a fair hearing and consistency with article 14(3)(d) of the Covenant.¹¹⁸ Consequently, article 14 was violated in a case where “the absence of legal aid ... denied the author the opportunity to test the irregularities of his criminal trial in the Constitutional Court in a fair hearing”.¹¹⁹

The European Court has observed with respect to article 6(3)(c) of the European Convention that “the right of an accused to be given, in certain circumstances, free legal assistance constitutes one aspect of the notion of a fair trial in criminal proceedings”.¹²⁰ In determining whether the interests of justice require the granting of free legal aid, the European Court has regard to various criteria, such as “*the seriousness of the offence*” committed, “*the severity of the sentence*” the accused person risks and “*the complexity of the case*”.¹²¹ Where the maximum sentence was

¹¹⁸Communication No. 707/1996, *P. Taylor v. Jamaica* (Views adopted on 14 July 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 241, para. 8.2.

¹¹⁹*Ibid.*, loc. cit.

¹²⁰*Eur. Court HR, Case of Quaranta v. Switzerland, judgment of 24 May 1991, Series A, No. 205*, p. 16, para. 27.

¹²¹*Ibid.*, p. 17, paras. 32-34; emphasis added.

three years' imprisonment for a drug offence, the Court concluded that "free legal assistance should have been afforded by reason of the mere fact that so much was at stake".¹²² Since the alleged offence had occurred when the applicant was on probation, an additional factor was "the complexity of the case", the domestic Court having "both to rule on the possibility of activating the suspended sentence and to decide on a new sentence".¹²³ Consequently, there was a breach of article 6(3)(c) of the Convention.

The European Court has held, furthermore, that the manner in which article 6(1) and (3)(c) of the European Convention

"... is to be applied in relation to *appellate or cassation courts* depends upon the special features of the proceedings involved; account must be taken of the entirety of the proceedings conducted in the domestic legal order and of the role of the appellate or cassation court therein".¹²⁴

The case of *Granger*, where legal aid had been refused, concerned appeal proceedings against a conviction for perjury following which the applicant was sentenced to five years' imprisonment. As noted by the European Court, there could "thus be no question as to the importance of what was at stake in the appeal".¹²⁵ After having examined the proceedings before the appeal court, the European Court also found that the applicant had not been "in a position fully to comprehend the pre-prepared speeches submitted to" the High Court of Justiciary by the Solicitor General, "or the opposing arguments submitted to the court", and that it was "also clear that, had the occasion arisen, he would not have been able to make an effective reply to those arguments or to questions from the bench".¹²⁶ As it turned out, one of the grounds for appeal "raised an issue of complexity and importance" that was in fact so difficult that the High Court had to adjourn its hearing "and called for a transcript of the evidence given at the applicant's trial, so as to be able to examine the matter more thoroughly".¹²⁷

In the light of this situation, the European Court of Human Rights concluded that "some means should have been available to the competent authorities, including the High Court of Justiciary in exercise of its overall responsibility for ensuring the fair conduct of the appeal proceedings, to have the refusal of legal aid reconsidered". In the view of the Court "it would have been in the interests of justice for free legal assistance to be given to the applicant" at least at the stage following the adjournment of the proceedings, since such a course "would in the first place have served the interests of justice and fairness by enabling the applicant to make an effective contribution to the proceedings", and, secondly, would have enabled that Court to have "the benefit of hearing ... expert legal argument from both sides on a complex issue".¹²⁸ The Court concluded, consequently, that there had been a violation of article 6(3)(c) taken together with article 6(1) of the Convention.

¹²²Ibid., para. 33.

¹²³Ibid., para. 34.

¹²⁴*Eur. Court HR, Case of Granger v. the United Kingdom, judgment of 28 March 1991, Series A, No. 174, p. 17, para. 44; emphasis added.*

¹²⁵Ibid., p. 18, para. 47.

¹²⁶Ibid., loc. cit.

¹²⁷Ibid.

¹²⁸Ibid., para. 47 at p. 19.

The Pakelli case

In the case of *Pakelli*, article 6(3)(c) was violated since the applicant was refused legal aid in order to be represented in the Federal Court which was going to hold an oral hearing in his case, a course it took only in exceptional cases. In the view of the European Court the personal presence of the applicant could not compensate for the lack of a legal practitioner to examine the legal issues arising, which inter alia concerned the application of a new version of the Code of Criminal Procedure. Consequently, the applicant was deprived of “the opportunity of influencing the outcome of the case”.¹²⁹

It is noteworthy that, in the view of the European Court, “the existence of a violation is conceivable even in the absence of prejudice”, and that to require proof that the lack of effective assistance prejudiced the applicant in interpreting article 6(3)(c) “would deprive it in large measure of its substance”.¹³⁰

Lastly, it is important to note that the available legal assistance must be “effective”, and that consequently it is not sufficient for the purposes of complying with article 6(3)(c) that a legal counsel has been merely nominated.¹³¹

3.5.3 The right to privileged communications with one’s lawyer

The right to privileged communications with one’s lawyer was dealt with in section 6.4 of Chapter 6 concerning “The right to legal assistance”. This right is of course also applicable at the stage of trial and appeal proceedings, during which the accused must be ensured adequate time and facilities for consulting with his or her lawyer confidentially.

Everyone has the right to defend himself or herself in person or to appoint a lawyer of his or her own choice in order to ensure an efficient defence.

The right to legal assistance must be effectively available, in particular in capital punishment cases. The domestic courts have a duty to ensure that the accused enjoys an effective defence.

***Incommunicado** detention violates the right to effective access to one’s lawyer.*

¹²⁹ Eur. Court HR, *Case of Pakelli v. Federal Republic of Germany*, judgment of 25 April 1983, Series A, No. 64, p. 18, para. 39.

¹³⁰ Eur. Court HR, *Case of Artico v. Italy*, judgment of 13 May 1980, Series A, No. 37, para. 35 at p. 18.

¹³¹ Ibid., para. 33 at p. 16.

If lacking sufficient means to pay for a lawyer, and if the interests of justice so require, a person accused of a criminal offence has the right to free legal aid. The interests of justice relate to such aspects as the severity of the crimes and potential sentence that might be imposed and the complexity of the case.

The accused must have adequate time and facilities to communicate with his or her legal counsel. Their communications are privileged and must be confidential.

3.6 The right to be present at one's trial

Article 14(3)(d) of the Covenant on Civil and Political Rights, and articles 20(4)(d) and 21(4)(d) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia provide that everyone has the right to “be tried in his [or her] presence”. Where the State party has failed to substantiate its denial of the alleged violation of this right by, for instance, submitting a copy of the trial transcript, the Committee has concluded that this right has been violated.¹³²

While article 6(1) of the European Convention on Human Rights does not expressly mention a person's right to participate in his or her trial, the European Court of Human Rights has held that the existence of this right is “shown by the ‘object and purpose of the article taken as a whole’”.¹³³ Where there was no evidence that the applicant had intended to waive his right to participate in his trial and where, inter alia, the President of the Savona Regional Court had not sought to notify him in person of the summons to appear before his court so that he was tried *in absentia*, it found that the trial had not been fair within the meaning of article 6(1) of the Convention.¹³⁴

3.6.1 Trials in absentia

Although the international monitoring organs have not yet developed any theory around trials *in absentia*, it appears that they might accept that such trials may be held in special circumstances. This is at least clear with regard to the International Covenant on Civil and Political Rights, from the Committee's General Comment No. 13 on article 14, which states that “when exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary”.¹³⁵ Consequently, while such trials do not ipso facto constitute a violation of article 14 of the Covenant, the basic requirements of a fair trial must be maintained; a trial *in absentia* is thus only compatible with article 14 when the accused has been

¹³²Communication No. 289/1988, *D. Wolf v. Panama* (Views adopted on 26 March 1992), in UN doc. GAOR, A/47/40, p. 289, para. 6.5.

¹³³*Eur. Court HR, Brozicek Case v. Italy, judgment of 19 December 1989, Series A, No. 167, p. 19, para. 45.*

¹³⁴*Ibid.*, p. 19, paras. 45-46.

¹³⁵*United Nations Compilation of General Comments*, p. 125, para. 11.

summoned “in a timely manner and informed of the proceedings against him” and the State party itself “must” in such cases show that the principles of a fair trial were respected.¹³⁶ Where the State party merely “assumed” that the author had been summoned in a timely manner, the Committee considered that this was “clearly insufficient to lift the burden placed on the State party if it is to justify trying an accused *in absentia*”; it was “incumbent on the court that tried the case to verify that the author had been informed of the pending case before the proceeding to hold the trial” in his absence, but, failing any evidence that the court did so, the Committee concluded “that the author’s right to be tried in his presence was violated”.¹³⁷

As noted above, the European Court of Human Rights has emphasized that “the object and purpose” of article 6 of the European Convention “taken as a whole show that a person ‘charged with a criminal offence’ is entitled to take part in the hearing”.¹³⁸ In the case of *Colozza and Rubinat*, the Italian authorities had held a trial by default since they were unable to trace the applicant who had moved without leaving his address. He was eventually classified as a *latinante*, i.e. a person who is wilfully evading the execution of a warrant issued by a court. A court-appointed lawyer failed to appear at the trial, which had to be postponed, a procedure repeated since the second court-appointed lawyer also failed to appear. The trial was eventually concluded after the court had appointed, during the sitting, another official defence lawyer. The applicant was convicted and sentenced to six years’ imprisonment. A few months later he was arrested at his home in Rome. He filed a “late appeal” that was dismissed. The European Court agreed with the Government that

“the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice. However, in the circumstances of the case, this fact does not appear to the Court to be of such a nature as to justify a complete and irreparable loss of the entitlement to take part in the hearing. When domestic law permits a trial to be held notwithstanding the absence of a person ‘charged with a criminal offence’ who is in Mr. Colozza’s position, that person should, once he becomes aware of the proceedings, be able to obtain, from a court which has heard him, a fresh determination of the merits of the charge.”¹³⁹

The Court importantly added that “the resources available under domestic law must be shown to be effective and a person ‘charged with a criminal offence’ who is in a situation like that of Mr. Colozza must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to *force majeure*”.¹⁴⁰

¹³⁶Communication No. 699/1996, *A. Maleki v. Italy* (Views adopted on 15 July 1999), in UN doc. GAOR, A/54/40 (vol. II), p. 183, paras. 9.2-9.3.

¹³⁷*Ibid.*, pp. 183-184, para. 9.4.

¹³⁸*Eur. Court HR, Case of Colozza v. Italy, judgment of 12 February 1985, Series A, No. 89*, p. 14, para. 27.

¹³⁹*Ibid.*, p. 15, para. 29.

¹⁴⁰*Ibid.*, para. 30 at p. 16.

An accused person has the right to be present at his or her trial. Trials in absentia may be acceptable in special circumstances but must preserve the rights of an effective defence. Once an accused who has not wilfully tried to avoid justice is aware of the proceedings, he or she should be entitled to a new determination of the merits of the charge.

3.7 The right not to be compelled to testify against oneself or to confess guilt

The prohibition on self-incrimination was dealt with in subsection 6.5 of Chapter 6 in view of its specific importance during criminal investigations. However, the right not to be compelled to testify against oneself does of course remain equally valid throughout the judicial proceedings. It is recalled that article 14(3)(g) of the International Covenant provides that “in the determination of any criminal charge against him”, every person has the right “not to be compelled to testify against himself or to confess guilt”. According to article 8(2)(g) of the American Convention, everyone has “the right not to be compelled to be a witness against himself or to plead guilty”, and article 8(3) further specifies that “a confession of guilt by the accused shall be valid only if it is made without coercion of any kind”. While the African Charter and the European Convention contain no similar provision, both article 55(1)(a) of the Statute of the International Criminal Court and articles 20(4)(g) and 21(4)(g) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia contain protection against self-incrimination.

In its General Comment No. 13 on article 14 of the International Covenant, the Human Rights Committee stated that, in considering this safeguard contained in subparagraph (3)(g), articles 7 and 10(1) of the Covenant “should be borne in mind”,¹⁴¹ these articles respectively outlawing torture and other cruel, inhuman or degrading treatment and stipulating that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. As emphasized by the Committee, “in order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should”, however, “require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable”.¹⁴² Moreover, “judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution”.¹⁴³ It is recalled in this respect that Guideline 16 of the Guidelines on the Role of Prosecutors also provides that prosecutors shall refuse evidence that has been obtained by recourse to unlawful methods.¹⁴⁴

¹⁴¹ *United Nations Compilation of General Comments*, p. 125, para. 14.

¹⁴² *Ibid.*, loc. cit.

¹⁴³ *Ibid.*, para. 15.

¹⁴⁴ See Principle 16 quoted *in extenso* in Chapter 6 above, subsection 6.2.

The Committee has further held that the guarantee “that no one shall be ‘compelled to testify against himself or to confess guilt’, must be understood in terms of *the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt*”.¹⁴⁵ The Committee has thus found violations of article 14(3)(g) in cases where the persons accused have been compelled to sign statements incriminating themselves,¹⁴⁶ or where attempts have been made – including through recourse to torture or duress – to compel them to do so.¹⁴⁷

However, where various issues relating to alleged self-incrimination under duress have not been brought to the attention of the trial judge either by the author himself or his privately retained lawyer, the Committee has concluded that the State party could not be held responsible under article 14(1) [*sic*] for the purportedly negative outcome of this failure.¹⁴⁸

With regard to article 8(3) of the American Convention on Human Rights, the American Court of Human Rights found in the case of *Castillo Petruzzi et al.* that it had not been proven that this provision had been violated. Although it was clear that the accused “were urged to tell the truth” during the preliminary testimony before the Judge of the Special Military Court of Inquiry, nothing in the record suggested “that any punishment or other adverse legal consequence was threatened if they did not tell the truth”; nor was there “any evidence to suggest that the accused were required to testify under oath or to swear to tell the truth, either of which would have violated their right to choose between testifying and not testifying”.¹⁴⁹

3.7.1 Prohibition on the use of evidence obtained through unlawful means/treatment

In Chapter 6 reference was made to Guideline 16 of the Guidelines on the Role of Prosecutors, according to which prosecutors shall refuse to use evidence which they “know or believe on reasonable grounds” to have been “obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights”, in particular when such methods have involved recourse to torture or other human rights abuses.

¹⁴⁵Communication No. 330/1988, *A. Berry v. Jamaica* (Views adopted on 7 April 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 28, para. 11.7; emphasis added.

¹⁴⁶Communication No. R.12/52, *S. R. López Burgos v. Uruguay* (Views adopted on 29 July 1981), in UN doc. GAOR, A/36/40, p. 183, para. 13; and Communication No. R.18/73, *M. A. Teti Izquierdo v. Uruguay* (Views adopted on 1 April 1982), in UN doc. GAOR, p. 186, para. 9.

¹⁴⁷Communication No. 74/1980, *M. A. Estrella v. Uruguay* (Views adopted on 29 March 1983), in UN doc. GAOR, A/38/40, p. 159, para. 10; and Communication No. 328/1988, *R. Z. Blanco v. Nicaragua* (Views adopted on 20 July 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 18, para. 10.4.

¹⁴⁸Communication No. 330/1988, *A. Berry v. Jamaica* (Views adopted on 7 April 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 27, para. 11.3.

¹⁴⁹I-A Court HR, *Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, p. 210, paras. 167-168.

Other pertinent international provisions on this issue are to be found in article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 10 of the American Convention to Prevent and Punish Torture. The former provides that “each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made”. With a similar proviso, the latter provision also declares inadmissible, “as evidence in a legal proceeding”, evidence obtained through torture.

Article 69(7) of the Statute of the International Criminal Court is drafted in less categorical terms in that “evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence;
or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”

It is not yet possible to know how this provision will be interpreted by the International Criminal Court, but it would in any event appear to provide a possibility for it to consider evidence obtained by unlawful means, provided there was no doubt as to the reliability of such evidence and its admission would not be “antithetical to” the integrity of the proceedings. In the light of the clear statements elsewhere, inter alia in article 15 of the Convention against Torture, it might, however, be presumed that evidence obtained by torture would be an example *par excellence* of evidence that is unreliable, the use of which would indeed be antithetical to the integrity of the proceedings.

Lastly, it is important to note in this context that the Human Rights Committee has stated that “it is important for the discouragement of violations under article 7 [of the International Covenant] ***that the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment***”.¹⁵⁰

The right of an accused not to be compelled to testify against himself or herself remains valid throughout the trial proceedings. It means that there must be an absence of both direct and indirect physical or psychological pressure from the investigating authorities for the purposes of obtaining a confession. An accused who has confessed guilt after such undue pressure must bring the matter before the competent authorities, including the judge(s) in the trial court, failing which he or she runs the risk of not having this undue compulsion considered in connection with the determination of the criminal charge.

¹⁵⁰See General Comment No. 20, in *United Nations Compilation of General Comments*, p. 141, para. 12; emphasis added.

Judges and prosecutors must be attentive to any sign of unlawful compulsion related to confessions and are not allowed to invoke such confessions against the accused.

The use of evidence and confessions obtained by torture is unlawful and should be expressly prohibited by national law.

3.8 The right to call, examine, or have examined, witnesses

Article 14(3)(e) of the International Covenant provides that, in the determination of any criminal charge against him, everyone shall be entitled to “examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”. Article 6(3)(d) of the European Convention on Human Rights contains an identically worded provision, while article 8(2)(f) of the American Convention on Human Rights contains the “right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts”. Article 20(4)(e) and article 21(4)(e) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia both also have wording similar to the International Covenant in this respect.

According to the Human Rights Committee, article 14(3)(e) “does not provide an unlimited right to obtain the attendance of witnesses requested by the accused or his counsel”, and where there is no evidence that the court’s refusal to call a certain witness does not violate the principle of equality of arms – for instance, if the evidence is not part of the case under consideration – there has been no violation of article 14(3)(e).¹⁵¹

As to the question whether the State party can be held responsible for a defence lawyer’s failure to call witnesses, the Committee has held that it “cannot be held accountable for alleged errors made by [the lawyer] *unless it was or should have been manifest to the judge that the lawyer’s behaviour was incompatible with the interests of justice*”.¹⁵²

In a case where it was “uncontested that no effort was made to have three potential alibi witnesses testify on the author’s behalf during the trial”, the Committee noted that it was “not apparent from the material before [it] and the trial transcript that counsel’s decision not to call witnesses was not made in the exercise of his professional judgement”. In these circumstances, the failure to examine witnesses on the author’s

¹⁵¹Communication No. 237/1987, *D. Gordon v. Jamaica* (Views adopted on 5 November 1992), in doc. GAOR, A/48/40 (vol. II), p. 10, para. 6.3.

¹⁵²Communication No. 610/1995, *Henry v. Jamaica* (Views adopted on 20 October 1998), in UN doc. GAOR, A/54/40 (vol. II), p. 50, para. 7.4; emphasis added.

behalf could not be attributed to the State party and there was no violation of article 14(3)(e).¹⁵³

In general, it can be said that, where (1) there is no indication that either the author or his or her legal counsel has complained to the trial judge that the time or facilities for the preparation of the defence have been inadequate, and (2) there is no evidence “that counsel’s decision not to call witnesses was not in the exercise of his professional judgement, or that, if a request to call witnesses was made, the judge disallowed it”, the Committee is reluctant to conclude that either article 14(3)(b) or (e) has been violated.¹⁵⁴

The case of Reid

In the case of *Reid*, the State party had “not denied the author’s claim that the court failed to grant counsel sufficient minimum time to prepare his examination of witnesses” and the Committee thus found a violation of article 14(3)(e). The author had alleged that the legal aid attorney was only assigned to him on the day his trial opened and that the trial judge refused a postponement to enable the lawyer to discuss the case with his client; according to the author, the lawyer “was wholly unprepared” and had told him “that he did not know which questions to pose to the witnesses”.¹⁵⁵

Article 14(3)(e) and (5) of the Covenant was also violated in a case where the domestic court had refused “to order expert testimony of crucial importance to the case”.¹⁵⁶

Invoking the case-law of the European Court of Human Rights, the Inter-American Court of Human Rights has held that “one of the prerogatives of the accused must be the opportunity to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf, under the same conditions as witnesses against him”.¹⁵⁷ Thus, in the case of *Castillo Petruzzi et al.*, article 8(2)(f) of the American Convention was violated since the law applied in the legal proceedings concerned “did not allow cross-examination of the witnesses whose testimony was the basis for the charges brought against the alleged victims. The problem created by disallowing cross-examination of the police and military agents was

¹⁵³Communication No. 615/1995, *B. Young v. Jamaica* (Views adopted on 4 November 1997), in UN doc. GAOR, A/53/40 (vol. II), pp. 74-75, para. 5.5.

¹⁵⁴Communication No. 356/1989, *T. Collins v. Jamaica* (Views adopted on 25 March 1993), in UN doc. GAOR, A/48/40 (vol. II), pp. 88-89, para. 8.1.

¹⁵⁵Communication No. 250/1987, *C. Reid v. Jamaica* (Views adopted on 20 July 1990), in UN doc. GAOR, A/45/40 (vol. II), p. 91, para. 11.3 as read in conjunction with p. 87, para. 4.

¹⁵⁶Communication No. 480/1991, *J. L. García Fuenzalida v. Ecuador* (Views adopted on 12 July 1996), in UN doc. GAOR, A/51/40 (vol. II), p. 55, para. 9.5.

¹⁵⁷I-A Court HR, *Castillo Petruzzi et al. case v. Peru*, judgment of May 30, 1999, Series C, No. 52, p. 205, para. 154; for the European case-law see *Eur. Court HR, case of Barberà, Messegue and Jabardo, judgment of 6 December 1998, Series A, No. 146* and *Eur. Court HR, Bönisch case, judgment of 6 May 1985, Series 92*.

compounded ... by the fact that the suspects were not allowed the advice of counsel until they had made their statements to the police”, a situation that “left the defence attorneys with no means to refute the evidence compiled and on record in the police investigation report”.¹⁵⁸

With regard to article 6(3)(d) of the European Convention on Human Rights, the European Court held in the *Delta* case that

“In principle, the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3 (d) and 1 of Article 6, provided the rights of the defence have been respected. As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness makes his statement or at some later stage of the proceedings...”¹⁵⁹

Consequently, in the *Delta* case, where the applicant was convicted on the basis of testimony given by witnesses at the police-investigation stage whose credibility neither the applicant nor his legal counsel had been able to challenge, the European Court found a violation of the right to a fair trial in article 6(1) and (3)(d) of the Convention.¹⁶⁰

The case of Unterpertinger

In the case of *Unterpertinger*, the applicant had been convicted of causing bodily harm to his step-daughter and former wife in two separate incidents. Both victims refused to give evidence in court although their statements were read out during the trial. The European Court observed that, although the reading out of their statements was not inconsistent with article 6(1) and (3)(d) of the Convention, “the use made of them as evidence must nevertheless comply with the rights of the defence, which it is the object and purpose of article 6 to protect”. This was especially so since the applicant had “not had an opportunity at any stage in the earlier proceedings to question the persons whose statements [were] read out at the hearing”.¹⁶¹ Since the applicant was prevented from having his former wife and step-daughter examined, or from having them examined on their statements in order to challenge their credibility, and given that the Court of Appeal treated their statements “as proof of the truth of the accusations made by the women”, the applicant did not have a fair trial and there was a breach of both article 6(1) and 3(d) of the Convention.¹⁶²

¹⁵⁸ I-A Court HR, *Castillo Petruzzi et al. case v. Peru*, judgment of May 30, 1999, Series C, No. 52, p. 205, paras. 153 and 156.

¹⁵⁹ Eur. Court HR, *Delta Case v. France*, judgment of 19 December 1990, Series A, No. 191-A, p. 16, para. 36.

¹⁶⁰ Ibid., para. 37.

¹⁶¹ Eur. Court HR, *Case of Unterpertinger v. Austria*, judgment of 24 November 1986, Series A, No. 110, pp. 14-15, para. 31.

¹⁶² Ibid., p. 15, paras. 32-33.

However, where the reading out of witness statements did not constitute the only item of evidence on which the national court based its decision, the Court has found that the applicant was not deprived of a fair trial contrary to article 6(1) and (3)(d) taken together.¹⁶³

It is noteworthy that, according to the jurisprudence of the European Court, the term “witness” in article 6(3)(d) is “to be given an autonomous interpretation”, and can thus also comprise, for instance, statements given to police officers by people who do not give “direct evidence” in court.¹⁶⁴

An accused person has the right to call and examine or have examined witnesses against him or her under the same conditions as the prosecution. Consequently, in order to guarantee a fair trial the domestic court must provide for the possibility of adversarial questioning of witnesses.

The right to call witnesses does not mean that an unlimited number of witnesses may be called. Witnesses to be called must be likely to be relevant to the case.

Domestic courts must give the accused and his or her lawyer adequate time to prepare for the questioning of witnesses.

The national judge must be attentive to manifest deficiencies in the defence lawyer’s professional conduct, and, where necessary, intervene in order to ensure the right to a fair trial, including equality of arms.

3.8.1 Anonymous witnesses

The issue of anonymous witnesses is not regulated in the human rights treaties considered in this Manual, but Rule 69 of the Rules of Procedure and Evidence of the International Criminal Tribunals for Rwanda and for the former Yugoslavia deals with “Protection of Victims and Witnesses”. In the case of the Rwanda Tribunal, Rule 69 reads:

“(A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Support Unit.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence.”

¹⁶³*Eur. Court HR, Asch Case v. Austria, judgment of 26 April 1991, Series A, No. 203, p. 11, paras. 30-31.*

¹⁶⁴*See e.g. Eur. Court HR, Windisch Case v. Austria, judgment of 27 September 1990, Series A, No. 186, pp. 9-10, para. 23.*

Rule 69 of the Rules of Procedure and Evidence of the Tribunal for the former Yugoslavia is slightly differently worded:

“(A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Section.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.”

Rule 75(A) of the Rules of Procedure of the Court for the former Yugoslavia concerns “Measures for the Protection of Victims and Witnesses”, and allows a Judge or a Chamber “*proprio motu* or at the request of either party, or of the victims or witness concerned, or of the Victims and Witnesses Section [to] order appropriate measures for the *privacy and protection* of victims and witnesses, *provided that the measures are consistent with the rights of the accused*” (emphasis added). Rule 75(A) of the Rwanda Court is almost identical, but instead refers to the “*privacy and security*” of the victims and witnesses (emphasis added). Paragraph (B) of Rule 75 in each case deals with measures that the Court may adopt *in camera* for the purpose of protecting the right to privacy and protection/security of the victims and witnesses. Such measures include:

- ❖ the deletion of names and identifying information from the Chamber’s/Tribunal’s public records;
- ❖ the non-disclosure to the public of any records identifying the victim;
- ❖ the giving of testimony through image- or voice- altering devices or closed-circuit television;
- ❖ the assignment of a pseudonym;
- ❖ closed sessions; and
- ❖ appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed-circuit television.

As can be seen from the Rules of Procedure of these two Tribunals, the guiding principle is that measures for the protection of victims and witnesses must be “consistent with the rights of the accused”, and that, to this end, they do not foresee permanent anonymity either of victims or of witnesses as between the parties themselves, their identity having to be disclosed in sufficient time prior to the trial to allow adequate time for the preparation of the trial. The approach adopted by the International Criminal Tribunals provides an interesting solution to difficult problems of security, while at the same time safeguarding to right to an effective defence.

Recourse to anonymous witnesses was to the fore in the case of *Kostovski* examined under article 6(1) and (3)(d) of the European Convention on Human Rights, where two such witnesses had been heard by the police and, in one case, also by the examining magistrate, but were not heard at the applicant's trials. Not only were the witnesses "not heard at the trials but also their declarations were taken ... in the absence of Mr Kostovski and his counsel" and, therefore, "at no stage could they be questioned by him or on his behalf".¹⁶⁵ The defence had, inter alia, the possibility of submitting written questions "indirectly through the examining magistrate", but "the nature and scope of the questions it could put ... were considerably restricted by reason of the decision that the anonymity of the authors of the statements should be preserved".¹⁶⁶ This fact "compounded the difficulties facing the applicant", because, "if the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable". In the view of the European Court, "the dangers inherent in such a situation are obvious".¹⁶⁷

Another aspect was that "each of the trial courts was precluded by the absence of the said anonymous persons from observing their demeanour under questioning and thus forming its own impression of their reliability".¹⁶⁸ The applicant, who had a long criminal record, was convicted of holding up a bank, and the Government defended the use of anonymous witnesses by citing the need to balance the interests of society, the accused and the witnesses themselves, in view of the increasing frequency of intimidation of witnesses in the Netherlands. In this particular case, the authors of the statements on which the applicant's conviction was based "had good reason to fear reprisals".¹⁶⁹

Although the Court admitted that the Government's line of argument was "not without force", it was "not decisive", and it went on to make the following statement, which merits quoting *in extenso*:

"Although the growth in organized crime doubtless demands the introduction of appropriate measures, the Government's submissions appear to the Court to lay insufficient weight on what the applicant's counsel described as 'the interest of everybody in a civilised society in a controllable and fair judicial procedure'. The right to a fair administration of justice holds so prominent a place in a democratic society ... that it cannot be sacrificed to expediency. The Convention does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants. However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6. In fact, the Government accepted that the applicant's conviction was based 'to a decisive extent' on the anonymous statements."¹⁷⁰

¹⁶⁵ *Enr. Court HR, Kostovski Case v. the Netherlands, judgment of 20 November 1989, Series A, No. 166*, p. 20, para. 42.

¹⁶⁶ *Ibid.*, loc. cit.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*, para. 43.

¹⁶⁹ *Ibid.*, p. 21, para. 44.

¹⁷⁰ *Ibid.*, loc. cit.

It followed that article 6(3)(d) taken together with article 6(1) of the European Convention had been violated in this case.

Testimony of anonymous victims and witnesses during trial is unlawful, but can in exceptional cases be used in the course of criminal investigations. The identity of anonymous victims and witnesses must be disclosed in sufficient time prior to the beginning of the court proceedings to ensure a fair trial.

3.9 The right to free assistance of an interpreter

According to article 14(3)(f) of the Covenant and article 6(3)(e) of the European Convention, everyone shall be entitled to “have the free assistance of an interpreter if he cannot understand or speak the language used in court”. Article 8(2)(a) of the American Convention guarantees “the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court”. Articles 20(4)(f) and 21(4)(f) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia also provide for the right to “free assistance of an interpreter” of an accused not understanding or speaking the language of these Tribunals.

In the words of the Human Rights Committee, the free assistance of an interpreter is a right that is “of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence” and it is moreover a right that “is independent of the outcome of the proceedings and applies to aliens as well as to nationals”.¹⁷¹ However, the services of an interpreter must be available only “if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language”.¹⁷² It is not a violation of article 14 that the States parties make provision for the use of only *one* official court language, and the requirement of a fair hearing does not “mandate States parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language”.¹⁷³

It follows that neither the right to a fair trial in article 14 nor article 14(3)(f) had been violated where a French citizen of Breton mother tongue, but who also spoke French, was refused the services of an interpreter during court proceedings against him in France. In this case, the author had “not shown that he, or the witnesses called on his behalf, were unable to address the tribunal in simple but adequate French”.¹⁷⁴ The

¹⁷¹General Comment No. 13 (Article 14), in *United Nations Compilation of General Comments*, p. 125, para. 13.

¹⁷²Communication No. 219/1986, *D. Guesdon v. France* (Views adopted on 25 July 1990), in UN doc. GAOR, A/45/40 (vol. II), p. 67, para. 10.2.

¹⁷³*Ibid.*, loc. cit.

¹⁷⁴*Ibid.*, para. 10.3.

Committee explained that the right to a fair trial in article 14(1) as read in conjunction with article 14(3)(f) of the Covenant “does not imply that the accused be afforded the possibility to express himself in the language which he normally speaks or speaks with a maximum of ease”; on the contrary, “if the court is certain”, as it was in this case, “that the accused is sufficiently proficient in the court’s language, it is not required to ascertain whether it would be preferable for the accused to express himself in a language other than the court language”.¹⁷⁵

The European Court of Human Rights has held with regard to article 6(3)(e) of the European Convention that the term “free” denotes “once and for all exemption or exoneration”.¹⁷⁶ In its view, “it would run counter not only to the ordinary meaning of [the term] free”, but also “to the object and purpose” of article 6, and in particular of article 6(3)(e), “if this latter paragraph were to be reduced to the guarantee of a right to provisional exemption from payment – not preventing the domestic courts from making a convicted person bear the interpretation costs –, since the right to a fair trial which Article 6 seeks to safeguard would itself be adversely affected”.¹⁷⁷ Article 6(3)(e) as construed in the context of the right to a fair trial as guaranteed by article 6(1), consequently

“signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial”.¹⁷⁸

Consequently, where the courts of the Federal Republic of Germany had attributed the costs of the interpretation to the applicants, article 6(3)(e) of the Convention was found to have been violated.¹⁷⁹

An accused person not able to speak and understand the language used by the authorities in the course of the criminal proceedings against him or her has the right to free interpretation and translation of all documents in these proceedings. This right is independent of the final outcome of the trial.

¹⁷⁵Ibid., loc. cit.

¹⁷⁶*Eur. Court HR, Case of Luedicke, Belkacem and Kog, judgment of 28 November 1978, Series A, No. 29, para. 40 at p. 17.*

¹⁷⁷Ibid., para. 42 at p. 18.

¹⁷⁸Ibid., p. 20, para. 48.

¹⁷⁹Ibid., pp. 20-21, paras. 49-50.

3.10 The right to a reasoned judgement

Although not expressly mentioned in the four main human rights treaties, the right to a reasoned judgement is inherent in the provisions regarding a “fair trial”, including the right to a public judgement. Article 22(2) and article 23(2) of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia both stipulate that the judgements of these Tribunals “shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended”. According to article 74(5) of the Statute of the International Criminal Court, the decisions of the Trial Chamber “shall be in writing and shall contain a full and reasoned statement of the Trial Chamber’s finding on the evidence and conclusions”.

The Human Rights Committee has examined numerous complaints concerning the failure of courts to issue a reasoned judgement. These complaints have been examined under article 14(3)(c) and (5) of the Covenant, which “are to be read together, so that the right to review of conviction and sentence must be made available without delay”. According to the Committee’s case-law under article 14(5),

“a convicted person is entitled to have, *within reasonable time, access to written judgements, duly reasoned, for all instances of appeal* in order to enjoy the effective exercise of the right to have conviction and sentence reviewed by a higher tribunal according to law”.¹⁸⁰

In the case of *Francis*, for instance, where the author had received a death sentence, the Court of Appeal had failed to issue a written judgement more than nine years after it dismissed his appeal, a delay that quite evidently was not reasonable and violated article 14(3)(c) and (5) of the Covenant.¹⁸¹ The delay in the submission of written judgements has in many cases implied that prisoners in Jamaica have not been able to pursue their right to appeal to the Privy Council.

According to the established case-law of the European Court of Human Rights, which reflects “a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based”. However, the “extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case”.¹⁸² Furthermore, although article 6(1) of the European Convention on Human Rights “obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument”.¹⁸³

¹⁸⁰Communication No. 320/1988, *V. Francis v. Jamaica* (Views adopted on 24 March 1993), in UN doc. GAOR, A/48/40 (vol. II), p. 66, para. 12.2; emphasis added.

¹⁸¹*Ibid.*, loc. cit. See also e.g. Communication No. 282/1988, *L. Smith v. Jamaica* (Views adopted on 31 March 1993), *ibid.*, p. 35, para. 10.5.

¹⁸²*Eur. Court HR, Case of García Ruiz v. Spain, judgment of 21 January 1999, Reports 1999-I*, p. 97, para. 26.

¹⁸³*Ibid.*, para. 26 at p. 98.

Consequently, a court may thus, “in dismissing an appeal, ... simply endorse the reasons for the lower court’s decision”.¹⁸⁴ In the case of *García Ruiz*, the applicant complained that the Madrid *Audiencia Provincial* failed to give him any reply to his arguments. However, the European Court noted that the applicant “had the benefit of adversarial proceedings” and that, at the various stages of those proceedings “he was able to submit the arguments he considered relevant to his case”; thus both the “factual and legal reasons for the first-instance decision dismissing his claim were set out at length”.¹⁸⁵ As to the judgement on appeal of the *Audiencia Provincial*, it “endorsed the statement of the facts and the legal reasoning set out in the judgment at first instance in so far as they did not conflict with its own findings” and, consequently, the applicant could not “validly argue that this judgment lacked reasons, even though in the present case a more substantial statement of reasons might have been desirable”.¹⁸⁶

In a case that was examined under article 6(1) and (3)(b) of the European Convention on Human Rights, the applicant complained that he did not have available a copy of the complete written judgement of the first-instance court at the time when he had to decide whether or not to lodge an appeal. The European Court of Human Rights concluded that this failure did not violate the Convention. A copy of the judgement in abridged form was available for inspection at the registry of the Regional Court, and a copy would have been made available to the defence had it so requested; at least the operative part of the judgement was read out in public in the presence of the applicant’s defence counsel. The Court expressed no views on the practice as such in the Netherlands with regard to judgements in abridged form which would be supplemented with an elaborated version only if an appeal was lodged. In the circumstances of the present case it concluded basically that the issues on which the applicant based his defence were addressed in the judgement in its abridged form (a fact that the applicant had not denied) and that it could not therefore be said that the applicant’s defence rights had been “unduly affected by the absence of a complete judgment”.¹⁸⁷

3.10.1 The lack of a reasoned judgement and capital punishment cases

The Human Rights Committee has consistently affirmed “that in all cases, and especially in capital cases, the accused is entitled to trial and appeal proceedings without undue delay, whatever the outcome of the judicial proceedings may turn out to be”,¹⁸⁸ and, as seen above, where the lack of a reasoned judgement had prevented the author from proceeding with his appeal, article 14(3)(c) and (5) was found to have been violated. The violation of these provisions has the further consequence of violating the right to life as protected by article 6 of the Covenant, since, according to General Comment No. 6, it follows from the express terms of article 6 that the death penalty

¹⁸⁴Ibid., loc. cit.

¹⁸⁵Ibid., p. 99, para. 29.

¹⁸⁶Ibid., loc. cit.

¹⁸⁷*Eur. Court HR, Case of Zoon v. the Netherlands, judgment of 7 December 2000*, paras. 39-51 of the text of the judgment as published on the Court’s web-site: <http://www.echr.coe.int/>.

¹⁸⁸Communication No. 356/1989, *T. Collins v. Jamaica* (Views adopted on 25 March 1993), in UN doc. GAOR, A/48/40 (vol. II), p. 89, para. 8.3.

“... can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence.”¹⁸⁹

Consequently, where “the final sentence of death” has been “passed without having met the requirements” of article 14, there is also a violation of article 6 of the Covenant, which provides in its second paragraph that a sentence of death may not be imposed “contrary to the provisions of the present Covenant”.¹⁹⁰

The African Commission on Human and Peoples’ Rights has likewise held that the execution of 24 soldiers constituted an “arbitrary deprivation” of their right to life as guaranteed by article 4 of the African Charter on Human and Peoples’ Rights, since their trial had violated the due process guarantees laid down by article 7(1)(a) of the Charter.¹⁹¹

Courts must at all times give reasons for their decisions, although they may not have to answer each argument made by the accused.

The convicted person is entitled to receive a reasoned judgement within a reasonable time; such judgement is essential for the purpose of lodging appeals.

The strict enforcement of these rights is particularly important in capital punishment cases.

3.11 Freedom from ex post facto laws/ The principle of *nullum crimen sine lege*

Article 15(1) of the International Covenant, article 7(2) of the African Charter, article 9 of the American Convention, article 7(1) of the European Convention and article 22 of the Statute of the International Criminal Court all guarantee – in slightly different terms – the right not to be held guilty on account of any act or omission that did not constitute a criminal offence at the time it was committed. Article 15(1) of the Covenant and article 7(1) of the European Convention refer to “national and international law” in this respect, while article 9 of the American Convention speaks

¹⁸⁹ *United Nations Compilation of General Comments*, pp. 115-116, para. 7. See also Communication No. 356/1989, *T. Collins v. Jamaica* (Views adopted on 25 March 1993), in UN doc. GAOR, A/48/40 (vol. II), p. 89, para. 8.4.

¹⁹⁰ Communication No. 356/1989, *T. Collins v. Jamaica* (Views adopted on 25 March 1993), in UN doc. GAOR, A/48/40 (vol. II), p. 89, para. 8.4.

¹⁹¹ ACHPR, *Forum of Conscience (on behalf of 24 soldiers) v. Sierra Leone*, Communication No. 223/98, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, para. 19 of the text of the decision published at <http://www1.umn.edu/humanrts/africa/comcases/223-98.html>.

only of “the applicable law”. Article 22 of the Statute of the International Criminal Court relates to crimes “within the jurisdiction of the Court”.

The prohibition on retroactivity of criminal law is fundamental in a society governed by the rule of law, one aspect of which is to ensure *legal predictability or foreseeability*, and thus, legal security for individuals. Experience shows that, in the course of severe crisis situations, there has often been a temptation to penalize certain behaviour retroactively, but, as can be seen in article 4(2) of the International Covenant, article 27(2) of the American Convention and article 15(2) of the European Convention, the right to freedom from ex post facto laws has been made non-derogable, and must therefore apply with full force even in the direst of emergencies.

The Human Rights Committee found a violation of article 15(1) of the Covenant in a case where the author had been sentenced to eight years’ imprisonment for “subversive association”, although the acts concerned were lawful when committed.¹⁹²

In the case of *Media Rights Agenda and Others* against Nigeria, the African Commission on Human and Peoples’ Rights had to consider the compatibility of Newspaper Decree No. 43 of 1993 with article 7(2) of the African Charter. This Decree, which had retroactive effect, inter alia made it an offence punishable with a heavy fine and/or a long term of imprisonment for a person to own, publish or print a newspaper not registered under the Decree. The Commission condemned “the literal, minimalist interpretation” of the Charter provided by the Government, which had argued that there had been no violation of article 7(2) since the retroactive aspect of the Decree had not been enforced. In the view of the Commission, however, article 7(2)

“... must be read to prohibit not only condemnation and infliction of punishment for acts which did not constitute crimes at the time they were committed, but retroactivity itself. It is expected that citizens must take the laws seriously. If laws change with retroactive effect, the rule of law is undermined since individuals cannot know at any moment if their actions are legal. For a law-abiding citizen, this is a terrible uncertainty, regardless of the likelihood of eventual punishment.”¹⁹³

¹⁹²Communication No. R.7/28, *I. Weinberger v. Uruguay* (Views adopted on 29 October 1980), in UN doc. GAOR, A/36/40, p. 119, para. 16.

¹⁹³ACHPR, *Media Rights Agenda and Others v. Nigeria*, Communications Nos. 105/93, 128/94, 130/94 and 152/96, decision adopted on 31 October 1998, paras. 58-59 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152_96.html.

The Commission added, furthermore, that “unfortunately” it could not be totally confident that no person or newspaper had as yet suffered under the retroactivity of Decree No. 43. In its view potential “prosecution is a serious threat” and “an unjust but un-enforced law undermines ... the sanctity in which the law should be held”. Consequently, Decree No. 43 violated article 7(2) of the African Charter.¹⁹⁴

The European Court has dealt with a number of varied cases under article 7(1). However, only the basic principles of the Court’s interpretation of this article can be dealt with here. To the European Court, article 7(1) not only prohibits “the retrospective application of the criminal law to an accused’s disadvantage” but also “embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*), as well as the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance, by analogy”.¹⁹⁵ This important qualification implies that “an offence must be clearly defined in law”, a condition which is “satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him liable”.¹⁹⁶ The Court has also held that, where new provisions of a Criminal Code had been applied to the *advantage* rather than the *detriment* of the accused person, article 7(1) of the Convention had not been violated.¹⁹⁷

3.12 The principle of *ne bis in idem*, or prohibition of double jeopardy

Article 14(7) of the International Covenant contains the prohibition of double jeopardy, or the principle of *ne bis in idem*, according to which “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”. Article 8(4) of the American Convention guarantees this principle in the following words: “An accused person **acquitted** by a nonappealable judgement shall not be subjected to a new trial for the same cause” (emphasis added). Protocol No. 7 to the European Convention provides in its article 4(1) that “no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State”. However, according to article 4(2) of the Protocol, these provisions “shall not prevent the re-opening of the case ... if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which would affect the outcome of the case”. The principle of *ne bis in idem* is non-derogable under the European Convention (cf. art. 4(3) of Protocol No. 7).

¹⁹⁴Ibid., para. 60.

¹⁹⁵Eur. Court HR, *Case of Kokkinakis v. Greece*, judgment of 25 May 1993, Series A, No. 260-A, p. 22, para. 52.

¹⁹⁶Ibid., loc. cit.

¹⁹⁷Eur. Court HR, *Case of G. v. France*, judgment of 27 September 1995, Series A, No. 325-B, p. 38, paras. 24-26.

Lastly, articles 9 and 10 of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia, as well as article 20 of the Statute of the International Criminal Court, also provide protection against double jeopardy for crimes within the jurisdiction of the respective courts. However, under the Statutes of the Tribunals for Rwanda and the former Yugoslavia, exceptions exist for persons having been tried by national courts for an act characterized as “an ordinary crime” rather than a “serious” violation of international humanitarian law and, further, if “the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted” (see art. 9(2) and art. 10(2) of the respective Statutes). Article 20(3) of the Statute of the International Criminal Court also provides for exceptions for such other court proceedings which had the “purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court”, or if such proceedings were otherwise “not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”.

Article 14(7) of the Covenant – like the European Convention – only prohibits double jeopardy “with regard to an offence adjudicated in a given State”; it does not guarantee *ne bis in idem* “with regard to the national jurisdictions of two or more States”.¹⁹⁸

It is clear that, when a domestic appellate court has already quashed a second indictment, thus vindicating the principle of *ne bis in idem*, there has been no violation of, for instance, article 14(7) of the Covenant.¹⁹⁹

With regard to the principle of *ne bis in idem* as guaranteed by article 8(4) of the American Convention on Human Rights, the Inter-American Court of Human Rights has explained that it “is intended to protect the rights of individuals who have been tried for specific facts from being subjected to a new trial for the same cause”, but, unlike “the formula used by other international rights protection instruments, ... the American Convention uses the expression ‘*the same cause*’, which is a much broader term in the victim’s favour”.²⁰⁰ This means, for instance, that, if a person has been acquitted by military courts on charges of treason, it is contrary to article 8(4) of the Convention subsequently to try that person in the civil courts, on the same facts, albeit with a different qualification such as terrorism.²⁰¹ Indeed, in the case of *Loayza Tamayo*, the Court also held that the Decree Laws containing the crimes of “terrorism” and “treason” were in themselves contrary to article 8(4), since they referred “to actions not

¹⁹⁸Communication No. 204/1986, *A. P. v. Italy* (Decision adopted on 2 November 1987), in UN doc. GAOR, A/43/40, p. 244, para. 7.3.

¹⁹⁹Communication No. 277/1988, *Teran Jijón v. Ecuador* (Views adopted on 26 March 1992), GAOR, A/47/40, p. 272, para. 5.4.

²⁰⁰I-A Court HR, *Loayza Tamayo Case v. Peru, judgment of September 17, 1977*, OAS doc. OAS/Ser.L/V/III.39, doc. 5, 1997 *Annual Report I-A Court HR*, p. 213, para. 66.

²⁰¹*Ibid.*, pp. 213-215, paras. 66-77.

strictly defined” which could be “interpreted similarly within both crimes” as was done in that particular case.²⁰² In other words, they gave rise to unacceptable legal insecurity.

The principle of *ne bis in idem* in article 4 of Protocol No. 7 to the European Convention was violated in the case of *Gradingner*, concerning an applicant who had already been convicted by an Austrian Regional Court for causing death by negligence while driving his car. According to the Regional Court, which based itself on the Criminal Code, the applicant’s alcohol level was not such that it would have constituted an aggravating factor.²⁰³ However, the District Attorney disagreed with the conclusion and, invoking the Road Traffic Act, imposed a fine on the applicant “with two weeks’ imprisonment in default, for driving under the influence of drink”.²⁰⁴ The European Court was of the view that, although the Criminal Code and the Road Traffic Act differed both as to “the designation of the offences” and “their nature and purpose”, “the impugned decisions were based on the same conduct” thereby constituting a violation of the principle of *ne bis in idem*.²⁰⁵

In the case of *Oliveira*, however, the outcome was different. The applicant had been driving on a road covered with ice and snow when her car veered onto the other side of the road, hitting one car and colliding with a second car whose driver was seriously injured. A police magistrate subsequently convicted the applicant on the basis of Sections 31 and 32 of the Federal Road Traffic Act of “*failing to control her vehicle*, as she had not adapted her speed to the road conditions”; she was sentenced to a fine of 200 Swiss francs (CHF).²⁰⁶ Subsequently, the District Attorney’s Office issued a penal order fining the applicant CHF 2000 “for *negligently causing physical injury*” contrary to article 125 of the Swiss Criminal Code; on appeal this fine was reduced to CHF 1,500, and, after deduction of the first fine of CHF 200, to CHF 1,300.²⁰⁷ Before the European Court of Human Rights, the applicant complained of a violation of article 4 of Protocol No. 7, arguing that the same incident had led to her being convicted twice, first for failing to control her vehicle and then for negligently causing physical injury.²⁰⁸

In the view of the European Court this is “a typical example of a single act constituting various offences (*concoirs idéal d’infractions*)”, and the “characteristic feature of this notion is that a single criminal act is split up in two separate offences”; in such cases “the greater penalty will usually absorb the lesser one”.²⁰⁹ In the view of the Court, however,

²⁰²Ibid., p. 213, para. 68.

²⁰³*Eur. Court HR, Case of Gradingner v. Austria, judgment of 23 October 1995, Series A, No. 328-C*, p. 66, para. 55.

²⁰⁴Ibid., p. 55, para. 9.

²⁰⁵Ibid., p. 66, para. 55.

²⁰⁶*Eur. Court HR, Case of Oliveira v. Switzerland, judgment of 30 July 1998, Reports 1998-V*, p. 1994, para. 10; emphasis added.

²⁰⁷Ibid., paras. 11-12; emphasis added.

²⁰⁸Ibid., p. 1996, para. 22.

²⁰⁹Ibid., p. 1998, para. 26.

“there is nothing in that situation which infringes article 4 of Protocol No. 7 since that provision prohibits people being tried twice for the same offence whereas in cases concerning a single act constituting various offences (*conours idéal d’infractions*) one criminal act constitutes two separate offences”.²¹⁰

The Court added, however, that it “would admittedly have been more consistent with the principles governing the proper administration of justice for sentence in respect of both offences, which resulted from the same criminal act, to have been passed by the same court in a single set of proceedings”; however, the fact that this was not done in this case was “irrelevant as regards compliance with” article 4 of Protocol No. 7, “since that provision does not preclude separate offences, even if they are part of a single act, being tried by different courts, especially where, as in the present case, the penalties were not cumulative, the lesser being absorbed by the greater”.²¹¹ The *Oliveira* case was “therefore distinguishable from the case of Gradinger, ... in which two different courts came to inconsistent findings on the applicant’s blood alcohol level”.²¹² There had not, consequently, been a violation of article 4 of protocol No. 7 in this case.

*Everyone has the right not to be convicted for conduct that did not constitute a criminal offence at the time it was committed. This right applies **at all times** and can never be derogated from.*

*The prohibition of ex post facto laws is essential in order to ensure **legal predictability**, which means that laws must be clear enough to guide the conduct of the individual, who must be able to know, possibly with some legal help, what conduct is criminal and what is not.*

The right not to be tried twice for the same criminal offence is guaranteed by international law, as a minimum within one and the same State. In Europe, the principle of ne bis in idem does not rule out a person’s being tried for separate offences originating in a single criminal act.

²¹⁰Ibid., loc. cit.

²¹¹Ibid., para. 27.

²¹²Ibid., para. 28. For other cases concerning the principle of *ne bis in idem* see e.g. *Eur. Court HR, Case of Franz Fischer v. Austria, judgment of 29 May 2001*; for the text see <http://hudoc.echr.coe.int>; and *Eur. Court HR, Ponsetti and Chesnel v. France, decision of 14 September 1999, Reports 1999-VI*.

4. Limits on Punishment

4.1 The right to benefit from a lighter penalty

Article 15(1) of the International Covenant and article 9 of the American Convention outlaw the imposition of a penalty heavier than the one that was applicable at the time when the criminal offence was committed, and provide that if, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit therefrom. These provisions cannot be derogated from even in public emergencies (cf. article 4(2) of the International Covenant and article 27(2) of the American Convention). The African Charter is silent on these questions, while article 7(1) of the European Convention is limited to the proscription of recourse to penalties that are heavier than those applicable at the time the crime was committed; this provision too is non-derogable (cf. art. 15(2) of the European Convention).

The question of preventive measures: The case of Welch

The case of *Welch* was examined under article 7(1) of the European Convention and concerned an applicant who had received a long prison sentence for drug offences and who, in addition, had been the subject of a confiscation order based on a law that had entered into force *after* the commission of the offences concerned. Failure to pay the money would have made the applicant liable to serve a consecutive sentence of two years' imprisonment. Recalling that the term "penalty" is an "autonomous" notion under the Convention and "looking behind appearances to the realities of the situation", the European Court concluded that article 7(1) had been violated in this case, since "the applicant faced more far-reaching detriment as a result of the order than that to which he was exposed at the time of the commission of the offences for which he was convicted".²¹³ This conclusion did not mean that the Court opposed the recourse to severe confiscatory measures "in the fight against the scourge of drug trafficking", only that it stigmatized the *retroactive* application thereof.²¹⁴

4.2 Consistency with international legal standards

Other limits on the right to impose penalties in connection with criminal convictions flow from the terms of international human rights law in general, and concern, most particularly, the prohibition on corporal punishment and the severe restrictions on, and outlawing of, recourse to capital punishment.

²¹³*Eur. Court HR, Case of Welch v. the United Kingdom, judgment of 9 February 1995, Series A, No. 307-A, p. 14, para. 35.*

²¹⁴*Ibid.*, pp. 14-15, para. 36.

4.2.1 Corporal punishment

It will be recalled that inter alia article 7 of the International Covenant, article 5 of the African Charter, article 5(2) of the American Convention and article 3 of the European Convention all outlaw recourse to torture, cruel and/or inhuman or degrading treatment or *punishment*. This prohibition is valid at all times and allows for no limitations.

The Human Rights Committee has observed that the prohibition in article 7 “relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim” and that, moreover,

*“the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure”.*²¹⁵

It is not clear, however, what the Committee here means by “excessive chastisement”; but to judge from the Committee members’ questions and recommendations to the States parties in connection with consideration of the periodic reports, they regard the use of corporal punishment as an inappropriate form of chastisement that is contrary to article 7 and should be abolished.²¹⁶

The case of *Tyrrer* brought under the European Convention on Human Rights concerned the imposition of three strokes with a cane on an adolescent, a punishment ordered by a juvenile court in the Isle of Man. The caning “raised, but did not cut, the applicant’s skin and he was sore for about a week and a half afterwards”.²¹⁷ The European Court concluded that “the element of humiliation attained the level inherent in the notion of ‘degrading punishment’” and was therefore contrary to article 3 of the European Convention.²¹⁸ The Court expressed its view on judicial corporal punishment in the following terms:

“The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. ... Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power

²¹⁵General Comment No. 20 (Art. 7), *United Nations Compilation of General Comments*, p. 139, para. 5; emphasis added.

²¹⁶See recommendations as to the Jamaican Flogging Regulation Act, 1903 and the Jamaican Crime (Prevention of) Act, 1942, *GAOR*, A/53/40 (vol. I), p. 17, para. 83; as to flogging, amputation and stoning in the Sudan, see *ibid.*, p. 23, para. 120. See also questions asked with regard to Australia, in UN doc. *GAOR*, A/38/40, p. 29, para. 144; and, as to Saint Vincent and the Grenadines, *GAOR*, A/45/40 (vol. I), p. 61, para. 280.

²¹⁷*Eur. Court HR, Case of Tyrrer v. the United Kingdom, judgment of 25 April 1978, Series A, No. 26*, p. 7, para. 10.

²¹⁸*Ibid.*, p. 17, para. 35.

of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity.”²¹⁹

4.2.2 Capital punishment

In international human rights law, recourse to capital punishment is surrounded by numerous safeguards aimed at limiting and eventually abolishing its use. For instance, article 6(2) of the International Covenant on Civil and Political Rights allows the imposition of the death penalty only “for the most serious crimes”, a provision that has led the Human Rights Committee to conclude that, where the death penalty was imposed for a conviction of aggravated robbery, the mandatory death sentence violated article 6(2); this was so since the domestic court could not take into consideration mitigating circumstances such as the fact that the use of firearms in this case “did not produce the death or wounding of any person”.²²⁰ Other safeguards contained in article 6 of the Covenant relate to the prohibition both on imposing death sentences “for crimes committed by persons below eighteen years of age” and on the carrying out of such sentences on pregnant women. Further, as described above, according to article 6(2) of the Covenant, death sentences cannot be imposed “contrary to the provisions of the ... Covenant”, which means that all the due process guarantees must have been respected in the trial leading to the death sentence.

The Second Optional Protocol to the Covenant aims at the abolition of the death penalty and entered into force on 11 July 1991. As of 8 February 2002 there were 46 States parties to this Protocol.²²¹

Article 4 of the American Convention also contains safeguards against abusive recourse to capital punishment and it cannot, for instance, “be reestablished in states that have abolished it” (art. 4(3)). Further, “in no case shall capital punishment be inflicted for political offences or related common crimes”, a limitation that is particularly important in public emergencies. In addition, the penalty shall not be inflicted on persons who committed the crime below the age of eighteen or over seventy years of age, nor shall it be carried out on pregnant women. On 8 June 1990, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty was adopted and, as of 9 April 2002, it had eight ratifications.²²² According to article 2 of this Protocol the States parties may, however, when ratifying or acceding to the Protocol, “declare that they reserve the right to apply the death penalty in wartime, in accordance with international law, for extremely serious crimes of a military nature”.

²¹⁹Ibid., p. 16, para. 33.

²²⁰Communication No. 390/1990, *B. Lubuto* (Views adopted on 31 October 1995), in UN doc. *GAOR*, A/51/40 (vol. II), p. 14, para. 7.2.

²²¹UN doc. *GAOR*, A/55/40 (vol. I), p. 8, para. 5.

²²²See the OAS web-site: <http://www.oas.org/juridico/english/treaties.html>.

The European Convention on Human Rights per se allows for the death penalty; this follows from article 2(1), which provides that “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”. However, according to article 1 of Protocol No. 6 to the Convention, “the death penalty shall be abolished” and “no one shall be condemned to such penalty or executed”. Yet article 2 of the Protocol makes provision for the use of the death penalty “in respect of acts committed in time of war or of imminent threat of war”. Once into force, Protocol No. 13 to the Convention will, however, outlaw the death penalty *at all times*. Signed on 3 May 2002 in Vilnius, Protocol No. 13 had, as of 14 May 2002, 3 of the 10 ratifications required for its entry into force.²²³

Neither the International Criminal Court nor the International Criminal Tribunals for Rwanda and the former Yugoslavia can impose the death penalty (see art. 77 of the Statute of the International Criminal Court and arts. 23 and 24 of the respective Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia).

Under international human rights law, a heavier penalty cannot be imposed than that applicable at the time of the commission of the offence. If a lighter penalty has been introduced since the commission of the offence, the convicted person shall, however, benefit therefrom.

Punishments must be consistent with international human rights standards. They must in no circumstances amount to torture, inhuman, cruel or degrading treatment or punishment. Corporal chastisement is unlawful to the extent that it amounts to such treatment. Such chastisement is in general considered inappropriate by the international monitoring organs.

The use of the death penalty is strictly circumscribed under international human rights law; if permissible at all, it is limited to the most serious crimes; and cannot be imposed for crimes committed by persons under eighteen years of age. Many countries are now legally committed not to resort to the use of capital punishment in times of peace.

²²³See <http://conventions.coe.int/>.

5. The Right of Appeal

Article 14(5) of the Covenant provides that “everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. The existence of a right to appeal is a right guaranteed by the Covenant itself and its existence is thus not in theory dependent on domestic law; the reference to “according to law” refers here exclusively to “the modalities by which the review by a higher tribunal is to be carried out”.²²⁴ Article 7(1)(a) of the African Charter on Human and Peoples’ Rights provides that “every individual shall have the right to have his cause heard”, a right which includes “the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”. Article 8(2)(h) of the American Convention on Human Rights stipulates that in criminal proceedings “every person is entitled, with full equality [to] the right to appeal the judgment to a higher court”. Article 6 of the European Convention does not, per se, guarantee a right of appeal,²²⁵ but this right is contained in article 2 of Protocol No. 7 to the Convention, although it “may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in first instance by the highest tribunal or was convicted following an appeal against acquittal” (art. 2(2) of the Protocol).

The African Commission on Human and Peoples’ Rights has held that the “foreclosure of any avenue of appeal to competent national organs in a criminal case attracting punishment as severe as the death penalty clearly violates” article 7(1)(a) of the African Charter. In the view of the Commission, the lack of appeal in such cases also falls short of the standard contained in paragraph 6 of the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, which provides that “anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction ...”.²²⁶ Article 7(1)(a) was thus also violated where the Nigerian Government had passed the Civil Disturbances Act whereby it excluded any review by any court of law of the “validity of any decision, sentence, judgment ... or order given or made, ... or any other thing whatsoever done under this Act”.²²⁷ In the particular case involving the *Constitutional Rights Project* acting on behalf of seven men sentenced to death, the fundamental rights involved were the rights to life and to liberty and security as guaranteed by articles 4 and 6 of the African Charter. The Commission held that, while “punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of these rights, to foreclose any

²²⁴Communication No. R.15/64, *C. Salgar de Montejo v. Colombia* (Views adopted on 24 March 1982), in UN doc. GAOR, A/37/40, p. 173, para. 10.4.

²²⁵*Eur. Court HR, Case of Tolstoy Miloslavsky v. the United Kingdom, judgment of 13 July 1995, Series A, No. 316-B*, para. 59 at p. 79.

²²⁶ACHPR, *Civil Liberties Organisation and Others v. Nigeria, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April – 7 May 2001*, para. 33 of the text of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/218-98.html>; the relevant United Nations resolution was approved by Economic and Social Council resolution 1984/50 of 25 May 1984.

²²⁷ACHPR, *Constitutional Rights Project, (on behalf of Zamani Lékéwot and six Others) v. Nigeria, Communication No. 87/93, decision adopted during the 16th session, October 1994*, paras. 26-27 of the text of the decision as published at: <http://www.up.ac.za/cht/>.

avenue of appeal to ‘competent national organs’ in criminal cases bearing such penalties clearly violates” article 7(1)(a) of the Charter, “and increases the risk that even severe violations may go unredressed”.²²⁸ In the case of *Forum of Conscience* concerning the trial and subsequent execution of 24 soldiers, the Commission concluded that the deprivation of the right to appeal constituted a violation of article 7(1)(a) and that this failure to provide due process amounted to an arbitrary deprivation of their lives contrary to article 4 of the Charter.²²⁹

The right to appeal in article 7(1)(a) of the African Charter does not, however, appear to be limited to criminal proceedings as such in that it allows for appeals “to competent national organs” against acts violating one’s “fundamental rights” in general.

5.1 The right to full review

The Human Rights Committee has made it clear that, regardless of the name of the remedy or appeal in question, “it must meet the requirements for which the Covenant provides”,²³⁰ which implies that the review must concern both the *legal and material aspects of the person’s conviction and sentence*. In other words, in addition to pure questions of law, the review must provide “for a full evaluation of the evidence and the conduct of the trial”.²³¹

In the case of *Gómez*, the author complained of a violation of article 14(5); since the Spanish Supreme Court could not re-evaluate evidence, his judicial review had thus been incomplete. The State party was not able to refute this allegation and the Committee consequently concluded that “the lack of any possibility of fully reviewing the author’s conviction and sentence, ... the review having been limited to the formal or legal aspects of the conviction, means that the guarantees provided for in article 14, paragraph 5, of the Covenant have not been met”.²³² In yet another case against Spain, the same provision was violated since there was no lawyer available to submit any grounds of appeal and, therefore, the authors’ appeal “was not effectively considered by the Court of Appeal”.²³³

With regard to *leave to appeal*, the Committee has however accepted that “a system not allowing for automatic right to appeal may still be in conformity with” article 14(5) of the Covenant “as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of

²²⁸Ibid., para. 28.

²²⁹ACHPR, *Forum of Conscience (on behalf of 24 soldiers) v. Sierra Leone*, Communication No. 223/98, decision adopted during the 28th Ordinary Session, 23 October – 6 November 2000, para. 19 of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/223-98.html>.

²³⁰Communication No. 701/1996, *Gómez v. Spain* (Views adopted on 20 July 2000), in UN doc. GAOR, A/55/40 (vol. II), p. 109, para. 11.1.

²³¹Communications Nos. 623, 624, 626, 627/1995, *V. P. Domukovsky et al. v. Georgia* (Views adopted on 6 April 1998), in UN doc. GAOR, A/53/40 (vol. II), p. 111, para. 18.11.

²³²Communication No. 701/1996, *Gómez v. Spain* (Views adopted on 20 July 2000), in UN doc. A/55/40 (vol. II), p. 109, para. 11.1.

²³³Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 18, para. 14.3.

the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case”.²³⁴

5.2 The availability of a judgement

As seen in subsections 3.10 and 3.10.1 above, for the right of appeal to be *effectively* available, a convicted person is entitled to have, within a reasonable time, access to duly reasoned written judgements; failing the availability of such judgement, article 14(5) of the International Covenant has been violated. Article 14(5) has also been violated in cases where the defence lawyers have abandoned all grounds of appeal, and where the domestic court has not ascertained that this was done in accordance with the wishes of the client. However, this jurisprudence does not apply to cases where it appears that the relevant domestic court “did ascertain that the applicant had been informed and accepted that there were no arguments to be made on his behalf”.²³⁵

5.3 Transcripts of the trial

The right to appeal can also be affected by a delay in producing the transcripts of the trial. Because of such delay in the *Pinkney* case, the author’s leave to appeal was not heard until 34 months after he had applied for leave to appeal, a delay that “was incompatible with the right to be tried without undue delay” contrary to article 14(3)(c) and (5) of the International Covenant.²³⁶

5.4 Preservation of evidence

The Committee has further recognized “that in order for the right to review of one’s conviction to be effective, the State party must be under an obligation to preserve sufficient evidential material to allow for” an effective review of one’s conviction.²³⁷ However, it does not see “that *any* failure to preserve evidential material until the completion of the appeals procedure constitutes a violation of” article 14(5), but only “where such failure prejudices the convict’s right to a review, i.e. in situations where the evidence in question is indispensable to perform such a review”. Moreover, in its view, “this is an issue which it is primarily for the appellate courts to consider”.²³⁸ Consequently, where the State party’s “failure to preserve the original confession statement was made one of the grounds of appeal” and the court dismissed the appeal since it had no merit and “without giving further reasons”, the Committee considered

²³⁴Communication No. 662/1995, *P. Lumley v. Jamaica* (Views adopted on 31 March 1999), in UN doc. *GAOR*, A/54/40 (vol. II), p. 145, para. 7.3.

²³⁵Communication No. 731/1996, *M. Robinson v. Jamaica* (Views adopted on 29 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 129, para. 10.5.

²³⁶Communication No. R.7/27, *L. J. Pinkney v. Canada* (Views adopted on 29 October 1981), in UN doc. *GAOR*, A/37/40, p. 113, para. 35, read in conjunction with p. 103, para. 10.

²³⁷Communication No. 731/1996, *M. Robinson v. Jamaica* (Views adopted on 29 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 130, para. 10.7; emphasis added.

²³⁸*Ibid.*, loc. cit.; emphasis added.

that it was “not in a position to re-evaluate the ... findings on this point” and concluded that article 14(5) had not been violated.²³⁹

5.5 The right to legal aid

The Committee has consistently held that “it is imperative that legal aid be available to a convicted prisoner under sentence of death, *and that this applies to all stages of the legal proceedings*”.²⁴⁰ In the case of *LaVende*, the author had been denied legal aid for the purpose of petitioning the Judicial Committee of the Privy Council, and, in the opinion of the Committee, this denial constituted a violation not only of article 14(3)(d), but also of article 14(5), since it effectively barred him from obtaining a review of his conviction and sentence.²⁴¹

The right to appeal as guaranteed by article 8 (2)(h) of the American Convention on Human Rights was violated in the case of *Castillo Petruzzi et al.* where the victims had only been able to file an appeal with the Supreme Court of Military Justice against the judgement of the lower military court. As noted by the Inter-American Court of Human Rights, the right to appeal the judgement as guaranteed by the Convention “is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse”; on the contrary, for “a true review of the judgment, in the sense required by the Convention, the higher court must have the jurisdictional authority to take up the particular case in question”.²⁴² In this case, where the victims had been tried by a military court with an appeal possible to the Supreme Court of Military Justice, “the superior court was part of the military structure and as such did not have the independence necessary to act as or be a tribunal previously established by law with jurisdiction to try civilians”; consequently, “there were no real guarantees that the case would be reconsidered by a higher court that combined the qualities of competence, impartiality and independence that the Convention requires”.²⁴³

Although the right to appeal is not guaranteed as such by article 6 of the European Convention on Human Rights, the European Court has consistently held that “a Contracting State which sets up an appeal system is required to ensure that persons within its jurisdiction enjoy before appellate courts the fundamental guarantees” of that article; yet “the manner of application of Article 6 to proceedings before such courts depends on the special features of the proceedings involved” and “account must be taken of the entirety of the proceedings in the domestic legal order

²³⁹Ibid., para. 10.8.

²⁴⁰Communication No. 554/1993, R. *LaVende v. Trinidad and Tobago* (Views adopted on 29 October 1997), in UN doc. GAOR, A/53/40 (vol. II), p. 12, para. 5.8; emphasis added.

²⁴¹Ibid., pp. 12-13, para. 5.8.

²⁴²I-A Court HR, *Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52*, p. 208, para. 161

²⁴³Ibid., loc. cit.

and of the role of the appellate court therein”.²⁴⁴ As previously noted, the right to appeal is, however, included in article 2 of Protocol No. 7.

International human rights law guarantees the right to appeal against a conviction. The appeal proceedings must provide a full review of the facts and the law. Inter alia, the effective exercise of the right to appeal requires, as a minimum, access within a reasonable time to the written judgement. It may also require the transcript of the trial, access to evidential material, and the granting of free legal aid.

It is not sufficient that the right to appeal is exercised before a higher court; this court must be independent and impartial and administer justice in accordance with the rules of due process of law.

6. The Right to Compensation in the Event of a Miscarriage of Justice

Of the main human rights treaties examined in this chapter, only the International Covenant on Civil and Political Rights provides *expressis verbis* for compensation in case of a miscarriage of justice. Article 14(6) thereof reads:

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.”

As is clear from this text, a pardon must be based on the fact that a miscarriage of justice has taken place, and, consequently, where a presidential pardon was instead motivated by considerations of *equity*, no question of compensation arises under article 14(6) of the Covenant.²⁴⁵

Under the International Covenant on Civil and Political Rights a person has the right to compensation in case of conclusive evidence that he or she has been the victim of a miscarriage of justice. The victim must not have contributed to the miscarriage of justice. Pardons based on equity do not give rise to any ground for compensation.

²⁴⁴*Eur. Court HR, Case of Tolstoy Miloslavsky v. the United Kingdom, judgment of 13 July 1995, Series A, No. 316-B, p. 79, para. 59.*

²⁴⁵Communication No. 89/1981, *P. Mahonen v. Finland* (Views adopted on 8 April 1985), in UN doc. GAOR, A/40/40, pp. 169-170, paras. 11.2-12.

7. The Right to a Fair Trial and Special Tribunals

In General Comment No. 13, the Human Rights Committee stated with regard to the creation of military and other special tribunals that

“The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.”²⁴⁶

Without explaining what aspect of the proceedings was not in conformity with article 14, the Human Rights Committee concluded that the Nicaraguan Peoples’ Tribunals (*Tribunales Especiales de Justicia*) “did not offer the guarantees of a fair trial provided for” in that article. In the case in question the author had been sentenced to 30 years’ imprisonment on account of his outspoken criticism of the Marxist orientation of the Sandinistas.²⁴⁷

It is clear from the case-law of the African Commission on Human and Peoples’ Rights that the provisions of article 7 of the African Charter should be considered to be non-derogable and that all tribunals, including military courts, must be impartial and ensure fair legal proceedings at all times.²⁴⁸

The Inter-American Court of Human Rights concluded that the military courts permitted to try civilians for treason in Peru violated article 8(1) of the American Convention on Human Rights because they were not independent and impartial and because, since the judges were “faceless”, the defendants had no possibility of knowing their identity and of assessing their competence.²⁴⁹

²⁴⁶United Nations Compilation of General Comments, p. 123, para. 4.

²⁴⁷Communication No. 328/1988, *R. Z. Blanco v. Nicaragua* (Views adopted on 20 July 1994), in UN doc. *GAOR*, A/49/40 (vol. II), p. 18, para. 10.4.

²⁴⁸See e.g. *ACHPR, Civil Liberties Organisation and Others v. Nigeria, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April – 7 May 2001*, p. 3 of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/218-98.html>.

²⁴⁹*I-A Court HR, Castillo Petruzzi et al. judgment of May 30, 1999, Series C, No. 52*, pp. 196-197, paras. 129-134.

The European Court of Human Rights held in several cases that National Security Courts trying civilians in Turkey lacked the independence and impartiality required by article 6(1) of the European Convention on Human Rights and could not, consequently, guarantee the applicants' right to a fair hearing. The reason why the National Security Courts failed to comply with the requirements of article 6(1) in this respect was that one of their three members was a military judge belonging to the army and subject to military discipline and assessment reports; further, the term of office of National Security Court judges was only a renewable period of four years.²⁵⁰

What follows from these few examples of the international case-law on this matter is that all courts trying civilians, whether ordinary or special, including military tribunals, must be independent and impartial so as to be able to guarantee a fair hearing to the accused at all times.

All courts trying civilians, whether ordinary or special courts, must at all times be independent and impartial and respect due process guarantees.

8. The Right to a Fair Trial in Public Emergencies

The right to due process in public emergencies will be dealt with in Chapter 16. Suffice it to point out here that, although the articles on fair trial in the International Covenant and the American and European Conventions do not, as such, form part of the list of non-derogable rights in article 4(2) of the Covenant, article 27(2) of the American Convention and article 15(2) of the European Convention, this in no way means that these provisions can be derogated from at will.

With regard to the International Covenant on Civil and Political Rights, the Human Rights Committee has stated in its General Comment No. 13 that

“If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.”²⁵¹

²⁵⁰ Eur. Court HR, *Case of Çiraklar v. Turkey*, judgment of 28 October 1998, Reports 1998-VII, pp. 3072-3074, paras. 37-41.

²⁵¹ United Nations Compilation of General Comments, p. 123, para. 4.

The Committee has also made it abundantly clear that the “**right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception**”.²⁵² It is further beyond doubt that the basic fair trial guarantees laid down in article 14 must be ensured even in severe crisis situations, although the Committee has accepted “that it would simply not be feasible to expect that all provisions of article 14 can remain fully in force in any kind of emergency”.²⁵³ However, it has not yet defined what aspect, or aspects, of the fair trial guarantees might possibly not be applicable in public emergencies threatening the life of the nation.

Since, as already noted above, the African Commission on Human and Peoples’ Rights considered that article 7 of the African Charter on Human and Peoples’ Rights should be considered non-derogable, it follows that the fair trial guarantees contained therein must be ensured at all times.²⁵⁴

The Inter-American Court has emphasized that “the guarantees to which every person brought to trial is entitled must be not only **essential** but also **judicial**”, a conception that implies “the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency”.²⁵⁵ In the case of *Castillo Petruzzi* “the military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality” that article 8(1) “recognizes as essentials of due process of law”.²⁵⁶ More details about the interesting inter-American jurisprudence relating to article 27 of the American Convention will be given in Chapter 16 of this Manual.

*The right to enjoy a **fair trial** must also be guaranteed in public emergencies threatening the life of the nation, although possibly some aspects thereof may be subject to limited enforcement.*

*The right to be tried by an **independent and impartial tribunal** must be guaranteed at all times, including in public emergencies threatening the life of the nation.*

²⁵²Communication No. 263/1987, *M. González del Río v. Peru* (Views adopted on 28 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 20, para. 5.2; emphasis added.

²⁵³See UN doc. *GAOR*, A/49/40 (vol. I), p. 5, para. 24. This was prompted by a request by the Sub-Commission on Prevention of Discrimination and Protection of Minorities that a new optional protocol be elaborated to include, inter alia, article 14 in the list of non-derogable rights.

²⁵⁴See e.g. *ACHPR, Civil Liberties Organisation and Others v. Nigeria*, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April – 7 May 2001, p. 3 of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/218-98.html>.

²⁵⁵*I-A Court HR, Castillo Petruzzi et al. case v. Peru*, judgment of May 30, 1999, Series C, No. 52, p. 197, para. 131; emphasis added.

²⁵⁶*Ibid.*, para. 132.

9. Concluding Remarks

This chapter has explained the principal rights that must be effectively ensured to accused persons in the determination of any criminal charges against them, rights which must be protected from the beginning of the trial proceedings until conviction or acquittal. It has also shown the indispensable role played by domestic judges in the fair administration of justice, a role which runs like a thread through Chapters 4 onwards. The essential role both of prosecutors and of defence lawyers has also been emphasized whenever relevant.

But the national judge is not only responsible for his or her own actions *stricto sensu*. He or she is also to some extent responsible for those of prosecutors and defence lawyers, to the extent that, where the judge has any indication that the prosecutor has erred in the course of the criminal inquiry by resorting to unlawful means of investigation, or that the defence lawyer has not duly consulted with his or her client or simply has not acted professionally, that judge has a duty to intervene to correct those errors or insufficiencies, since such action may be essential in order to guarantee a fair hearing and equality of arms between the prosecution and the defence.

The rights dealt with in this chapter are manifold and it is difficult, or even impossible, to single out some as being more important than others. These rights indeed form a whole, and, together with the rights dealt with in Chapters 4 to 6, constitute the foundation on which a society respectful of human rights in general, including the rule of law, is built.

.....Chapter 8
**INTERNATIONAL
LEGAL STANDARDS
FOR THE PROTECTION
OF PERSONS DEPRIVED
OF THEIR LIBERTY**

Learning Objectives

- *To familiarize participants with some of the most important international legal standards concerning the treatment of persons deprived of their liberty, including the legal duty of States to prevent, punish and remedy violations of these standards;*
- *To illustrate how the many legal rules are enforced in practice in order to protect the rights of persons deprived of their liberty;*
- *To explain what legal steps, measures and/or actions judges, prosecutors and lawyers must take in order to safeguard the rights of persons deprived of their liberty.*

Questions

- *Have you ever encountered persons deprived of their liberty who have complained of ill-treatment?*
- *If so, when was the alleged ill-treatment inflicted and for what purpose?*
- *What measures were taken to remedy the situation, and what effect did they have, if any?*
- *What are the rules in your country with regard to the recognition of places of detention and the registration of persons deprived of their liberty?*
- *What are the rules in your country with regard to recourse to solitary confinement? For example, for what reasons, for how long, and in what conditions can it be imposed?*
- *Is incommunicado detention permitted under the laws of your country, and if so, for how long? What legal remedies are at the disposal of the person subjected to such detention? How do the authorities ensure that no physical or mental abuses occur while the detainee or prisoner is held incommunicado?*

Questions (cont.d)

- *As lawyers, have you ever encountered problems in having free and confidential contacts with your detained clients? If so, what did you do about it?*
- *Are there any special problems in your country with regard to the conditions of detention for children and women?*
- *If so, what are they and what measures, if any, have been taken in order to remedy the situation?*
- *What are the formal complaint procedures in your country for alleged ill-treatment of detainees and prisoners, including women and children?*

Relevant Legal Instruments

Universal Instruments

- International Covenant on Civil and Political Rights, 1966
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- The 1949 Geneva Conventions and the two Protocols Additional of 1977
- Statute of the International Criminal Court, 1998
- Universal Declaration of Human Rights, 1948

- Standard Minimum Rules for the Treatment of Prisoners, 1955
- Basic Principles for the Treatment of Prisoners, 1990
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988
- Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1982
- Code of Conduct for Law Enforcement Officials, 1979
- Declaration on the Protection of All Persons from Enforced Disappearance, 1992
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, 1989

Relevant Legal Instruments (cont.d)

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- Inter-American Convention to Prevent and Punish Torture, 1985
- Inter-American Convention on the Forced Disappearance of Persons, 1994
- European Convention on Human Rights, 1950
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987

Introduction

This chapter explains the principal international legal rules governing the treatment of persons deprived of their liberty and will also provide examples of how these legal rules have been interpreted by the international monitoring organs.

The treatment of all categories of detainees and prisoners remains a major challenge in the area of overall improvement in respect for the human person. Placed in a situation of inferiority and weakness, a person who is arrested, in pre-trial detention or serving a prison sentence upon conviction is to a considerable extent left to the mercy of the police and prison officials. The detainee or prisoner is virtually cut off from outside life, and thus also vulnerable to treatment violating his or her rights. The continuing widespread use of torture and other inhuman or degrading treatment or punishment of these categories of people, whose cries for help in moments of pain can be heard by nobody except fellow inmates, constitutes an intolerable insult to human dignity.

International human rights law does however contain strict rules about the treatment of detainees and prisoners which are applicable at all times, and States are under a legal duty to take the necessary legislative and practical measures to put an end to all practices that violate these rules. In this respect, the task of judges, prosecutors and lawyers is of primordial importance in contributing to an increased respect for the legal rules that will help safeguard the life, security and dignity of people deprived of their liberty. In their daily work, these legal professions, when faced with people suspected or accused of criminal activities, will have to exercise constant vigilance for signs of torture, forced confessions under ill-treatment or duress, and any other kind of physical or mental hardship. Judges, prosecutors and lawyers thus have not just a key role in this regard, but also a professional duty to ensure the effective implementation of the existing domestic and international rules for the protection of the rights of people deprived of their liberty.

This chapter will first deal with the notion of torture, cruel, inhuman and degrading treatment and punishment, and will in particular deal with the problems caused by solitary confinement and, more specifically, incommunicado detention. It will also briefly explain the particular problems to which vulnerable groups such as children and women are subjected while detained. The rights both of children and of women in the administration of justice will, however, also be dealt with in some detail in Chapters 10 and 11 respectively. This chapter will then consider aspects of detention such as accommodation, exercise, the health of detainees and prisoners and their contacts with the outside world through visits and correspondence. Thirdly, the chapter will deal with the complaints procedures which must be available at all times to all persons deprived of their liberty. Lastly, the chapter will provide some advice on how judges, prosecutors, and lawyers may work more effectively for the eradication of torture and other unlawful treatment of detainees and prisoners.

1.1 Use of terms

In this chapter the terms “detainee” and “detained person” mean any person deprived of his or her personal liberty except as a result of conviction for an offence, while the expressions “prisoner” and “imprisoned person” mean any person deprived of his or her personal liberty as a result of conviction for an offence. It should however be noted that in the Standard Minimum Rules for the Treatment of Prisoners, the term “prisoner” is used in a generic sense covering both untried and convicted persons, a fact that must be borne in mind whenever these rules are being quoted or otherwise referred to.

2. The Prohibition of Torture and Cruel, Inhuman or Degrading Treatment or Punishment

2.1 Introductory remarks

Not only are the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to be found in all major general human rights treaties and numerous other human rights instruments, but these norms also run like a thread through international humanitarian law. For instance, according to common article 3(I)(a) to the 1949 Geneva Conventions, which concerns armed conflicts not of an international character, “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” shall remain prohibited at any time and in any place whatsoever with respect to “persons taking no active part in the hostilities”. Further, article 75(2)(a) of Protocol Additional I and article 4(2)(a) of Protocol Additional II to the Geneva Conventions, which respectively relate to international and non-international armed conflicts, similarly proscribe “violence to the

life, health and physical or mental well-being of persons”, and, in particular, murder, torture, corporal punishment and mutilation.

The peremptory nature both of the right to life and of the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment is moreover underlined by the fact that these rights cannot be derogated from under international human rights law even in the gravest of crisis situations. This is made clear by article 4(2) of the International Covenant on Civil and Political Rights, article 27(2) of the American Convention on Human Rights and article 15(2) of the European Convention on Human Rights. Article 2(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also provides that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”. Moreover, article 5 of the Inter-American Convention to Prevent and Punish Torture adds that “neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture”.

The fundamental nature of the prohibition of torture is further underlined by the fact that, according to article 7 of the Rome Statute of the International Criminal Court, torture constitutes a *crime against humanity* “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. “Torture or inhuman treatment, including biological experiments” also constitute *war crimes* and *grave breaches* of the 1949 Geneva Conventions for the purpose of the same Statute (art. 8(2)(a)(ii)).

In addition to this multitude of international legal rules, recourse to torture is often prohibited at the domestic level. The existence of torture is thus not a legal problem per se, but rather one of implementation of the law, that poses a true challenge to the world community.

2.2 Legal responsibilities of States

Article 7 of the International Covenant on Civil and Political Rights provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”, and, in particular, that “no one shall be subjected without his free consent to medical or scientific experimentation”. In its General Comment No. 20, the Human Rights Committee explained that the aim of this article “is to protect both the dignity and the physical and mental integrity of the individual”.¹ It emphasized, furthermore, that “it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity”.² The prohibition in article 7 “is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which

¹United Nations Compilation of General Comments, p. 139, para. 2.

²Ibid., loc. cit.

stipulates that ‘All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’.”³

Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that “each State Party shall take effective legislative, administrative, judicial or other measures to *prevent* acts of torture in any territory under its jurisdiction” (emphasis added). According to article 12 of the Convention, each State party shall moreover “ensure that its competent authorities proceed to *a prompt and impartial investigation*, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction” (emphasis added). In making its recommendations to States parties, the Committee against Torture has consistently emphasized that they should “ensure vigorous investigation and, where appropriate, the prosecution of all reported instances of alleged torture and ill-treatment” by their authorities, “whether civil or military”.⁴ For the purpose of ensuring that perpetrators of torture do not enjoy *immunity*, the Committee against Torture has further recommended that States parties “ensure that amnesty laws exclude torture from their reach”.⁵

Furthermore, it is noteworthy that the Committee against Torture has repeatedly recommended that States parties to the Convention against Torture *should consider repealing laws which may undermine the independence of the Judiciary*,⁶ and, with regard more particularly to the problem of limited-term appointments, bring their legislation into line with the 1985 Basic Principles on the Independence of the Judiciary and the 1990 Guidelines on the Role of Prosecutors.⁷

In General Comment No. 20, the Human Rights Committee also pointed out that article 7 of the International Covenant on Civil and Political Rights should be read in conjunction with article 2(3) thereof concerning the obligation of the States parties to provide *effective remedies* to persons whose rights and freedoms are violated.⁸ This means, in particular, that “the *right to lodge complaints against maltreatment* prohibited by article 7 must be recognized in the domestic law” and that “complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective”.⁹ The Committee against Torture has also emphasized the importance of introducing “an effective and reliable complaint system that will allow the victims of torture and other forms of cruel, inhuman or degrading treatment or punishment to file complaints”.¹⁰

³Ibid.

⁴See e.g. as to Peru, UN doc. GAOR, A/55/50, p. 15, para. 61(a).

⁵Ibid., p. 17.

⁶See e.g. as to Peru, in UN doc. GAOR, A/55/44, p. 15, para. 60; and, as to Azerbaijan, see *ibid.*, p. 17, para. 69(d).

⁷See as to Kyrgyzstan, *ibid.*, p. 19, para. 75(d).

⁸United Nations *Compilation of General Comments*, p. 141, para. 14.

⁹Ibid., *loc. cit.*; emphasis added.

¹⁰See e.g. as to Poland, UN doc. GAOR, A/55/44, p. 22, para. 94.

Lastly, with regard to the problem of *impunity*, the Human Rights Committee has stated that “amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future”.¹¹ On the issue of amnesty laws the Human Rights Committee and the Committee against Torture thus concur. In this respect the Human Rights Committee has said that “States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”¹²

The Inter-American Court of Human Rights has explained States’ obligations *inter alia* under article 1 of the American Convention on Human Rights in some detail. With regard to the obligation to “ensure ... the free and full exercise” of the rights and freedoms guaranteed by the Convention, it has thus stated that it

“... implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”¹³

The Court added in this respect that

“The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation – it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.”¹⁴

This means, in particular, allowing the Judiciary, the prosecuting authorities and lawyers to pursue their work effectively and independently of the governmental authorities.

In a case concerning the alleged rape and ill-treatment of a female detainee, the *Aydin* case, the European Court of Human Rights recalled that article 13 of the European Convention on Human Rights “guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order”.

¹¹General Comment No. 20, *United Nations Compilation of General Comments*, p. 141, para. 15.

¹²*Ibid.*, loc. cit.

¹³*I-A Court HR, Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4*, p. 152, para. 166.

¹⁴*Ibid.*, para. 167.

“The effect of this article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.”¹⁵

Although “the scope of the obligation under article 13 varies depending on the nature of the applicant’s complaint under the Convention”, nevertheless,

“the remedy required ... must be ‘effective’ *in practice as well as in law*, in particular in the sense that its exercise must not be unjustifiably hindered by acts or omissions of the authorities of the respondent State ...”.¹⁶

The European Court added in this case that

“the nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims, ... Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.

Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an ‘effective remedy’ entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.”¹⁷

Lastly, although, unlike article 12 of the 1984 Convention against Torture, article 13 of the European Convention does not impose, *expressis verbis*, “a duty to proceed to a ‘prompt and impartial’ investigation whenever there is a reasonable ground to believe that an act of torture has been committed”, “such a requirement is implicit in the notion of an ‘effective remedy’ under article 13”.¹⁸ Consequently, in the *Aydin* case there had been a violation of article 13 since “no thorough and effective investigation was conducted into the applicant’s allegations and ... this failure undermined the effectiveness of any other remedies which may have existed given the centrality of the public prosecutor’s role to the system of remedies as a whole, including the pursuit of compensation”.¹⁹

For a more detailed analysis of the legal duty of States to prevent, investigate, prosecute, punish and remedy human rights violations see Chapter 15 of this Manual.

¹⁵*Eur. Court HR, Aydin v. Turkey, judgment (Grand Chamber) of 25 September 1997, Reports 1997-VI*, p. 1895, para. 103.

¹⁶*Ibid.*, loc. cit.; emphasis added.

¹⁷*Ibid.*, pp. 1895-1896, para. 103.

¹⁸*Ibid.*, para. 103 at p. 1896.

¹⁹*Ibid.*, p. 1898, para. 109.

2.3 The notions of torture and cruel, inhuman or degrading treatment or punishment: definitions and understandings

Article 7 of the International Covenant on Civil and Political Rights contains no definition of the notions covered thereby, nor did the Human Rights Committee “consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment”, since “the distinctions depend on the nature, purpose and severity of the treatment applied”.²⁰ However, it has made clear that “the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim” and, moreover, that it covers “excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure”.²¹

In one case, however, the Human Rights Committee observed that the assessment of what constitutes *inhuman and degrading treatment* “depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of health of the victim”.²²

For the purposes of the Convention against Torture, the term “torture” means

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions” (art. 1(1)).

Under article 16 of the Convention against Torture, “each State Party shall undertake to prevent ... other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

²⁰See General Comment No. 20, *United Nations Compilation of General Comments*, p. 139, para. 4.

²¹*Ibid.*, para. 5.

²²Communication No. 265/1987, *A. Vuolanne v. Finland* (Views adopted on 7 April 1989), in UN doc. *GAOR*, A/44/40, p. 256, para. 9.2.

In the *Loayza Tamayo* case, the Inter-American Court of Human Rights explained that

“the violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.”²³

Referring to the judgments of the European Court of Human Rights in the *Irish* and *Ribitsch* cases, the Inter-American Court added that

“even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance. ... That situation is exacerbated by the vulnerability of a person who is unlawfully detained. ... Any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person ... , in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties in the anti-terrorist struggle must not be allowed to restrict the protection of a person’s right to physical integrity.”²⁴

With regard to the prohibition of “torture or ... inhuman or degrading treatment or punishment” in article 3 of the European Convention on Human Rights, the European Court of Human Rights has stated that the distinction between “torture” and “inhuman or degrading treatment” “derives principally from a difference in the intensity of the suffering inflicted”.²⁵ In the view of the Court, “it appears ... that it was the intention that the Convention, with its distinction between ‘torture’ and ‘inhuman or degrading treatment’, should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering”.²⁶

The Court has consistently emphasized the absolute prohibition under article 3, which shows that it “enshrines one of the fundamental values of the democratic societies making up the Council of Europe”.²⁷ In view of “the object and purpose of

²³I-A Court HR, *Case of Loayza Tamayo v. Peru*, Judgment of September 17, 1997, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report of the Inter-American Court of Human Rights 1997*, p. 211, para. 57.

²⁴*Ibid.*, loc. cit.

²⁵*Eur. Court HR, Case of Ireland v. the United Kingdom*, judgment of 18 January 1978, *Series A*, No. 25, p. 66, para. 167.

²⁶*Ibid.*, loc. cit. For a more recent case see *Eur. Court HR, Aydin v. Turkey*, judgment (Grand Chamber) of 25 September 1997, *Reports 1997-VI*, p. 1891, para. 82.

²⁷*Eur. Court HR, Soering v. the United Kingdom*, judgment of 7 July 1989, *Series A*, No. 161, p. 34, para. 88.

the Convention, as an instrument for the protection of individual human beings”, article 3 must, like any other provision thereof, “be interpreted and applied so as to make its safeguards *practical and effective*”.²⁸

Some examples will be given below of behaviour that has been considered to violate the international prohibitions on torture and/or cruel, inhuman and degrading treatment or punishment of people deprived of their liberty, or, exceptionally, in the execution of a punishment.

2.3.1 Rape as torture

In the case of *Aydin*, to which reference was made above, the applicant, a Turkish citizen of Kurdish origin, was only 17 years old when, together with her father and sister-in-law, she was detained by security forces. She was raped and ill-treated during her detention. Accepting the findings of the European Commission of Human Rights as to the facts of the case, the Court held that

“Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.”²⁹

The applicant had, moreover, been “subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held”; she had been

“... detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought about by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre.”³⁰

²⁸Ibid., para. 87; emphasis added.

²⁹*Eur. Court HR, Aydin v. Turkey, judgment (Grand Chamber) of 25 September 1997, Reports 1997-VI, p. 1891, para. 83.*

³⁰Ibid., para. 84.

The Court was thus

“... satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention”.³¹

In a case against Peru, the Inter-American Commission on Human Rights was also confronted with a case of rape by military personnel. Although the woman was not detained as such, she was helpless in the hands of these individuals who had abducted – and eventually killed – her husband. On the night of her husband’s abduction from their home, Ms. Mejía was raped twice by a military officer.³² The Commission presumed the alleged facts to be true; in its view “the credibility of the version presented by the petitioner” was corroborated by various reports of intergovernmental and non-governmental bodies that had documented “numerous rapes of women in Peru by members of the security forces in emergency areas and in which the specific case of Raquel Mejía” had been mentioned and described.³³ Having thus presumed the responsibility of troops of the Peruvian Army in the commission of the abuses against Ms. Mejía and also the non-existence in Peru of effective domestic remedies, the Commission held that

“Current international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result of failure by the State to prevent the occurrence of this crime, constitutes a violation of the victims’ human rights, especially the right to physical and mental integrity.”³⁴

In support of this view it referred inter alia to articles 27 and 147 of the Fourth Geneva Convention of 1949, common article 3 of the Geneva Conventions, article 76 of Protocol Additional I to the Geneva Conventions, article 4(2) of Protocol Additional II to the Geneva Conventions and article 5 of the 1998 Statute of the International Criminal Court.³⁵

The Commission then interpreted the notion of torture in article 5 of the American Convention on Human Rights in the light of the definition thereof contained in the Inter-American Convention to Prevent and Punish Torture; on the basis of this definition, for torture to exist, the following three elements had to be combined:

- ❖ “it must be an intentional act through which physical and mental pain and suffering is inflicted on a person”;
- ❖ “it must be committed with a purpose”; and
- ❖ “it must be committed by a public official or by a private person acting at the instigation of the former”.³⁶

³¹Ibid., p. 1892, para. 86.

³²*I-A Comm. HR, Report No. 5/96, Case 10.970 v. Peru, March 1, 1996, in OAS doc. OEA/Ser.L/V/II.91, doc. 7 rev., Annual Report of the Inter-American Commission on Human Rights 1995, pp. 158-159.*

³³Ibid., pp. 174-175.

³⁴Ibid., p. 182.

³⁵Ibid., pp. 182-184.

³⁶Ibid., p. 185.

These elements were all fulfilled in the case of Ms. Mejía. As to the *first* element, the Commission considered “that rape is a physical and mental abuse that is perpetrated as a result of an act of violence”; it also “causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.”³⁷ This element was fulfilled in this case, since Ms. Mejía “was a victim of rape, ... in consequence of an act of violence that [caused] her ‘physical and mental pain and suffering’.”³⁸ As to the *second* element, the rape of Ms. Mejía was committed “with the aim of punishing her personally and intimidating her”; the guilty man had told her that “she, too, was wanted as a subversive, like her husband”, and “that her name was on a list of persons connected with terrorism”. The man also threatened to come back and rape her again.³⁹ Lastly, with regard to the *third* element, the Commission concluded that the man who raped Ms. Mejía was a member of the security forces who had himself been accompanied by a large group of soldiers.⁴⁰

Considering that the three elements of the definition of torture were all present in this case, the Commission concluded that Peru had violated article 5 of the American Convention on Human Rights.⁴¹ It concluded moreover that the rapes suffered by Ms. Mejía constituted a violation of article 11 of the Convention concerning the right to privacy “in that they affected both her physical and her moral integrity, including her personal dignity”; indeed, as stated by the Commission, besides being a violation of victims’ physical and mental integrity, sexual abuse “implies a deliberate outrage to their dignity”.⁴² Lastly, the Peruvian State had also violated articles 1(1), 8(1) and 25 of the Convention since it had not provided effective remedies with regard to these violations.⁴³

2.3.2 Treatment of detainees and prisoners

The prevalence of torture and other unlawful treatment of persons deprived of their liberty is all too evident from the case-law of, inter alia, the Human Rights Committee, which contains numerous examples of violations of articles 7 and 10(1) of the International Covenant following the use of violence for the purpose, among others, of extracting confessions. Whenever the author is able to give a sufficiently detailed account of the beatings and other kinds of ill-treatment and the State party concerned fails to respond thereto, or does not dispute the allegations, the Committee considers that the information before it sustains a violation of articles 7 and 10(1) of the

³⁷Ibid., p. 186.

³⁸Ibid., loc. cit.

³⁹Ibid., pp. 186-187.

⁴⁰Ibid., p. 187.

⁴¹Ibid., loc. cit.

⁴²Ibid., pp. 187-188.

⁴³Ibid., p. 193. The same held true with regard to the homicide of her husband, *ibid.*, loc. cit.

Covenant either taken together or separately, depending on the viciousness of the treatment.⁴⁴

With regard to means of constraint of detained persons, the Committee against Torture has recommended that the United States of America abolish “electro-shock stun belts and restraint chairs as methods of restraining those in custody”, since their use almost invariably leads to breaches of article 16 of the Convention against Torture, which outlaws cruel, inhuman or degrading treatment or punishment.⁴⁵

In a case against Zaire, the African Commission on Human and Peoples’ Rights concluded that “beating of detainees with fists, sticks and boots, the keeping of prisoners in chains and subjecting them to electric shock, physical suspension and submersion in water ... offend the human dignity”; such acts, together and separately, constitute a violation of article 5 of the African Charter.⁴⁶ Similarly, in a case against Malawi, the Commission concluded that the acts to which Vera and Orton Chirwa were subjected in prison “jointly and separately” clearly constituted a violation of article 5; their ill-treatment and punishment for disciplinary reasons included reduction in diet, chaining for two days of the arms and legs with no access to sanitary facilities, detention in a dark cell without access to natural light, water or food, forced nudity, and beating with sticks and iron bars; these were “examples of torture, cruel and degrading punishment and treatment”.⁴⁷

The Inter-American Court of Human Rights has also had on numerous occasions to deal with cases involving torture and other kinds of ill-treatment, as in the so-called “*Street Children*” case, where the Court found that, after their having been abducted by Guatemalan State security forces and prior to their murder, “the physical and mental integrity” of the four adolescents had been violated and that “they were

⁴⁴See e.g. among many other cases, Communication No. 328/1988, *R. Zelaya Blanco v. Nicaragua* (Views adopted on 20 July 1994), in UN doc. GAOR, A/49/40 (vol. II), pp. 15-16, paras. 6.5-6.6 and p. 18, para. 10.5: attempts to extract confession by threats, beatings, assassination of fellow detainees etc. contrary to articles 7 and 10(1) of the Covenant; Communication No. 613/1995, *A. Leebong v. Jamaica* (Views adopted on 13 July 1999), in UN doc. GAOR, A/54/40 (vol. II), p. 60, para. 9.2: ill-treatment and conditions were “such as to violate the author’s right to be treated with humanity and with respect for the inherent dignity of the human person and the right not to be subjected to **cruel, inhuman or degrading treatment**” under articles 7 and 10(1) (emphasis added); the author, who was on death row, had been beaten by prison warders and only allowed to see a doctor once although having made other requests to this effect; Communication No. 481/1991, *J. Villacnés Ortega v. Ecuador* (Views adopted on 8 April 1997), in UN doc. A/52/40 (vol. II), p. 4, para. 9.2 as compared with p. 2 para. 2.4: ill-treatment by prison personnel after an escape attempt by author’s cell-mates; the author had, inter alia, “multiple round black traces on his abdomen and thorax resulting from the application of electric discharges”; the treatment amounted to “**cruel and inhuman treatment**” contrary to articles 7 and 10(1) of the Covenant (emphasis added); Communication No. 612/1995, *Arbuacos v. Colombia* (Views adopted on 29 July 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 181, para. 8.5: **torture** of two brothers in violation of article 7, the victims being, inter alia, “blindfolded and dunked in a canal”.

⁴⁵UN doc. GAOR, A/55/44, p. 32, para. 180(c).

⁴⁶ACHPR, *World Organisation against Torture and Others v. Zaire*, Communications Nos. 25/89, 47/90, 56/91 and 100/93, decision adopted during the 19th session, March 1996, para. 65 of the text of the decision as published at <http://www.up.ac.za/chr/>.

⁴⁷ACHPR, *Krishna Achuthan and Amnesty International (on behalf of Aleke Banda and Orton and Vera Chirwa) v. Malawi*, Communications Nos. 64/92, 68/92 and 78/92, decision adopted during the 16th session, October-November 1994, para. 33 of the text of the decision as published at <http://www.up.ac.za/chr/>.

victims of ***ill-treatment and torture***” contrary to article 5(1) and (2) of the American Convention on Human Rights.⁴⁸

In the case of *Castillo-Páez*, involving the abduction and disappearance of the victim, the Inter-American Court of Human Rights concluded that it was contrary to the right to humane treatment guaranteed by article 5 to place Mr. Castillo-Páez in the trunk of an official vehicle, and that “even if no other physical or other maltreatment occurred, that action alone must be clearly considered to contravene the respect due to the inherent dignity of the human person.”⁴⁹

In the *Irish* case, the European Court of Human Rights concluded that the combined use of the five interrogation techniques of people arrested in Northern Ireland in 1971 constituted ***inhuman treatment*** within the meaning of article 3 of the European Convention on Human Rights. The Court found that these techniques, which consisted of wall standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink, “were applied in combination, with premeditation and for hours at a stretch” and that they “caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation”.⁵⁰ In the view of the Court, these interrogation techniques were also “***degrading*** since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance”.⁵¹

In the case of *Tomasi* versus France, the applicant was subjected to police interrogation for about 40 hours, during which he had been “slapped, kicked, punched and given forearm blows, made to stand for long periods and without support, hands handcuffed behind the back; he had been spat upon, made to stand naked in front of an open window, deprived of food, threatened with a firearm and so on”.⁵² This constituted “inhuman and degrading treatment” to the European Court of Human Rights, the Court significantly adding that “the requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals”.⁵³

In the later case of *Aksoy*, the Court did however conclude that the applicant had been subjected to ***torture***. In this case, the Court stated that “where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation as to the causing of the injury, failing which a clear issue arises under Article 3 of the Convention.”⁵⁴ Relying on

⁴⁸I-A Court HR, *Villagrán Morales et al. case v. Guatemala*, judgment of November 19, 1999, Series C, No. 63, p. 180, para. 177 read in conjunction with p. 176, para. 186; emphasis added.

⁴⁹I-A Court HR, *Castillo-Páez case*, judgment of November 3, 1997, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report Inter-American Court of Human Rights 1997*, p. 264, para. 66.

⁵⁰Eur. Court HR, *Case of Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A, No. 25, p. 66, para. 167.

⁵¹*Ibid.*, p. 66, para. 167; emphasis added.

⁵²Eur. Court HR, *Case of Tomasi v. France*, judgment of 27 August 1992, Series A, No. 241-A, p. 40, para. 108.

⁵³*Ibid.*, p. 42, para. 115.

⁵⁴Eur. Court HR, *Case of Aksoy v. Turkey*, judgment of 18 December 1996, Reports 1996-VI, p. 2278, para. 61.

the findings of the European Commission of Human Rights, the Court accepted that Mr. Aksoy had, inter alia, been subjected to “Palestinian hanging”, meaning that he had been “stripped naked, with his arms tied together behind his back, and suspended by his arms”. In the view of the Court:

“this treatment could only have been deliberately inflicted; indeed, a certain amount of preparation and exertion would have been required to carry it out. It would appear to have been administered with the aim of obtaining admissions or information from the applicant. In addition to the severe pain which it must have caused at the time, the medical evidence shows that it led to a paralysis of both arms which lasted for some time... . The Court considers that this treatment was of such a serious and cruel nature that it can only be described as torture.”⁵⁵

2.3.3 Corporal punishment

As noted above, the Human Rights Committee considers that “corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure”, is covered by the prohibition in article 7 of the International Covenant on Civil and Political Rights.⁵⁶ This view was confirmed in the *Osbourne* case, where the author had been given a 15-year prison sentence and ordered to receive 10 strokes of the tamarind switch for illegal possession of a firearm, robbery with aggravation and wounding with intent. It was held in this case that “irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes **cruel, inhuman and degrading treatment or punishment**” contrary to article 7 of the Covenant, which was thus violated.⁵⁷ The Committee informed the Government that it was “under an obligation to refrain from carrying out the sentence of whipping upon Mr. Osbourne”, and, further, that it “should ensure that similar violations do not occur in the future by repealing the legislative provisions that allow for corporal punishment”.⁵⁸

With regard to Namibia, the Committee against Torture recommended “the prompt abolition of corporal punishment” insofar as it was still legally possible under Namibian law to impose such punishment.⁵⁹ This Committee has also expressed concern with regard to the situation in Saudi Arabia, since “sentencing to, and imposition of, corporal punishments by judicial and administrative authorities, including, in particular, flogging and amputation of limbs, ... are not in conformity with” the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.⁶⁰

⁵⁵Ibid., p. 2279, para. 64.

⁵⁶See General Comment No. 20, *United Nations Compilation of General Comments*, p. 139, para. 5.

⁵⁷Communication No. 759/1997, *G. Osbourne v. Jamaica* (Views adopted on 15 March 2000), in UN doc. *GAOR*, A/55/40 (vol. II), p. 138, para. 9.1; emphasis added.

⁵⁸Ibid., para. 11.

⁵⁹UN doc. *GAOR*, A/52/44, p. 37, para. 250.

⁶⁰See UN doc. CAT/C/XXVIII/CONCL.6 *Conclusions and Recommendations: Saudi Arabia, adopted on 15 May 2002*, para. 4(b).

In a case where a juvenile court in the Isle of Man had ordered that an adolescent be given three strokes with a cane – a punishment that was in fact executed – the European Court of Human Rights concluded that it neither amounted to “torture”, nor to “inhuman treatment” but that it did constitute “*degrading treatment*” for the purposes of article 3 of the European Convention on Human Rights.⁶¹ The Court examined in detail whether the punishment could be regarded as “degrading”, and considered that the “humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation” that follows from judicial punishment in general; the assessment was “relative”, depending “on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of execution”.⁶² The Court’s description of the nature of corporal punishment was explained in the following words:

“The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State... . Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment – whereby he was treated as an object in the power of the authorities – constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person’s dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.”⁶³

In the view of the Court, the institutionalized character of the violence was “further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender”. Viewing the circumstances “as a whole”, the Court thus concluded that “the element of humiliation attained the level inherent in the notion of ‘degrading treatment’”.⁶⁴

2.3.4 Medical or scientific experimentation

According to the second sentence of article 7 of the International Covenant on Civil and Political Rights, “no one shall be subjected without his free consent to medical or scientific experimentation.” Failing such consent, the experimentation will be considered to constitute a form of “torture” or “cruel, inhuman or degrading treatment”. In its General Comment No. 20, the Human Rights Committee observed that “special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health”.⁶⁵ This is of course particularly relevant with regard to people held in psychiatric hospitals.

⁶¹ *Eur. Court HR, Tyrer case, judgment of 25 April 1978, Series A, No. 26*, p. 14, para. 29 and p. 17, para. 35; emphasis added.

⁶² *Ibid.*, p. 15, para. 30

⁶³ *Ibid.*, p. 16, para. 33.

⁶⁴ *Ibid.*, pp. 16-17, paras. 33 and 35.

⁶⁵ *United Nations Compilation of General Comments*, p. 140, para. 7.

On this issue, Principle 22 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment goes a step further by stipulating that “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” (emphasis added).

The question may rightly be asked whether such vulnerable persons should *ever* be subjected to any medical or scientific *experimentation*, given the often difficult task of predicting the possible adverse effect that such experimentation may have.

2.4 Torture and law enforcement officials, health personnel and prosecutors

It follows from what has been said above that every person concerned with the arrest, interrogation or detention and imprisonment of a suspect or convict has the legal duty to treat the person with whom he or she has to deal with respect for human dignity and to refrain from resorting to torture or ill-treatment. With regard to those who exercise *police powers, such as arrest and detention*, this has also been made explicit in the 1979 Code of Conduct for Law Enforcement Officials, which provides in its article 5 that:

“No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”

As far as *medical personnel* are concerned, Principle 2 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment stipulates that:

“It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.”

Rather, it is the duty of these professional groups to protect the physical and mental health of detainees and prisoners and to provide them with treatment “of the same quality and standard as is afforded to those who are not imprisoned or detained” (Principle 1).

As pointed out by the Human Rights Committee, it is important that the States parties to the Covenant disseminate information to the population regarding the ban on torture, and, as further emphasized by the Committee, “enforcement personnel, medical personnel, police officers and any other persons involved in the custody or

treatment of any individual subjected to any form of arrest, detention or imprisonment **must receive appropriate instruction and training.**⁶⁶

As indicated above, and as explained in Chapters 4 and 7, confessions may not be obtained by illegal means such as torture or other forms of ill-treatment or human rights violations. Guideline 16 of the Guidelines on the Role of Prosecutors provides that **prosecutors** “shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice” (for a similar rule, see also art. 15 of the Convention against Torture).

*States have a legal duty under international law to take effective legislative, administrative, judicial and other measures to **prevent** acts of torture and other forms of ill-treatment.*

*States also have a legal duty to **investigate promptly and effectively** alleged instances of torture and other forms of ill-treatment and to provide **effective remedies** to alleged victims of such treatment.*

*To grant **immunity** to perpetrators of torture or other forms of ill-treatment is **incompatible** with States’ legal duty to **prevent, investigate and remedy** human rights violations.*

*Every person has the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and this right must be guaranteed **at all times**, and cannot be derogated from even in public emergencies threatening the life of the nation.*

*In general, it can be said that **torture** is a particularly severe form of ill-treatment aimed either at obtaining confessions or information from a person or punishing or intimidating him or her. It is committed by a public official, or at the instigation of or with the consent or acquiescence of such official or other person acting in an official capacity.*

*Sexual abuse in the form of **rape**, committed by public officials, has been considered to constitute a form of torture.*

The right to freedom from ill-treatment comprises the prohibition on corporal punishment and, as a minimum, medical and scientific experimentation that has not been freely consented to.

All persons deprived of their liberty must also be treated with respect for the inherent dignity of the human person.

Law enforcement officials and medical personnel are strictly forbidden to resort to torture and other forms of ill-treatment at any time. Confessions obtained by such treatment must be disregarded by prosecutors and judges.

⁶⁶United Nations Compilation of General Comments, p. 140, para. 10; emphasis added.

In order to be able to contribute to ensuring the full exercise of the right to freedom from torture and other forms of ill-treatment, judges, prosecutors and lawyers must be allowed to pursue their work efficiently and independently.

3. Legal Requirements as to Places of Detention and Registration of Detainees and Prisoners

3.1 Official recognition of all places of detention

In order to protect the personal security of persons deprived of their liberty, they must be held exclusively in officially recognized places of detention. The obligation of States to comply with this legal duty is recognized both by the international monitoring organs and in various legal instruments. For instance, in General Comment No. 20 on article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee stated that:

“To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places officially recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends.”⁶⁷

Article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance and Principle 6 of the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions contain similar requirements with regard to the holding of detained persons in officially recognized places of detention. Principle 12(1)(d) of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment provides that there shall be duly recorded “precise information concerning the place of custody”.

At the regional level, article XI of the Inter-American Convention on the Forced Disappearance of Persons stipulates, inter alia, that “every person deprived of liberty shall be held in an officially recognized place of detention...”. The Inter-American Court of Human Rights has had to deal with numerous cases involving disappeared persons, disappearances that have been made possible because of the failure by the respondent State to comply with the basic guarantees against arbitrary

⁶⁷ *United Nations Compilation of General Comments*, p. 140, para. 11.

detention, including the duty only to hold persons deprived of their liberty in officially recognized places of detention. As stressed by the Inter-American Court of Human Rights, the “forced disappearance of human beings is a multiple and continuous violation of many rights under the [Inter-American] Convention [on Human Rights] that the States Parties are obligated to respect and guarantee”, such as those contained in articles 7, 5 and 4 in conjunction with article 1(1).⁶⁸

The European Court of Human Rights has underlined that “the *unacknowledged detention* of an individual is a complete negation” of the guarantees against arbitrary detention contained in article 5 of the European Convention on Human Rights and that it “discloses a most grave violation of Article 5”; given the responsibility of the authorities to account for individuals under their control, “Article 5 requires them to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since”.⁶⁹

3.2 Registration of detainees and prisoners

In addition to the requirement that persons deprived of their liberty must be held in officially recognized places of detention, the Human Rights Committee has held that provision must also be made for “their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends”.⁷⁰

This duty is also spelled out in Rule 7(1) of the Standard Minimum Rules for the Treatment of Prisoners, according to which:

“(1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:

- (a) Information concerning his identity;
- (b) The reasons for his commitment and the authority therefor;
- (c) The day and hour of his admission and release.”

Principle 12(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “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;

⁶⁸See e.g. *I-A Court HR, Velásquez Rodríguez case, judgment of July 29, 1998, Series C, No. 4*, p. 147, para. 155 and pp. 162-163, para. 194.

⁶⁹*Eur. Court HR, Case of Çakıcı v. Turkey, judgment of 8 July 1999, Reports 1999-IV*, p. 615, para. 104; emphasis added.

⁷⁰General Comment No. 20, in *United Nations Compilation of General Comments*, p. 140, para.11.

- (c) The identity of the law enforcement officials concerned;
- (d) Precise information concerning the place of custody.”

Moreover, according to Principle 12(2) of the Body of Principles, “such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.”

Article 10 of the Declaration on the Protection of All Persons from Enforced Disappearance goes even further in this respect by stipulating with regard to any person deprived of liberty that:

“2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.

3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person.”

The Inter-American Convention on the Forced Disappearance of Persons was elaborated in response to the tens of thousands of persons who disappeared in the Americas in the 1970s and 1980s. Article XI thereof provides that:

“The States Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with their domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities.”

With regard to the European Convention on Human Rights, the European Court has specified that:

“The recording of accurate holding data concerning the date, time and location of detainees, as well as the grounds for the detention and the name of the persons effecting it, is necessary for the detention of an individual to be compatible with the requirements of lawfulness for the purposes of Article 5 § 1”.⁷¹

⁷¹*Eur. Court HR, Case of Çakici v. Turkey, judgment of 8 July 1999, Reports 1999-IV, para. 105 at p. 616.*

In the case of *Çakici*, the lack of records of the applicant – who was held in unacknowledged detention – disclosed “a serious failing”, which was aggravated by the “findings as to the general unreliability and inaccuracy” of the custody records in question. The Court found “unacceptable the failure to keep records which enable the location of a detainee to be established at a particular time”.⁷² Consequently, there was a particularly grave violation of article 5 of the European Convention in this case.

All persons deprived of their liberty must be held exclusively in officially recognized places of detention. Registers must be kept at every place of detention with detailed and reliable information, inter alia as to the name of the detained persons, the reasons for their detention, the time of arrival, departure and transfer, and the names of the persons responsible for their detention and imprisonment. Such registers must at all times be readily available to all persons concerned, such as legal counsel and family members, to whom the relevant records should also be communicated ex officio.

4. Conditions of Detention and Imprisonment

4.1 Basic principles governing detention and imprisonment

The following essential principles regarding the treatment of persons deprived of their liberty condition, among others, all the issues dealt with in this section.

In the first place, and as already indicated above, all persons deprived of their liberty “*shall be treated with humanity and with respect for the inherent dignity of the human person*” (art. 10(1) of the International Covenant, and see also art. 5(2) of the American Convention which, however, makes no reference to “humanity”; see further Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and Principle 1 of the Basic Principles for the Treatment of Prisoners; emphasis added).

With regard to article 10(1) of the International Covenant, the Human Rights Committee has stated that, in addition to the prohibition of ill-treatment and experimentation in article 7, persons deprived of their liberty may not “be subjected to any hardship or constraint other than that resulting from the deprivation of liberty”, and that “respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons”. This means that “persons deprived of their

⁷²Ibid., loc. cit.

liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.”⁷³

Furthermore, the Human Rights Committee has emphasized that “treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule”, which, “*as a minimum, cannot be dependent on the material resources available in the State party*”, and which must be applied without discrimination.⁷⁴ In considering whether the States parties have fulfilled their treaty obligations in this respect, the Committee will have regard to the relevant United Nations standards applicable to the treatment of prisoners to which reference is made throughout this chapter.

Second, the *prohibition on discrimination* as found in articles 2(1) and 26 of the International Covenant on Civil and Political Rights, article 2 of the African Charter on Human and Peoples’ Rights, articles 1(1) and 24 of the American Convention on Human Rights and article 14 of the European Convention on Human Rights is, of course, fully applicable to *all* detained or imprisoned persons. The principle of non-discrimination is also found in article 6(1) of the Standard Minimum Rules for the Treatment of Prisoners, Principle 2 of the Basic Principles for the Treatment of Prisoners, and Principle 5(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. *The prohibition on discrimination does not, however, exclude reasonable distinctions made between different detainees and/or prisoners which are objectively justified by their specific needs and status.*

Third, accused persons “shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons” (cf. inter alia art. 10(2)(a) of the International Covenant and art. 5(4) of the American Convention). As noted by the Human Rights Committee, “such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the *right to be presumed innocent*”.⁷⁵ Consequently, they also have a right to more favourable treatment than convicted prisoners, such differential treatment not being a form of discrimination but a justified distinction made between the two groups of persons. This issue will be further dealt with below, in subsection 4.2.1.

Fourth, as to those persons who are convicted, the penitentiary system shall have as its essential aim the *reformation and social rehabilitation/re-adaptation of the prisoner concerned* (art. 10(3) of the International Covenant and art. 5(6) of the American Convention). According to the Human Rights Committee “no penitentiary system should be only retributory”, but “should essentially seek the reformation and social rehabilitation of the prisoner”.⁷⁶ In submitting their periodic reports, the States parties must therefore provide “specific information concerning the measures taken to provide teaching, education and re-education, vocational guidance and training and

⁷³See General Comment No. 21, in *United Nations Compilation of General Comments*, para. 3 at p. 142.

⁷⁴*Ibid.*, para. 4; emphasis added.

⁷⁵*Ibid.*, pp. 142-143, para. 9; emphasis added.

⁷⁶*Ibid.*, p. 143, para. 10.

also concerning work programmes for prisoners inside the penitentiary establishment as well as outside”.⁷⁷

In this respect, Rule 59 as read in conjunction with Rule 58 of the Standard Minimum Rules for the Treatment of Prisoners provides that in order to enable the prisoners “to lead a law-abiding and self-supporting life” upon discharge,

“the institution should utilize all the remedial, educational, moral, spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners”.

Principle 8 of the Basic Principles for the Treatment of Prisoners also emphasizes the need for “meaningful remunerated employment which will facilitate [prisoners’] reintegration into the country’s labour market and permit them to contribute to their own financial support and to that of their families”.

According to Rule 89 of the Standard Minimum Rules, “an untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it”. For further details as to the work of convicted persons, see Rules 71-76 of the Standard Minimum Rules.

All persons deprived of their liberty have the right to be treated with humanity and respect for their dignity. This is a fundamental and universal rule which must be guaranteed at all times and independently of States’ available material resources.

Every detained or imprisoned person has the right not be subjected to discrimination.

Except in exceptional circumstances, suspects shall be separated from convicted prisoners; unconvicted detainees have the right to be presumed innocent until proved guilty and therefore also have the right to more favourable treatment than convicted prisoners.

States have the duty to provide convicted prisoners with teaching and training aimed at their reformation and social rehabilitation.

4.2 Accommodation

While the general human rights conventions contain no details of the requirements with regard to the accommodation of detainees and prisoners, Rules 9-14 of the Standard Minimum Rules for the Treatment of Prisoners regulate, in particular, sleeping, working and sanitary conditions.

Thus, Rule 9(1) provides that “where *sleeping accommodation* is in *individual* cells or rooms, each prisoner shall occupy by night a cell or room by himself. If, for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room” (emphasis added). Where dormitories are used,

they shall only be occupied by prisoners “suitable to associate with one another in those conditions” (Rule 9(2)). **All** prison accommodation of persons deprived of their liberty, including in particular the sleeping accommodation, “shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation” (Rule 10).

In *all living and working places* within places of detention, “the windows shall be large enough to enable the prisoners to read or work by natural light, and shall ... allow the entrance of fresh air whether or not there is artificial ventilation” (Rule 11(a)). “Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight” (Rule 11(b)).

Lastly, “the *sanitary installations* shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner” (Rule 12; emphasis added).

The African Commission on Human and Peoples’ Rights concluded that article 5 of the African Charter was violated in the *Ouko* case, where the complainant alleged that the detention facility had a 250-watt electric bulb that had been left on throughout his ten-month-long detention; during this time, he had also been denied bathroom facilities and been subjected both to physical and to mental torture. In the view of the Commission these conditions contravened the complainant’s right to respect for his dignity and freedom from inhuman and degrading treatment as guaranteed by article 5 of the Charter.⁷⁸ In addition to the specific conditions of Vera and Orton Chirwa, which were considered under subsection 2.3.2 above, the African Commission has also examined general prison conditions in Malawi. It concluded that the following conditions “offend the dignity of the person and violate” article 5 of the African Charter: “the shackling of hands in the cell so that the prisoner is unable to move (sometimes during the night and day), serving of rotten food, solitary confinement or overcrowding such that cells for 70 people are occupied by up to 200”.⁷⁹

In the *Greek* case, the European Commission of Human Rights concluded that accommodation in the Lakki camp violated article 3 of the European Convention on Human Rights because of “the conditions of gross overcrowding and its consequences”; the dormitories could hold 100 to 150 persons.⁸⁰

4.2.1 Separation of categories

⁷⁸ ACHPR, *John D. Ouko v. Kenya*, Communication No. 232/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, paras. 22-33 of the text of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/232-99.html>.

⁷⁹ ACHPR, *Krishna Achuthan and Amnesty International (on behalf of Aleke Banda and Orton and Vera Chirwa) v. Malawi*, Communications Nos. 64/92, 68/92 and 78/92, decision adopted during the 16th session, October-November 1994, para. 34 of the text of the decision as published at <http://www.up.ac.za/chr/>.

⁸⁰ Eur. Comm. HR, *Applications Nos. 3321-3323/67 and 3344/67, Denmark, Norway, Sweden and the Netherlands v. Greece*, Report of the Commission adopted on 5 November 1969, 12 Yearbook 1969, p. 497, para. 21 and p. 494, para. 14.

As noted above, international human rights law requires, in principle, that accused persons be segregated from convicted prisoners and that they be given separate treatment appropriate to their status as unconvicted persons (cf. art. 10(2)(a) of the International Covenant on Civil and Political Rights and art. 5(4) of the American Convention; see also in particular art. 8(b) of the Standard Minimum Rules).

As to *accused children/minors*, more specifically, both article 10(2)(b) of the International Covenant and article 5(5) of the American Convention provide that they shall be separated from adults and brought to justice as soon as possible. However, according to article 37(c) of the Convention on the Rights of the Child, which must be considered as *lex specialis* as compared to the general human rights treaties, “every child deprived of liberty shall be separated from adults **unless it is considered in the child’s best interest not to do so**” (emphasis added). The best interest of the individual child may thus justify a departure from the basic rule that it shall be separated from adults.⁸¹

Rule 8 of the Standard Minimum Rules for the Treatment of Prisoners is of a more general scope and provides that “the different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment.” This means, in particular, that “**men and women** shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate” (Rule 8(a) of the Standard Minimum Rules, emphasis added).

The separation of women from men and children from adults is a first indispensable, albeit not sufficient, measure to ensure the right to security of these particularly vulnerable persons. With regard in particular to children, it is also essential that the relevant places of detention have an adequate infrastructure and specially trained personnel who enable their specific needs and interests to be met.⁸² Further details as to detained children and women will be given in Chapters 10 and 11.

In general, the accommodation of detainees and prisoners must be such as to respect their dignity, security and good health, with adequate sleeping, living, working and sanitary conditions.

Children/minors who are deprived of their liberty shall be separated from adults, unless such separation is not in their best interest; they shall be brought to justice promptly.

To the extent possible men and women shall be held in separate institutions.

⁸¹On the question of separation of detained children from detained adults, see *Implementation Handbook for the Convention on the Rights of the Child* (New York, UNICEF, 1998), pp. 501-502 (hereinafter referred to as *UNICEF Implementation Handbook*).

⁸²On the detention of children, see e.g. Eric Sottas and Esther Bron, *Exactions et Enfants*, Geneva, OMCT/SOS Torture, 1993, pp. 26-27.

4.3 Personal hygiene, food, health and medical services

Without examining in detail the rules and case-law regarding the personal hygiene, food, health and medical services of persons deprived of their liberty, the following main principles contained in the United Nations Standard Minimum Rules for the Treatment of Prisoners should be emphasized:

- ❖ **As to personal hygiene:** “prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness” (Rule 15).
- ❖ **As to clothing:** “every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating” (Rule 17(1)). “All clothing shall be clean and kept in proper condition” (Rule 17(2)); “whenever a prisoner is removed outside the institution for an authorized purpose, he shall be allowed to wear his own clothing or other inconspicuous clothing” (Rule 17(3)).
- ❖ **As to bedding:** “Every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness” (Rule 19).
- ❖ **As to food:** “Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served”; “drinking water shall be available to every prisoner whenever he needs it” (Rule 20(1) and (2)).
- ❖ **As to health and medical services:** there shall be “at least one qualified medical officer who should have some knowledge of psychiatry” at every place of detention and the medical services “should be organized in close relationship to the general health administration of the community or nation” (Rule 22(1)); “sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals”, and where hospital facilities exist in the institution concerned, they shall have the equipment and supplies “proper for the medical care and treatment of sick prisoners and ... a staff of suitable trained officers” (Rule 22(2)); every prisoner shall also have at his or her disposal “the services of a qualified dental officer” (Rule 22(3)).

In institutions for *women* there shall inter alia “be special accommodation for all necessary pre-natal and post-natal care and treatment (Rule 23(1)).

Next, “the medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures” (Rule 24); the medical officer shall also “have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed” (Rule 25(1)); the medical officer shall further “regularly inspect and advise the director” upon such

issues as the quality of the food, the hygiene and cleanliness of the institution and prisoners, the sanitation, clothing and bedding etc. (Rule 26). Furthermore, Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “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.”

The international monitoring organs have examined numerous cases involving conditions of detention and a few of these cases set out below will illustrate the views of these organs on such issues as lack of food, deficient hygiene and alleged lack of medical care.

In the case of *Freemantle*, the following conditions of the author’s detention amounted to a violation of article 10(1) of the International Covenant: the author was confined to a 2-metre-square cell for 22 hours each day, and remained isolated from other men for most of the day; he spent most of his waking hours in enforced darkness, had little to keep him occupied, and was not permitted to work or to undertake education.⁸³

In the case of *Robinson*, the Committee concluded that the following conditions of the author’s imprisonment amounted to a violation of article 10(1) of the International Covenant: there was a complete lack of mattresses, other bedding and furniture in the cells, a desperate shortage of soap, toothpaste and toilet paper, the quality of food and drink was very poor, there was no integral sanitation in the cells and there were open sewers and piles of refuse, no doctor was available and the author was “confined to his cell for 22 hours every day in enforced darkness, isolated from other men, without anything to keep him occupied”.⁸⁴

Among many other cases, article 10(1) of the International Covenant was also violated in the case of *Elabie*, where the author complained that he only had “a piece of sponge and old newspapers” to sleep on, that he was given “food not fit for human consumption” and then “treated with brutality by the warders whenever complaints were made”.⁸⁵

Article 10(1) of the Covenant was further violated in the case of *Michael and Brian Hill*, who were not given any food during the first five days of police detention in Spain,⁸⁶ while article 7 was violated in the case of *Tshisekedi wa Mulumba*, who was subjected to “inhuman treatment” after having been “deprived of food and drink for

⁸³Communication No. 625/1995, *M. Freemantle v. Jamaica* (Views adopted on 24 March 2000), in UN doc. GAOR, A/55/40 (vol. II), p. 19, para. 7.3.

⁸⁴Communication No. 731/1996, *M. Robinson v. Jamaica* (Views adopted on 29 March 2000), in UN doc. GAOR, A/55/40 (vol. II), p. 128, paras. 10.1-10.2.

⁸⁵Communication No. 533/1993, *H. Elabie v. Trinidad and Tobago* (Views adopted on 28 July 1997), in UN doc. GAOR, A/52/40 (vol. II), p. 37, para. 8.3.

⁸⁶Communication No. 526/1993, *M. and B. Hill v. Spain* (Views adopted on 2 April 1997), in UN doc. GAOR, A/52/40 (vol. II), pp. 17-18, para. 13.

fours days after his arrest” and “subsequently kept interned under unacceptable sanitary conditions”.⁸⁷ Article 10(1) was also violated in the case of *Kalenga*, where the author complained, in particular, that he was denied recreational facilities, occasionally deprived of food and not given medical assistance when needed.⁸⁸

In the view of the Committee, articles 7 and 10(1) of the Covenant were violated in the *Linton* case following “the mock execution set up by prison warders and the denial of adequate medical care” to the author for the treatment of injuries sustained in an aborted escape attempt; the treatment was considered to be “cruel and inhuman”.⁸⁹

In the case against Malawi, already dealt with under subsections 2.3.2 and 4.2, the African Commission on Human and Peoples’ Rights held, moreover, that “the inability of prisoners to leave their cells for up to 14 hours at a time, lack of organised sports, lack of medical treatment, poor sanitary conditions and lack of access to visitors, post and reading material” were all violations of article 5 of the Charter.⁹⁰ The Commission has also decided that to deny a detainee access to doctors while his health is deteriorating is a violation of article 16 of the African Charter, which guarantees to every individual “the right to enjoy the best attainable state of physical and mental health” (art. 16(1)).⁹¹ Article 16 was also violated with regard to Ken Saro-Wiwa, whose health while in custody suffered to the point where his life was endangered; despite requests for hospital treatment made by a qualified prison doctor, such treatment was denied.⁹²

The victim’s right to respect and dignity and his right to freedom from inhuman and degrading treatment under article 5 were violated in a case where the person concerned had, in addition to having his legs and hands chained to the floor day and night, been refused permission to take a bath during his 147 days of detention; he had also been given food only twice daily and been kept in solitary confinement prior to his trial, in a cell meant for criminals.⁹³

⁸⁷Communications Nos. 241 and 242/1987, *F. Birindya ci Birbaswirwa and E. Tshisekedi wa Malumba v. Zaire* (Views adopted on 2 November 1989), in UN doc. *GAOR*, A/45/40 (vol. II), p. 84, para. 13(b).

⁸⁸Communication No. 326/1988, *H. Kalenga v. Zambia* (Views adopted on 27 July 1993), in UN doc. *GAOR*, A/48/40 (vol. II), p. 71, para. 6.5.

⁸⁹Communication No. 255/1987, *C. Linton v. Jamaica* (Views adopted on 22 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 16, para. 8.5.

⁹⁰ACHPR, *Krishna Achuthan and Amnesty International (on behalf of Aleke Banda and Orton and Vera Chirwa) v. Malawi*, *Communications Nos. 64/92, 68/92 and 78/92, decision adopted during the 16th session, October-November 1994*, para. 34 of the text of the decision as published at <http://www.up.ac.za/chr/>.

⁹¹ACHPR, *Media Rights Agenda and Others v. Nigeria*, *Communications Nos. 105/93, 128/94, 130/94 and 152/96, decision adopted on 31 October 1998*, para. 91 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152-96.html.

⁹²ACHPR, *International Pen and Others (on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation) v. Nigeria*, *Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998*, para. 112 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/137-94_139-94_154-96_161-97.html.

⁹³ACHPR, *Media Rights Agenda (on behalf of Niran Malaolu) v. Nigeria*, *Communication No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000*, paras. 70 and 72 of the text of the decision as published at <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>.

In the case of *de Varga-Hirsch*, the European Commission of Human Rights held that “it cannot be excluded that detention of a person who is ill may raise issues” under article 3 of the European Convention. In that particular case, the applicant, who was in prolonged detention on remand, suffered from diabetes and cardio-vascular disorders; “[his] state of health was poor throughout his detention ... and it became worse”.⁹⁴ The Commission pointed out, however, that the authorities had “complied with all the applicant’s requests for medical expert opinions” and where “the reports were lacking in precision, the authorities did not fail to appoint new experts”; in all, 10 reports were drawn up, and “none of the expert opinions definitely reached the conclusion that the applicant’s state of health was incompatible with detention”.⁹⁵ When the experts had recommended that the applicant be transferred to a hospital, this had also been done. The Commission further pointed out that the Government had noted that “the applicant had contributed to his bad state of health by refusing, at a certain period, his transfer to a prison hospital, not properly following his diabetic diet and refusing insulin treatment”.⁹⁶ Given “the special circumstances of the case”, the applicant’s medical treatment during his detention did not amount to a violation of article 3 of the European Convention on Human Rights.⁹⁷

State Responsibility for Prisoners on Hunger Strike The Case of R., S., A. and C. v. Portugal

The responsibilities of the State for the health and well-being of prisoners on hunger strike were inter alia at issue in a case against Portugal, involving four applicants, with applicant R. only being examined by a medical team on the twenty-sixth day of his hunger strike. The European Commission of Human Rights noted that it was “certainly disturbing that such a long time could have elapsed without the applicants being put under medical supervision”, but the question to be determined was “the extent to which the national authorities were responsible for this situation”.⁹⁸ The Commission found it important to note that, as from the moment they began their hunger strike, “the applicants always refused to be examined by the prison doctor”, and two of the applicants – including applicant R. – even refused to be examined by a team composed of three doctors from the Lisbon University Hospital, although one of these appeared in a list supplied by the applicants stating the doctors of their choice.⁹⁹

⁹⁴*Eur. Comm. HR, Application No. 9559/81, P. de Varga-Hirsch v. France, decision of 9 May 1983 on the admissibility, 33 DR, p. 213, para. 6.*

⁹⁵*Ibid.*, loc. cit.

⁹⁶*Ibid.*, pp. 213-214, para. 6.

⁹⁷*Ibid.*, para. 6 at p. 214.

⁹⁸*Eur. Comm. HR, Applications Nos. 9911/82 & 9945/82 (joined), R., S., A. and C. v. Portugal, 36 DR, p. 207, para. 16.*

⁹⁹*Ibid.*, pp. 207-208, para. 16.

*State Responsibility for Prisoners on Hunger Strike
The Case of R., S., A. and C. v. Portugal (cont.d)*

The deadlock was resolved on the twenty-sixth day of applicant R.'s hunger strike, "when the prison authorities allowed the applicants to be visited by a team consisting of a doctor appointed by the Medical Council, the prison doctor and a doctor of their choice". The team asked that the applicants be "hospitalised as a matter of urgency", which was done a few days later.¹⁰⁰ The Commission's reasoning in this case deserves to be quoted in full:

"18. As the Commission has already emphasised, the Convention requires that the prison authorities, with due regard to the ordinary and reasonable requirements of imprisonment, exercise their custodial authority to safeguard the health and well-being of all prisoners, including those engaged in protest, in so far as that may be possible in the circumstances. ... ***In situations of serious deadlock, the public authorities must not entrench themselves in an inflexible approach aimed more at punishing offenders against prison discipline than at exploring ways of resolving the deadlock...*** .

19. In the instant case, regrettable as it may be that the applicants received no medical care for a long period during their hunger strike, the fact remains that they were themselves to a large extent responsible for this situation. In respecting the applicants' refusal to be examined by certain doctors, whose competence could not be disputed, the Government acted in a manner about which the applicants cannot complain. The Commission is unable to conclude from the specific circumstances of these cases that the Portuguese authorities showed inflexibility and allowed the applicants' situation to deteriorate to the extent that they were victims of inhuman treatment or torture violating article 3 of the Convention."¹⁰¹

The reasoning in the Portuguese case was based on the *McFeeley* case, which arose in the dramatic context of Northern Ireland. The applicants in this case wanted to be recognized as political prisoners and therefore, inter alia, refused to wear prison clothes and work in prison. In return, they were given multiple punishments including periods of cellular isolation. In that particular case the Commission stated that it

"... must express its concern at the inflexible approach of the State authorities which has been concerned more to punish offenders against prison discipline than to explore ways of resolving such a serious deadlock. Furthermore, the Commission is of the view that, for humanitarian reasons, efforts should have been made by the authorities to ensure that the applicants could avail of certain facilities such as taking regular exercise

¹⁰⁰Ibid., p. 208, para. 17.

¹⁰¹Ibid., paras. 18-19; emphasis added.

in the open air with some form of clothing (other than prison clothing) and making greater use of the prison amenities under similar conditions. At the same time, arrangements should have been made to enable the applicants to consult outside medical specialists even though they were not prepared to wear prison uniform or underwear.”¹⁰²

Notwithstanding the above, and, “taking into consideration the magnitude of the institutional problem posed by the protest and the supervisory and sanitary precautions” the authorities had adopted to cope with it, their failure could not lead the Commission to conclude, *prima facie*, that article 3 of the European Convention on Human Rights had been violated in this case.¹⁰³

More About the Need for Medical Examination of Persons in Police Custody

In order to prevent the occurrence of torture and other forms of ill-treatment of persons deprived of their liberty, the Committee against Torture has emphasized “the need to allow suspects ... to be examined by an independent doctor immediately upon their arrest, or after each session of questioning, and before they are brought before an examining magistrate or released”.¹⁰⁴

In its many reports to individual European Governments following visits to places of detention, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has recommended

- that a person in police custody shall have the right to be examined by a doctor of his choice;
- that all medical examinations of persons in police custody be conducted out of the hearing of police officers and preferably also out of their sight (unless the doctor concerned requests otherwise); and that
- the results of all medical examinations as well as relevant statements by the detainees and the doctor’s conclusions be formally recorded by the doctor and made available to the detainee and his lawyer.¹⁰⁵

¹⁰²*Eur. Comm HR, Application No. 8317/78, T. McFeeley and Others v. the United Kingdom, decision of 15 May 1980 on the admissibility, 20 DR, p. 86, para. 64.*

¹⁰³*Ibid.*, pp. 86-87, para. 65.

¹⁰⁴Statement as to Switzerland, in UN doc. GAOR, A/53/44, p. 12, para. 96.

¹⁰⁵See *inter alia* Council of Europe, docs.: (1) CPT/Inf (92) 4 *Report to the Swedish Government on the Visit to Sweden carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 14 May 1991*, p. 52; (2) CPT/Inf (93) 13, *Report to the Government of the Federal Republic of Germany on the visit to Germany carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 8 to 20 December 1991*, p. 70; (3) CPT/Inf (93) 8, *Report to the Finnish Government on the visit to Finland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 20 May 1992*, p. 56.

Every person deprived of his or her liberty has the right and the duty to keep clean and the right to be warm and in good health. To this end, he or she shall be provided with the necessary hygienic equipment, clothing, bedding, adequate food and medical and dental services.

Every person deprived of his or her liberty has the right to a cell of adequate size and to enjoy daylight.

When dealing with detainees or prisoners staging protests or hunger-strikes, the authorities must take care not to adopt an inflexible, punitive approach but should instead explore avenues of dialogue and be guided by a sense of humanity.

A person in police custody shall be allowed to be examined by a physician of his or her own choice. Medical examinations shall be conducted in private unless the doctor requests otherwise, and the result of the medical examinations shall be recorded by the doctor and made available to the detainee and his or her lawyer.

4.4 Religion

Rule 6(1) of the Standard Minimum Rules for the Treatment of Prisoners, Principle 2 of the Basic Principles for the Treatment of Prisoners and Principle 5(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment prohibit discrimination on the basis of **religion**. Principle 3 of the Basic Principles adds, furthermore, that it is “desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require”.

Rules 41 and 42 of the Standard Minimum Rules contain the following more detailed regulations in this respect. In the first place, “if the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis” (Rule 41(1)). A qualified representative so appointed or approved “shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times” (Rule 41(2)). Furthermore, “access to a qualified representative of any religion shall not be refused to any prisoner”, but “if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected” (Rule 41(3)). Lastly, “so far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination” (Rule 42).

Every person deprived of his or her freedom has the right not to be discriminated against on the basis of religion. To the extent possible, the religious convictions and cultural precepts of the detainees and prisoners shall be respected, including the holding of regular services and the organization of pastoral visits.

4.5 Recreational activities

According to Rule 21(1) of the Standard Minimum Rules, “every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits”. As to “young prisoners, and others of suitable age and physique”, they “shall receive physical and recreational training during the period of exercise”, and, “to this end space, installations and equipment should be provided” (Rule 21(2)).

Principle 6 of the Basic Principles further provides that “all prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.”

Lastly, according to Principle 28 of the Body of Principles, “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.”

With regard to the police prisons in Zürich, Switzerland, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment recommended that urgent measures be taken in order to ensure that the detained persons be authorized to exercise in the fresh air, at least one hour per day, in conditions permitting them to benefit therefrom fully and by guaranteeing their right to respect for their private life.¹⁰⁶ This recommendation was made in response to the refusal of the detainees to exercise outside since they were afraid of being seen by the public handcuffed and accompanied by a police officer.¹⁰⁷

*Every person deprived of his or her liberty has the right to **exercise outdoors for a minimum of one hour daily** in conditions respecting his or her right to privacy. Certain categories of detainees and prisoners may require special recreational training.*

Detainees and prisoners shall have reasonable access to educational, cultural and informational material.

¹⁰⁶Council of Europe doc. CPT/Inf (93) 3, *Report to the Swiss Federal Council on the Visit to Switzerland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 29 July 1991*, p. 75 in the French text.

¹⁰⁷*Ibid.*, p. 20, paras. 22-23.

4.6 Solitary confinement

The use of solitary confinement is not, per se, regulated in the international human rights treaties, although numerous complaints relating to isolation during detention and imprisonment have been brought to the attention of the international monitoring organs, which have given some further interpretative guidance with regard to recourse to this particularly serious form of confinement. As a starting point it can be said that the use of solitary confinement does not per se violate international human rights law such as articles 7 and 10(1) of the International Covenant, but that the question of its lawfulness will depend on the *aim*, *length* and *conditions* of the confinement in each particular case.

The Human Rights Committee has stated in its General Comment No. 20 that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7” of the Covenant.¹⁰⁸ It is noteworthy that Principle 7 of the Basic Principles for the Treatment of Prisoners provides, furthermore, that “efforts addressed to the abolition of solitary confinement as a *punishment*, or to the restriction of its use, should be undertaken and encouraged” (emphasis added).

The Human Rights Committee examined the question of solitary confinement in the *Vuolanne* case, which originated in a complaint from a conscript who had received a sanction of “10 days of close arrest, i.e. confinement in the guardhouse without service duties”. The author claimed in particular that “he was locked in a cell of 2 x 3 metres with a tiny window, furnished only with a camp bed, a small table, a chair and a dim electric light” and, further, that “he was only allowed out of his cell for purposes of eating, going to the toilet and to take fresh air for half an hour daily”.¹⁰⁹ The Committee concluded, however, that neither article 7 nor article 10(1) had been violated in this case: in the first place, it did not appear that “the solitary confinement to which the author was subjected, having regard to its strictness, duration and the end pursued, produced any adverse physical or mental effects on him”, and, in the second place, “it [had] not been established that Mr. Vuolanne suffered any humiliation or that his dignity was interfered with apart from the embarrassment inherent in the disciplinary measure to which he was subjected”.¹¹⁰

However, the outcome was different in the case of *Antonaccio*, where the Committee concluded that both article 7 and article 10(1) had been violated because the author was held in an underground cell and denied the medical attention his condition required; he had also been tortured for three months.¹¹¹ Article 10(1) alone was violated in the case of *Gómez de Voituret* concerning the author’s detention in solitary confinement for about seven months “in a cell almost without natural light”; Article 10(1) was violated in this case because, in the view of the Committee, the author “was

¹⁰⁸United Nations Compilation of General Comments, p. 139, para. 6.

¹⁰⁹Communication No. 265/1987, *A. Vuolanne v. Finland* (Views adopted on 7 April 1989), in UN doc. G.AOR, A/44/40, p. 249, para. 2.2 and p. 250, para. 2.6.

¹¹⁰*Ibid.*, p. 256, para. 9.2.

¹¹¹Communication No. R.14/63, *R. S. Antonaccio v. Uruguay* (Views adopted on 28 October 1981), in UN doc. G.AOR, A/37/40, p. 120, para. 20 as read in conjunction with p. 119, para. 16.2.

kept in solitary confinement for several months in conditions which failed to respect the inherent dignity of the human person”.¹¹²

The solitary confinement violated both articles 7 and 10(1) in the case of *Espinoza de Polay*, in particular because of the author’s “isolation for 23 hours a day in a small cell” and the fact that he could not have more than 10 minutes’ sunlight a day.¹¹³

With regard inter alia to Norway and Sweden, the Committee against Torture recommended that the use of solitary confinement be abolished, particularly during the period of pre-trial detention, other than in exceptional cases, such as *when the security or the well-being of persons or property are in danger*. It further recommended that the use of this exceptional measure be “strictly and specifically regulated by law” and subjected to judicial control.¹¹⁴

When examining whether solitary confinement might violate article 3 of the European Convention on Human Rights, the European Commission of Human Rights consistently examined the lawfulness of such a measure in the light of its *duration*, the *objective pursued*, and the *effect that the measure may have on the person concerned*. This approach was applied in the case of *R. v. Denmark*, where the applicant spent no fewer than 17 months in solitary confinement during his detention on remand. The Commission pointed out in this case that “when a measure of solitary confinement is considered, a balance must be struck between the requirements of the investigation and the effect which the isolation will have on the detained person”. Although accepting that “the applicant was isolated for an undesirable length of time”, the Commission concluded that “having regard to the particular circumstances of the confinement in question, it was not of such severity as to fall within the scope of article 3” of the Convention.¹¹⁵ The Commission noted in this respect that “the applicant was kept in a cell of approximately six square metres”; that “he was allowed to listen to the radio and watch television”; that throughout the relevant period he was “allowed to exercise in the open air for one hour every day”; that he could borrow books from the prison library; that he was in daily contact with prison staff several times a day and sometimes also with other persons in connection with police interrogations and court hearings; that he was under medical observation; and finally, that although he was subjected to restrictions with regard to visits during this period, “he was allowed to receive controlled visits by his family”.¹¹⁶

¹¹²Communication No. 109/1981, *T. Gómez de Voituret v. Uruguay* (Views adopted on 10 April 1984), in UN doc. GAOR, A/39/40, p. 168, paras. 12.2-13.

¹¹³Communication No. 577/1994, *R. Espinoza de Polay v. Peru* (Views adopted on 6 November 1997), in UN doc. GAOR, A/53/40 (vol. II), p. 42, para. 8.7.

¹¹⁴UN docs. GAOR, A/53/44, p. 17, para. 156 (Norway) and GAOR, A/52/44, p. 34, para. 225 (Sweden).

¹¹⁵*Eur. Comm. HR, R. v. Denmark, Application No. 10263/83, R. v. Denmark, decision of 11 March 1985 on the admissibility*, 41 DR, p. 154.

¹¹⁶*Ibid.*, pp. 153-154.

The European Committee for the Prevention of Torture, which makes very precise recommendations following its on-the-spot investigations, has recommended with regard to a place of detention in Switzerland, for instance, that the instances in which recourse is had to involuntary isolation should be clearly defined and it should be used only in exceptional circumstances; moreover, the isolation must be for “the shortest possible period” and reviewed every three months, if need be on the basis of a socio-medical report.¹¹⁷ On this occasion the European Committee further recommended that each prisoner who has his isolation prolonged must be informed in writing of the reasons for the measures unless there are imperative reasons of security why this should not be done. If need be, the prisoner should also be allowed to benefit from the assistance of counsel and be permitted to make his views known to the competent authorities in case of prolongation of the isolation.¹¹⁸

4.6.1 *Incommunicado detention*

Incommunicado detention is a particularly severe form of solitary confinement, where the persons deprived of their liberty have no access whatever to the outside world, with the result that they are at increased risk of being subjected to human rights abuses. Innumerable persons have been tortured, made to disappear, and even killed following the extensive use of incommunicado detention. The United Nations Special Rapporteur on the question of torture has pointed out that torture “is most frequently practised during incommunicado detention”, and he has therefore proposed that such detention “be made illegal and persons held incommunicado ... be released without delay”.¹¹⁹ As will be seen below, the tendency of other international monitoring organs is also to discourage the use of this form of detention.

In its General Comment No. 20, the Human Rights Committee emphasized that “provisions should also be made against incommunicado detention”, adding that “States parties should ensure that any places of detention be free from any equipment liable to be used for inflicting torture or ill-treatment”.¹²⁰ After having considered the fourth periodic report of Chile, the Committee recommended that “the State party should reconsider its law on this issue with a view to eliminating incommunicado detention altogether”.¹²¹ In connection with its consideration of the initial report of Switzerland, the Committee regretted that “in various cantons, detainees may be held incommunicado for periods ranging from 8 to 30 days or even, in some cases, for indefinite periods”, and it recommended “that the discussions aimed at harmonizing the various cantonal laws on criminal procedure be intensified, with due respect for the provisions of the Covenant, particularly with regard to fundamental guarantees during police custody or incommunicado detention”.¹²²

¹¹⁷Council of Europe doc. CPT/Inf (93) 3, *Report to the Swiss Federal Council on the Visit to Switzerland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 21 to 29 July 1991*, p. 77.

¹¹⁸*Ibid.*, loc. cit.

¹¹⁹UN doc. E/CN.4/1995/34, *Report of the Special Rapporteur on the question of torture*, para. 926(d).

¹²⁰*United Nations Compilation of General Comments*, p. 140, para. 11.

¹²¹UN doc. GAOR, A/54/40 (vol. I), p. 46, para. 209.

¹²²UN doc. GAOR, A/52/40 (vol. I), p. 20, para. 98 and p. 22, para. 109.

In the case of *El-Megreisi*, the author's brother had been held incommunicado in the Libyan Arab Jamahiriya for more than three years when he was finally allowed a visit by his wife in April 1992; on 23 March 1994, when the Committee adopted its views in the case, Mr. El-Megreisi was still in incommunicado detention. This fact led the Committee to conclude that, "by being subjected to prolonged incommunicado detention in an unknown location, [he was] the victim of **torture and cruel and inhuman treatment**" contrary to articles 7 and 10(1) of the Covenant.¹²³ Article 7 was also violated in the case of *Mukong*, where the author "was kept incommunicado, was threatened with torture and death and intimidated, deprived of food, and kept locked in his cell for several days on end without the possibility of recreation". Referring to its above-mentioned General Comment, the Committee also noted that "total isolation of a detained or imprisoned person may amount to acts prohibited by article 7", and it concluded that Mr. Mukong had been subjected to "**cruel, inhuman and degrading treatment**" in this case contrary to that article.¹²⁴ In several other cases the Committee considered that incommunicado detention for several weeks or months was contrary to article 10(1) of the Covenant, including in one case where such detention had lasted for 15 days.¹²⁵ However, these cases are of earlier date than those of *El-Megreisi* and *Mukong*, and it is therefore possible to conclude that the Committee has now adopted a stricter legal approach to the use of incommunicado detention.

Lastly, articles 7 and 10(1) were both violated in the case of *Espinosa de Polay*, where the author was held incommunicado from 22 July 1992 until 26 April 1993 and then again for one year following his conviction.¹²⁶

The Committee against Torture recommended that Peru abolish the period of pre-trial incommunicado detention.¹²⁷

¹²³Communication No. 440/1990, *Y. El-Megreisi v. the Libyan Arab Jamahiriya* (Views adopted on 23 March 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 130, para. 5.4; emphasis added.

¹²⁴Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 180, para. 9.4; emphasis added.

¹²⁵Communication No. 147/1983, *L. Arzuaga Gilboa v. Uruguay* (Views adopted on 1 November 1985), in UN doc. GAOR, A/41/40, p. 133, para. 14 (15 days); and e.g. Communication No. 139/1983, *H. Conteris v. Uruguay* (Views adopted on 17 July 1985), in UN doc. GAOR, A/40/40, p. 202, para. 10 (over three months).

¹²⁶Communication No. 577/1994, *R. Espinoza de Polay v. Peru* (Views adopted on 6 November 1997), in UN doc. GAOR, A/53/40 (vol. II), pp. 41-43, paras 8.4, 8.6 and 9. The conditions of the author's detention and imprisonment also violated articles 7 and 10(1) in various other ways: display of author to the press during transfer from one place of detention to another; conditions of solitary confinement.

¹²⁷UN doc. GAOR, A/55/44, p. 15, para. 61(b).

In the case of *Suárez Rosero*, the Inter-American Court of Human Rights stated that

“51. *Incommunicado* detention is an exceptional measure the purpose of which is to prevent any interference with the investigation of the facts. Such isolation must be limited to the period of time expressly established by law. Even in that case, the State is obliged to ensure that the detainee enjoys the minimum and non-derogable guarantees established in the Convention and, specifically, the right to question the lawfulness of the detention and the guarantee of access to effective defence during his incarceration.”¹²⁸

Mr. Suárez Rosero had been held *incommunicado* for 36 days, although Ecuadoran law establishes that such detention may not exceed 24 hours; consequently, article 7(2) of the American Convention on Human Rights had been violated in this case.¹²⁹ The Inter-American Court further explained that:

“90. One of the reasons that *incommunicado* detention is considered to be an exceptional instrument is the grave effects it has on the detained person. Indeed, isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prisons.”¹³⁰

The Inter-American Court concluded that, for the following reasons, the *incommunicado* detention was ***cruel, inhuman and degrading treatment*** violating article 5(2) of the American Convention, an argument that was not contested by Ecuador:

“91. The mere fact that the victim was for 36 days deprived of any communication with the outside world, in particular with his family, allows the Court to conclude that Mr. Suárez Rosero was subjected to cruel, inhuman and degrading treatment, all the more so since it has been proven that his *incommunicado* detention was arbitrary and carried out in violation of Ecuador’s domestic laws. The victim told the Court of his suffering at being unable to seek legal counsel or communicate with his family. He also testified that during his isolation he was held in a damp underground cell measuring approximately 15 square meters with 16 other prisoners, without the necessary hygiene facilities, and that he was obliged to sleep on newspaper; he also described the beatings and threats he received during his detention. For all those reasons, the treatment to which Mr. Suárez Rosero was subjected may be described as cruel, inhuman and degrading.”¹³¹

¹²⁸I-A Court HR, *Suárez Rosero case v. Ecuador*, judgment of November 12, 1997, in OAS doc. OAS/Ser.L/V/III.39, doc. 5, *Annual Report of the Inter-American Court of Human Rights 1997*, p. 296, para. 51.

¹²⁹*Ibid.*, paras. 48 and 52.

¹³⁰*Ibid.*, p. 301, para. 90.

¹³¹*Ibid.*, pp. 301-302, para. 91.

In the case of *Velásquez Rodríguez*, which concerned the involuntary disappearance of Mr. Velásquez, the Inter-American Court held that

“156. ... prolonged isolation and deprivation of communication are ***in themselves*** cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention, which recognizes the right to integrity of the person...”¹³²

The ***link between lack of prompt judicial intervention, isolation and torture*** was highlighted in the *Aksoy* case, where, as was seen in subsection 2.3.2 above, the applicant had been subjected to torture in violation of article 3 of the European Convention on Human Rights. In this case, the applicant was held incommunicado for at least fourteen days without judicial intervention, and then appeared before the public prosecutor with injuries to his arms. Although the Court accepted that the investigation of terrorist offences “undoubtedly presents the authorities with special problems”, it could not accept that it is necessary to hold a suspect for fourteen days without judicial intervention; this period was “exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture”.¹³³ Prompt judicial intervention to examine the lawfulness of a deprivation of liberty is thus instrumental in ensuring respect for a detained person’s physical and mental integrity.

*While not unlawful as such, the use of solitary confinement should be limited to exceptional circumstances, in particular during pre-trial detention. The lawfulness of solitary confinement depends on an assessment of its **purpose, length and conditions**.*

Solitary confinement should only be used when the security or the well-being of persons or property are in danger and should be subject to regular judicial supervision.

Solitary confinement should not be used as a punishment.

*Incommunicado detention is a particularly serious form of solitary confinement and should be declared illegal. Prolonged isolation constitutes **per se** torture and cruel and inhuman treatment.*

It is unlawful to prevent people held incommunicado from challenging the legality of their detention or from effectively preparing their defence.

Prompt judicial intervention to examine the lawfulness of a deprivation of liberty is instrumental in ensuring respect for a detained person’s physical and mental integrity.

¹³²I-A Court HR, *Case of Velásquez Rodríguez v. Honduras*, judgment of July 29, 1988, Series C, No. 4, p. 148, para. 156; emphasis added. Cf. also *ibid.*, p. 159, para. 187.

¹³³Eur. Court HR, *Aksoy v. Turkey*, judgment of 18 December 1996, Reports 1996-VI, p. 2282, para. 78.

5. Contacts with the Outside World

A fundamental premiss when dealing with the right of detainees and prisoners to maintain contact with the world outside the institutions where they are held is that, like free persons, those deprived of their liberty enjoy all the human rights guaranteed by international law, subject of course to those restrictions that are an unavoidable consequence of the confinement.¹³⁴ This means, *inter alia*, that no detainee or prisoner “shall ... be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence” (art. 17 of the International Covenant on Civil and Political Rights).

5.1 Contact with family members and friends: visits and correspondence

Rule 37 of the Standard Minimum Rules provides that “prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.” Prisoners who are foreign nationals “shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong”, or “with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons” (Rule 38(1) and (2)). Furthermore, according to Rule 92:

“92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.”

Principle 15 of the Body of Principles provides that “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”. Further, Principle 16(1) of the Body of Principles stipulates that:

“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.”

¹³⁴Cf. in particular statement by the Human Rights Committee in its General Comment No. 21 on article 10, in *United Nations Compilation of General Comments*, para. 3 at p. 142.

According to Principle 16(4) such notification “shall be made or permitted to be made *without delay*” (emphasis added), although “the competent authority may ... delay a notification for a reasonable period where exceptional needs of the investigation so require”. The United Nations Special Rapporteur on torture has recommended in this respect that “in all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours”,¹³⁵ a time-limit that does however seem to be unduly long, given that many cases of severe torture and involuntary disappearance take place during the very first hours following an arrest.

Lastly, according to Principle 19 of the Body of Principles:

“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.”

The refusal of the prison authorities to allow a detainee or prisoner to write to, and receive visits by, family members, may violate both article 7 and article 10(1) of the International Covenant on Civil and Political Rights. For instance, in the case of *Espinoza de Polay* referred to above, the author was not only refused visits by his family during the year following his conviction, but was also unable either to receive from, or to send correspondence to, his family. These facts constituted *inhuman treatment* contrary to article 7 of the Covenant and also violated article 10(1).¹³⁶ However, it is not clear exactly when, and how frequently, in the Committee’s view, a prisoner should be allowed to see or communicate with his family.

In the case of *Estrella*, article 17 read in conjunction with article 10(1) was violated because of the extent to which the author’s correspondence was censored and restricted at Libertad prison in Uruguay.¹³⁷ Mr. Estrella claimed that prison officials arbitrarily deleted sentences and refused to dispatch letters; during his entire detention of two years and four months he was allegedly given only 35 letters and during a seven-month-long period he was given none.¹³⁸ With regard to the censorship of Mr. Estrella’s correspondence, the Committee accepted

“... that it is normal for prison authorities to exercise measures of control and censorship over prisoners’ correspondence. Nevertheless, article 17 of the Covenant provides that ‘no one shall be subjected to arbitrary or unlawful interference with his correspondence’. This requires that any such measures of control or censorship shall be subject to satisfactory legal safeguards against arbitrary application... . Furthermore, the degree of restriction must be consistent with the standards of humane treatment of detained persons required by article 10 (1) of the Covenant. In particular, prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by

¹³⁵UN doc. E/CN.4/1995/34, *Report of the Special Rapporteur on torture*, para. 926(d).

¹³⁶Communication No. 577/1994, *R. Espinoza de Polay v. Peru* (Views adopted on 6 November 1997), in UN doc. GAOR, A/53/40 (vol. II), p. 42, para. 8.6.

¹³⁷Communication No. 74/1980, *M. A. Estrella v. Uruguay* (Views adopted on 29 March 1983), in UN doc. GAOR, A/38/40, p. 159, para. 10.

¹³⁸*Ibid.*, p. 154, para. 1.13.

correspondence as well as by receiving visits. On the basis of the information before it, the Committee finds that Miguel Angel Estrella's correspondence was censored and restricted at Libertad prison to an extent which the State party has not justified as compatible with article 17 read in conjunction with article 10 (1) of the Covenant."¹³⁹

The most detailed arguments relating to prisoners' correspondence have been made by the European Court of Human Rights, and the relevant complaints have been examined under articles 6(1) and 8 of the European Convention on Human Rights, these articles respectively guaranteeing, among others, the right of access to a court and the right to respect for one's correspondence. As far as article 6(1) is concerned, it will be considered below under section 5.2.

While article 8(1) of the European Convention provides that "everyone has the right to respect for his private and family life, his home and his correspondence", paragraph 2 allows for the following restrictions on the exercise of this right:

"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Whenever a detainee's or a prisoner's correspondence has been stopped or delayed, such measures must consequently, in order to be lawful, be taken "in accordance with the law" for one or more of the legitimate aims enumerated therein and be "necessary in a democratic society" for such aim or aims. However, most problems raised before the international monitoring organs have concerned the interference with correspondence to lawyers rather than family members, and it is that particular aspect that will be emphasized below.

5.1.1 The rights of visitors to detainees and prisoners

The rights of *visitors* to people deprived of their liberty arose under the American Convention on Human Rights in a case against Argentina. The complaint concerned the situation of a woman and her thirteen-year-old daughter, both of whom were required to undergo a vaginal inspection before each personal-contact visit with the man who was their husband and father respectively. The petitioners alleged before the Inter-American Commission on Human Rights that these inspections constituted an illegitimate interference with the exercise of their right to family, as well as their right to privacy, honour and dignity and their right to physical integrity, contrary to articles 17, 11 and 5 of the American Convention on Human Rights.¹⁴⁰

¹³⁹Ibid., pp. 158-159, para. 9.2.

¹⁴⁰*I-A Comm. HR, Report No. 38/96, Case 10.506 v. Argentina, October 15, 1996*, in OAS doc. OEA/Ser.L/V/II.95, doc. 7 rev., *Annual Report of the Inter-American Commission on Human Rights 1996*, pp. 58-59, para. 48.

In examining these allegations, the Commission held, *in the first place*, that “a measure as extreme as the vaginal search or inspection of visitors, that involves a threat of violation to a number of the rights guaranteed under the Convention, must be prescribed by law which clearly specifies the circumstances when such a measure may be imposed and sets forth what conditions must be obeyed by those applying this procedure so that all persons subjected to it are granted as full a guarantee as possible from its arbitrary and abusive application.”¹⁴¹ *Second*, the Commission did not question the need for general searches prior to entry into prisons; in its view, however, “vaginal searches or inspections are nevertheless an exceptional and very intrusive type of search”; although “the measure in question may be exceptionally adopted to guarantee security in certain specific cases, it cannot be maintained that its systematic application to all visitors is a necessary measure in order to ensure public safety”.¹⁴²

The Commission then explained, *thirdly*, that, for a vaginal search or inspection to be lawful in a particular case, it would have to comply with the following four conditions:

- ❖ “it must be absolutely necessary to achieve the security objective in the particular case”;
- ❖ “there must not exist an alternative option”;
- ❖ “it should be determined by judicial order”;
- ❖ “it must be carried out by an appropriate health professional”.¹⁴³

Applying these principles to the case under examination, the Commission found that:

- ❖ the measure might “have been justifiable immediately after Mr. X was found to be in possession of explosives”, but the same could not be said of “the numerous times the measure was applied prior to that occasion”;¹⁴⁴
- ❖ there were “other more reasonable options ... available to the authorities in order to ensure security in the prison”;¹⁴⁵
- ❖ the State had a legal duty under the American Convention “to request a judicial order to execute the search”, which was not done;¹⁴⁶
- ❖ the petitioners’ rights were interfered with since the intrusive measure was not accompanied by “appropriate guarantees”. The Commission insisted “that any type of corporal probing ... must be performed by a medical practitioner with the strictest observance of safety and hygiene, given the potential of physical and moral injury to individuals.”¹⁴⁷

¹⁴¹Ibid., pp. 63-64, para. 64.

¹⁴²Ibid., p. 64, para. 68.

¹⁴³Ibid., p. 65, para. 72.

¹⁴⁴Ibid., pp. 65-66, para. 73.

¹⁴⁵Ibid., p. 67, para. 80.

¹⁴⁶Ibid., p. 68, para. 83.

¹⁴⁷Ibid., paras. 84-85.

In conclusion the Commission found that “when the prison authorities ... systematically performed vaginal inspections on Ms. X and [Ms.] Y they violated their rights to physical and moral integrity, in contravention of Article 5 of the Convention.”¹⁴⁸ These searches also violated “the petitioners’ rights to honour and dignity, protected by Article 11 of the Convention”.¹⁴⁹ The requirement that the petitioners undergo such inspections each time they wished to have a personal-contact visit with Mr. X further “interfered unduly with” their family rights as guaranteed by article 17 of the Convention.¹⁵⁰ Lastly, as to the daughter, the searches violated the rights of the child as protected by article 19 of the Convention.¹⁵¹ In organizing family visits in places of detention, the authorities must, in other words, take care to do so in a manner that also respects the rights and freedoms of the visitors.

5.2 Contact with lawyers: visits and correspondence

Contacts between a lawyer and his clients are privileged and confidential and this basic rule also continues to apply when the clients are deprived of their liberty. Rule 93 of the Standard Minimum Rules stipulates in this respect that:

“93. For the purposes of his defence, an untried prisoner shall be allowed to apply for free legal aid where such aid is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall if he so desires be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.”

This same issue is also covered by Principle 18 of the Body of Principles, which reads as follows:

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 consultation 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.

¹⁴⁸Ibid., p. 69, para. 89.

¹⁴⁹Ibid., p. 70, para. 94.

¹⁵⁰Ibid., p. 72, para. 100.

¹⁵¹Ibid., p. 73, para. 105.

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.”

Apart from the importance of seeking legal advice for purposes of preparing a criminal defence, the Human Rights Committee has also emphasized, in connection with the risk of ill-treatment of persons deprived of their liberty, that “the protection of the detainee ... requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members”.¹⁵² The cases referred to above in connection with incommunicado detention illustrate the imperative need for this rule to be effectively applied at all times.

For examples of cases concerning a suspect’s right of access to a lawyer in order to defend himself, see above, Chapter 5, section 7, Chapter 6, subsection 6.4 and Chapter 7, subsection 3.5.

The case of *Tomlin* brought under the International Covenant on Civil and Political Rights concerned the alleged interference with a letter from a prisoner to his lawyer. The author submitted that a letter he wrote to his lawyer on 22 April 1991 concerning his petition for special leave to appeal to the Judicial Committee of the Privy Council was not mailed by the prison authorities until 10 July 1991; the Government denied this, affirming that there was “no evidence whatsoever of any arbitrary or unlawful interference with the author’s correspondence”.¹⁵³ The Human Rights Committee accepted that the material before it “did not reveal that the State party’s authorities, in particular the prison administration, withheld the author’s letter for a period exceeding two months”. It could not therefore conclude that there had been an “arbitrary” interference with the author’s right to privacy under article 17(1) of the Covenant.¹⁵⁴ It added nonetheless that it considered that such long delay “could raise an issue in respect of article 14, paragraph 3 (b) of the Covenant inasmuch as it could constitute a breach of the author’s right to freely communicate with his counsel. Nevertheless, as this delay did not adversely affect the author’s right to prepare adequately his defence”, it could not be considered to violate article 14(3)(b).¹⁵⁵

¹⁵²General Comment No. 20, *United Nations Compilation of General Comments*, p. 140, para. 11.

¹⁵³Communication No. 589/1994, *C. Tomlin v. Jamaica* (Views adopted on 16 July 1996), in UN doc. GAOR, A/51/40 (vol. II), p. 193, paras. 3.7 and 4.5.

¹⁵⁴*Ibid.*, p. 195, para. 8.3.

¹⁵⁵*Ibid.*, loc. cit.

Questions regarding the Tomlin case:

- Should it matter that a delay in sending on a letter from a client-prisoner to his lawyer did not *in fact* have any adverse consequences for his legal defence?
- Why did the Human Rights Committee continue to examine the case under article 14 of the Covenant, although it had found that there was no evidence of the authorities having withheld the letter and interfered arbitrarily with the author's right to privacy under article 17(1)?
- Compare the Committee's reasoning with that of the European Court of Human Rights below. What are the differences? Are those differences legally justified?
- Should the Committee in your view uphold its ruling in the *Tomlin* case in future communications?

The question of prisoners' correspondence has been considered on numerous occasions by the European Court of Human Rights, the opinions of which provide important clarifications as to the right of a detainee or prisoner to communicate with his or her lawyer either for defence purposes or in order to complain about prison conditions and treatment. Although the European Court has in principle accepted that it may be necessary to interfere with a prisoner's correspondence for "the prevention of disorder or crime" under article 8(2) of the European Convention on Human Rights, such measures must be proportionate to the legitimate aim pursued in a democratic society and regard must in this respect be had to the Government's margin of appreciation.¹⁵⁶ On the extent of the control of correspondence, the Court has stated:

“45. It has also been recognised that some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention, regard being paid to the ordinary and reasonable requirements of imprisonment In assessing the permissible extent of such control in general, the fact that the opportunity to write and to receive letters is sometimes the prisoner's only link with the outside world should, however, not be overlooked.

46. It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged. Indeed, in its *S. v. Switzerland* judgment of 28 November 1991 the Court stressed the importance of a prisoner's right to communicate with counsel out of earshot of the prison authorities. It was considered, in the context of Article 6, that if a lawyer were unable to confer with his client without such surveillance, and receive confidential instructions from him his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective... .

¹⁵⁶*Eur. Court HR, Case of Campbell v. the United Kingdom, judgment of 25 March 1992, Series A, No. 233, p. 18, para. 44.*

47. In the Court's view, similar considerations apply to a prisoner's correspondence with a lawyer concerning contemplated or pending proceedings where the need for confidentiality is equally pressing, particularly where such correspondence relates ... to claims and complaints against the prison authorities. That such correspondence be susceptible to routine scrutiny, particularly by individuals or authorities who may have a direct interest in the subject matter contained therein is not in keeping with the principles of confidentiality and professional privilege attaching to relations between a lawyer and his client.

48. Admittedly, ... the borderline between mail concerning contemplated litigation and that of a general nature is especially difficult to draw and correspondence with a lawyer may concern matters which have little or nothing to do with litigation. Nevertheless, the Court sees no reason to distinguish between the different categories of correspondence with lawyers which, whatever their purpose, concern matters of a private and confidential character. In principle, such letters are privileged under Article 8.

This means that the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, e.g. opening the letter in the presence of the prisoner. The reading of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as 'reasonable cause' will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused... ."¹⁵⁷

In the case of *Campbell*, the European Court stated furthermore with regard to the *automatic control of correspondence* that "the right to respect for correspondence is of special importance in a prison context where it may be more difficult for a legal adviser to visit his client in person because ... of the distant location of the prison", and that "the objective of confidential communication with a lawyer could not be achieved if this means of communication were the subject of automatic control".¹⁵⁸ Finally, "the mere possibility of abuse" by solicitors who might not comply with the rules of their profession "is outweighed by the need to respect the confidentiality attached to the lawyer-client relationship".¹⁵⁹ Considering that there was "no pressing social need" for the opening and reading of Mr. Campbell's correspondence with his solicitor, it constituted a violation of article 8 of the European Convention.¹⁶⁰

¹⁵⁷Ibid., pp. 18-19, paras. 45-48.

¹⁵⁸Ibid., p. 20, para. 50.

¹⁵⁹Ibid., para. 52 at p. 21.

¹⁶⁰Ibid., p. 21, paras. 53-54.

In the *Golder* case, the applicant complained about the refusal of the Home Secretary to grant him permission to bring a civil action for libel against a prison officer. The Court concluded that it “was not for the Home Secretary himself to appraise the prospects of the action contemplated” by Mr. Golder, but that it was “for an independent and impartial court to rule on any claim that might be brought. In declining to accord the leave which had been requested, the Home Secretary failed to respect, in the person of Golder, the right to go before a court as guaranteed by Article 6 § 1”.¹⁶¹ In the view of the European Court, the refusal to let Mr. Golder correspond with his lawyer for the purpose of seeking legal advice with regard to the libel action also violated article 8 of the European Convention in that it was not an interference with his right to respect for his correspondence that could be justified as being necessary in a democratic society for any of the legitimate purposes enumerated therein.¹⁶²

The case of *Silver and Others* raised numerous instances of interference with prisoners’ correspondence, and article 8 of the European Convention had inter alia been *violated* where the stopping of letters was based on the following principal or subsidiary grounds: (1) restriction on communication in connection with any legal or other business, including a letter to the National Council for Civil Liberties; (2) prohibition on complaints calculated to hold the authorities up to contempt; and (3) prohibition on the inclusion in letters to legal advisers and Members of Parliament of complaints that had not yet been through the prior internal prison ventilation system.¹⁶³ The stopping of the letters concerned was not considered to be necessary in a democratic society for the various purposes indicated by the United Kingdom Government.

Article 8 of the European Convention was also violated in the case of *McCallum* insofar as, for instance, the applicant’s letters to his solicitor and Member of Parliament had been stopped because they contained complaints about prison treatment that should first have been addressed to the competent prison authorities (prior internal ventilation rule); the fact that the Prison Visiting Committee had imposed on the applicant a disciplinary award which included *an absolute prohibition for 28 days on all correspondence*, also violated article 8 of the Convention.¹⁶⁴

Lastly, it should be noted in this respect that while the African Charter on Human and Peoples’ Rights does not guarantee the right to respect for one’s private life, family life and correspondence, this right is contained in article 11 of the American Convention on Human Rights.

¹⁶¹ Eur. Court HR, *Golder Case v. the United Kingdom*, judgment of 21 February 1975, Series A, No. 18, para. 40 at p. 20.

¹⁶² Ibid., pp. 21-22, para. 45.

¹⁶³ Eur. Court HR, *Case of Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A, No. 61, pp. 38-38, para. 99.

¹⁶⁴ Eur. Court HR, *McCallum Case v. the United Kingdom*, judgment of 30 August 1990, Series A, No. 183, p. 15, para. 31.

Persons deprived of their liberty have the right to enjoy the same human rights as persons at liberty, subject only to those restrictions that are an unavoidable consequence of the confinement.

***First**, detainees and prisoners have the right to contact their families or friends without delay upon arrest or detention. Further, throughout their deprivation of liberty they have a right to maintain contact with families and friends through visits and correspondence at regular intervals. Any interference with this right must not be arbitrary (International Covenant on Civil and Political Rights) and must be based on law, imposed for legitimate purposes, and necessary in a democratic society for such purposes (European Convention on Human Rights).*

***Second**, persons deprived of their liberty have a right to be regularly visited by, and consult and communicate with, their lawyers through correspondence that shall be transmitted without delay and preserving the full confidentiality of the lawyer-client relationship. During visits by their lawyers, detainees and prisoners shall be able to confer within sight but not within the hearing of law enforcement officials.*

In order to help ensure their right to personal security, all persons deprived of their liberty have a right to unhindered communication for the purpose of bringing complaints concerning, in particular, allegedly unsatisfactory conditions of detention, torture and other forms of ill-treatment.

In organizing family visits, prison authorities must ensure that the rights and freedoms of the visiting persons are respected.

6. Inspection of Places of Detention and Complaints Procedures

6.1 Inspection of places of detention

As pointed out by the United Nations Special Rapporteur on the question of torture, “regular inspection of places of detention, especially when carried out as part of a system of periodic visits, constitutes one of the most effective preventive measures against torture. Inspections of all places of detention, including police lock-ups, pre-trial detention centres, security service premises, administrative detention areas and prisons, should be conducted by teams of *independent* experts”, whose members “should be afforded an opportunity to speak privately with detainees” and should also report publicly on their findings.¹⁶⁵ Given the importance of the regular inspection of penal institutions, the Human Rights Committee has expressed concern “at the lack of an

¹⁶⁵UN doc. E/CN.4/1995/34, *Report of the Special Rapporteur on torture*, para. 926(c).

independent system of supervision of: (a) abuses of human rights by police officers; (b) the conditions in penal institutions, including those for juvenile offenders; and (c) complaints of violence or other abuse by members of the Prison Service”.¹⁶⁶

The Committee against Torture has also recommended that “independent governmental bodies consisting of persons of high moral standing should be appointed to take over the inspection of detention centres and places of imprisonment.”¹⁶⁷

Similarly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has recommended that the Swedish authorities “explore the possibility of establishing a system under which each prison establishment would be visited on a regular basis by an independent body, which would possess powers to inspect the prison’s premises and hear complaints from inmates about their treatment in the establishment”.¹⁶⁸

6.2 Complaints procedures (See also above, section 2.2, “Legal responsibilities of States”)

In General Comment No. 20, the Human Rights Committee emphasized that “the right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law”, and that “complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective”.¹⁶⁹ This is simply a logical consequence of the twin duties the States parties have undertaken under article 2(1) and (3) of the Covenant, “to respect and to ensure” the rights recognized therein and to provide alleged victims of violations with an “effective remedy”. The Human Rights Committee has emphasized that “the need to make effective remedies available to any person whose rights are violated is particularly urgent in respect of the obligations embodied in articles 7, 9 and 10 of the Covenant.”¹⁷⁰ On another occasion, it recommended that the State party “establish an independent body with authority to receive and investigate all complaints of excessive use of force and other abuses of power by the police and other security forces”.¹⁷¹

¹⁶⁶See as to Japan, UN doc. GAOR, A/54/40 (vol. I), p. 67, para. 350. See also as to Mexico, insofar as there was no independent body to investigate the substantial number of complaints regarding acts of torture and other forms of ill-treatment, *ibid.*, p. 62, para. 318.

¹⁶⁷See with regard to Namibia, UN doc. GAOR, A/52/44, p. 37, para. 244.

¹⁶⁸Council of Europe doc. CPT/Inf (92) 4, *Report to the Swedish Government on the Visit to Sweden Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 5 to 14 May 1991*, p. 57, para. 5(a).

¹⁶⁹*United Nations Compilation of General Comments*, p. 141, para. 14.

¹⁷⁰As to Latvia, see UN doc. GAOR, A/50/40, p. 63, para. 344.

¹⁷¹As to Chile, see UN doc. GAOR, A/54/40 (vol. I), p. 45, para. 206.

The Committee against Torture has also recommended that the States parties to the Convention against Torture “introduce an effective and reliable complaint system that will allow the victims of torture and other forms of cruel, inhuman or degrading treatment or punishment to file complaints”,¹⁷² such as against members of the police department.¹⁷³ The Committee has further suggested “the establishment of a central register containing adequate statistical data about complaints of torture and other inhuman or degrading treatment or punishment, investigation of such complaints, the time within which the investigation is conducted and any prosecution mounted thereafter and its outcome.”¹⁷⁴

Article 25(1) of the American Convention on Human Rights guarantees the right to judicial protection in that “everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention.”

Inherently linked to this right to an effective recourse for alleged human rights violations is, of course, the duty of the States parties to investigate and punish the allegations concerned, a duty that is based on article 1(1) of the American Convention.¹⁷⁵ The obligation to investigate “must be undertaken in a serious manner and not as a mere formality preordained to be ineffective”, and it “must have an objective and be assumed by the State as its own legal duty”.¹⁷⁶

It follows that all complaints as to torture and other forms of ill-treatment of persons deprived of their liberty or complaints regarding any other aspect of detention and imprisonment that might violate human rights standards must be investigated in such manner, that “appropriate punishment” must be imposed on those responsible for the human rights violations concerned, and that the victims must in turn be ensured “adequate compensation”.¹⁷⁷ It is recalled that the duty to investigate is an essential element in the obligation of the States parties to “take reasonable steps to *prevent* human rights violations”;¹⁷⁸ if the perpetrators of such violations know there will be no serious investigations of their acts, they will have no motivation to stop committing them, with the likely result that a climate of *impunity* will take hold in the society in question.

¹⁷²See with regard to Poland, UN doc. GAOR, A/55/44, p. 22, para. 94.

¹⁷³See with regard to Namibia, UN doc. GAOR, A/52/44, p. 37, para. 244.

¹⁷⁴See with regard to Cuba, UN doc. GAOR, A/53/44, p. 14, para. 118(g).

¹⁷⁵I-A Court HR, *Villagrán Morales et al. Case (The “Street Children” Case)*, judgment of November 19, 1999, Series C, No. 63, pp. 194-195, para. 225.

¹⁷⁶I-A Court HR, *Velásquez Rodríguez Case*, judgment of July 29, 1988, Series C, No. 4, p. 156, para. 177.

¹⁷⁷Ibid., p. 155, para. 174.

¹⁷⁸Ibid., loc. cit.; emphasis added.

The Inter-American Court has thus found violations of the States parties' legal duties to investigate and punish in several cases where people have disappeared or been found dead after having been abducted, held illegally and tortured.¹⁷⁹

Article 13 of the European Convention on Human Rights also provides the right to “an effective remedy” and, in the words of the European Court of Human Rights, this means that there must be available at the national level “a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order”. Although “the Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision”, the remedy required thereby “must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State”.¹⁸⁰ In the case of *Çakici*, which concerned the disappearance of the applicant's brother, the Court held furthermore that:

“Given the fundamental importance of the rights in issue, the right to protection of life and freedom from torture and ill-treatment, Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation apt to lead to those responsible being identified and punished and in which the complainant has effective access to the investigative proceedings.”¹⁸¹

Article 13 was thus violated in the case of *Çakici* because the Turkish Government had failed to comply with its obligation “to carry out an effective investigation into the disappearance of the applicant's brother”, a failure that also “undermined the effectiveness of any other remedies which might have existed”.¹⁸²

In this respect, the legal obligations of the Contracting States are thus twofold, in that they have an obligation both effectively to investigate alleged human rights abuses and to provide effective remedies to the actual victims.

The regular inspection of all places of detention by independent teams is an effective measure to prevent the occurrence of torture and other forms of ill-treatment and should be organized systematically in all countries. To maximize the effect of such visits, the team members must have uninhibited and confidential access to all detainees and prisoners and make a public report on their findings.

¹⁷⁹See e.g. I-A Court HR, *Velásquez Rodríguez Case*, judgment of July 29, 1988, Series C, No. 4 and I-A Court HR, *Villagrán Morales et al. Case (The “Street Children” Case)*, judgment of November 19, 1999, Series C, No. 63.

¹⁸⁰*Eur. Court HR, Case of Çakici*, judgment of 8 July 1999, Reports 1999-IV, p. 617, para. 112.

¹⁸¹*Ibid.*, p. 618, para. 113.

¹⁸²*Ibid.*, para. 114.

Persons deprived of their liberty have a right to an effective remedy for alleged violations of their human rights, including, in particular, the right to freedom from torture and other forms of ill-treatment, and must to this effect have unbindered access to effective complaints procedures which should result in prompt, serious and objective investigations of the complaints by the authorities.

Proven torture or other forms of ill-treatment must be adequately punished and appropriate compensation granted to the victim.

The existence of efficient complaints procedures and the consistent and vigorous investigation and prosecution of grievances of persons deprived of their liberty have a strong dissuasive effect on the incidence of all forms of torture and cruel, inhuman or degrading treatment and punishment.

7. The Role of Judges, Prosecutors and Lawyers in Preventing and Remediating Unlawful Treatment of Persons Deprived of their Liberty

As shown in this chapter, States also have a legal duty to guarantee human rights to persons deprived of their liberty, and to provide independent, impartial and effective complaints procedures which can process alleged violations of their rights and provide adequate remedies whenever a person's rights are found to have been violated. Much remains to be done in this field, given that torture and other forms of ill-treatment of detainees and prisoners, including the unlawful admission of confessions given under duress, continue to be commonplace in many countries. The role of judges, prosecutors and lawyers in ensuring *both* the true enjoyment of these rights *and* the effective functioning of the complaints system is therefore indispensable and multifaceted.

Lawyers will at all times have to protect and defend their clients' interests, and must remain vigilant to any signs of torture or other forms of ill-treatment and vigorously pursue any avenues open to them to complain against such treatment. If the domestic avenues of appeal are not functioning, a remedy of last resort may be to pursue the complaints before a competent body at the international level.

As shown throughout this Manual, *prosecutors* have a special obligation to take all necessary steps to bring to justice those who are suspected of having committed human rights violations such as torture or cruel, inhuman or degrading treatment. Their work is a key both to the remedying of past human rights violations and to the prevention of future violations. The effective work of prosecutors does of course

presuppose that they are able to work in an independent and impartial manner, without interference by the Executive (cf. Chapter 4). Prosecutors are not allowed to rely on evidence obtained by unlawful means involving human rights violations.

Lastly, *judges* too must be able to decide independently and impartially all cases of alleged human rights violations. They must at all times refuse to accept confessions that have been obtained from suspects by means of torture or any form of duress. Further, as lawyers and prosecutors, in particular in countries where torture and other forms of ill-treatment are known to exist, they must constantly be on the watch for any signs of such treatment being administered, and take the necessary legal steps to remedy and put an end to such situations.

Where the Government is unwilling or unable to act forcefully to eradicate torture, judges, prosecutors and lawyers have a professional responsibility to do their utmost to provide help to the victims and to prevent future occurrences of such treatment, as explained in this chapter. To this end, they will also have to keep themselves continuously informed about the meaning of the international human rights standards applied by the international monitoring organs.

Judges, prosecutors and lawyers have a key role to play in the protection of the human rights of persons deprived of their liberty and must be allowed to carry out their respective legal duties in true independence and impartiality.

8. Concluding Remarks

This chapter has provided an overview of some fundamental human rights which persons deprived of their liberty continue to enjoy throughout their confinement, including, in particular, their right to personal integrity and security and the consequential right to freedom from torture and other forms of ill-treatment. While States have a legal duty under international human rights law to guarantee these rights and to provide complaints procedures including effective remedies, such procedures and remedies require the full participation of the legal professions in order to become a true reality. Where the legal professions are unwilling to assume this role, individuals will live in a legal vacuum and be an easy prey to injustice. It is the legal duty of States under international human rights law to ensure that judges, prosecutors and lawyers are able to carry out these duties in a spirit of true independence and impartiality.

.....Chapter 9
**THE USE OF
NON-CUSTODIAL
MEASURES IN THE
ADMINISTRATION
OF JUSTICE**

Learning Objectives

- *To familiarize participants with the existing international standards that promote the use of non-custodial measures;*
- *To explain the aim of non-custodial measures and their use at the various stages of the administration of justice;*
- *To help participants identify what kinds of non-custodial measures may be useful within the context of their professional responsibilities;*
- *To acquaint participants with the legal protection linked to the use of non-custodial measures;*
- *To familiarize participants with the consequences of non-compliance with the dispositions of non-custodial measures.*

Questions

- *What alternatives to imprisonment exist in the country where you work, and in regard to what kinds of criminal offences?*
- *Have you, in your role as a judge, prosecutor or lawyer, advised or resorted to the use of non-custodial measures?*
- *In what situations do you think that it would be particularly useful to do so?*
- *Are there special groups of people that are more likely to benefit from the use of non-custodial measures than others?*

Questions (cont.d)

- *If so, identify these groups and explain why they are more likely to benefit from alternatives to imprisonment.*
- *What legal safeguards exist in the country where you work with regard to the use of non-custodial measures?*
- *What are the sanctions for violations of the conditions attached to non-custodial measures in the country where you work?*

Relevant Legal Instruments

- United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), 1990
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985

1. Introduction

The question of punishment for overstepping legal boundaries is a subject of continuing interest. Although not the most frequently used penal sanction, imprisonment of offenders remains a common punishment for crime, which is authorized by international human rights law to the extent that it is imposed following a trial respecting due process of law and does not amount to treatment prohibited by human rights standards as being, in particular, clearly disproportionate to the criminal offence committed.

While imprisonment is necessary in many cases involving violent offenders, it does not constitute a panacea with regard either to crime prevention or to the social reintegration of offenders. Moreover, in many countries the prison system faces major challenges because of overcrowded and outdated facilities, with the result that prisoners often find themselves in deplorable conditions of detention that can have adverse effects on their physical and mental health and impede their educational and vocational training, thereby also affecting their chances of future adjustment to an ordinary life in the community. The impact of long-term imprisonment on a person's family and work life is also considerable.

The most commonly applied penal sanctions are of *a non-custodial nature*, and it is the use of these sanctions that will be dealt with in this chapter. As scepticism has grown with regard to the effectiveness of imprisonment, experts have tried to develop other useful measures to help offenders while keeping them in the community, and one goal of the United Nations Standard Minimum Rules for Non-custodial Measures (hereinafter referred to as the Tokyo Rules) is to emphasize the importance of such measures.¹ The present chapter will primarily be based on the Tokyo Rules and the *Commentary* thereto, although reference will also occasionally be made to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Beijing Rules will however be considered in greater depth in Chapter 10, on “The Rights of the Child in the Administration of Justice”.

1.1 The purpose of non-custodial measures and the Tokyo Rules

As intimated above, *the purpose of non-custodial measures in general, and the Tokyo Rules in particular, is to find effective alternatives to imprisonment for offenders and to enable the authorities to adjust penal sanctions to the needs of the individual offender in a manner proportionate to the offence committed.* The advantages of individualizing sentencing in this way are evident, given that it permits the offender to remain at liberty, thereby also enabling him or her to continue work, studies and family life.²

¹See UN doc. ST/CSDHA/22, *Commentary on the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)* (hereinafter referred to as *Commentary*), p. 2.

²*Ibid.*, loc. cit.

As will be seen below, non-custodial measures can, however, be subjected to conditions and restrictions, the violation of which may in serious cases lead to imprisonment. Yet in order to safeguard human rights and human dignity, standards must be set for the imposition and implementation of any restrictions and conditions, and one of the major purposes of the Tokyo Rules is precisely to try to define these standards, which must be considered to be the *minimum standards* aimed at promoting “efforts to overcome practical difficulties in the application of such measures”. Consequently, the Rules are not intended to be read as a detailed model for a system of non-custodial measures, but simply as setting out “what are generally accepted as good principles and current good practice” in this area.³

Following an explanation of some of the basic terms used, this chapter will consider the general principles of the Tokyo Rules, the legal safeguards, the options for non-custodial measures at the various stages of the administration of justice, and the implementation of these measures. Lastly, brief reference will be made to the role of the legal professions in choosing alternatives to imprisonment.

2. Terminology

2.1 The term “non-custodial measures”

For the purposes of this chapter, the concept of “non-custodial measures” means any decision made by a competent authority to submit a person suspected of, accused of or sentenced for an offence to certain conditions and obligations that do not include imprisonment; such decision can be made at any stage of the administration of criminal justice (Rule 2.1).⁴

2.2 The term “offender”

According to Rule 2.1, the Tokyo Rules “shall be applied to all persons subject to prosecution, trial or the execution of a sentence, at all stages of the administration of criminal justice”, and “these persons are referred to as ‘offenders’, irrespective of whether they are suspected, accused or sentenced”. Consequently, the term “offender” is used in a generic sense, without detracting from the presumption of innocence.

³Ibid., p. 3.

⁴Ibid., loc. cit.

2.3 The term “competent authority”

The term “competent authority” means a member of the judiciary, a prosecutor or a body that is empowered by law to make decisions about the imposition or implementation of a non-custodial measure.⁵

3. General Principles Relating to Non-custodial Measures

Rules 1 to 4 of the Tokyo Rules lay down in some detail the general principles guiding recourse to non-custodial measures as alternatives to imprisonment, and, apart from the saving clause in Rule 4, these principles describe the fundamental aims, the scope, and the legal safeguards of non-custodial measures. This section will highlight the most salient aspects of these general principles.

3.1 The fundamental aims of non-custodial measures

According to Rule 1.1, the two fundamental purposes of the Tokyo Rules are to provide:

- ❖ “a set of basic principles to promote the use of non-custodial measures”; and
- ❖ “minimum safeguards for persons subject to alternatives to imprisonment”.

The Tokyo Rules thus begin by establishing an important balance between their two fundamental purposes in that they simultaneously encourage recourse to non-custodial measures and aim at guaranteeing a just application thereof based on respect for the human rights of the offenders; such guarantees are required in order to prevent disproportionate recourse to control measures.⁶

According to the *Commentary* to the Tokyo Rules, non-custodial measures are of “considerable potential value for offenders, as well as for the community”, and can be an appropriate sanction for a whole range of offences and many types of offenders, and in particular for those who are not likely to repeat offences, those convicted of minor crimes and those needing medical, psychiatric or social help.⁷ In these cases, imprisonment cannot be considered an appropriate sanction, since it severs community ties and hinders reintegration into society and thereby also reduces offenders’ sense of responsibility and their ability to make their own decisions.⁸ On the other hand, non-custodial measures have the unique characteristic of making it possible to exercise control over an offender’s behaviour while allowing it to evolve under natural circumstances.⁹

⁵Ibid.

⁶Ibid., p. 5.

⁷Ibid., loc. cit.

⁸Ibid., p. 6.

⁹Ibid., loc. cit.

Consequently, the use of non-custodial measures also diminishes social costs, given that the administration of criminal justice imposes a very heavy financial burden on States. Since not only the individual offender, but also society as a whole, benefit from the use of non-custodial measures, this positive potential should encourage community involvement in their implementation.¹⁰

Next, Rule 1.2 describes the further aim of promoting both “greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as ... a sense of responsibility towards society” among offenders. Involvement of the community is essential in reintegrating the offender into society and may reduce the risk of stigmatization.¹¹

According to Rule 1.3, the Tokyo Rules “shall be implemented taking into account the political, economic, social and cultural conditions of each country and the aims and objectives of its criminal justice system”. Consequently, the Rules are not intended to describe a model system of non-custodial measures, and such a task would in any event be precluded by the variety of criminal justice systems throughout the world; the intention is rather that this diversity should allow for a fruitful exchange of ideas about methods and developments.¹²

Mindful of the objectives of a criminal justice system and the balance that has to be struck between the different individual interests, Rule 1.4 provides that “when implementing the Rules, Member States shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention”. *While emphasizing the promotion of non-custodial measures and the application of individualized penal sanctions, the Tokyo Rules consequently also fully support the general aim of the criminal justice system, which is to reduce crime and the need to recognize the important role of the victims of crime.*¹³

Lastly, according to Rule 1.5,

“Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.”

According to the *Commentary*, the reference to “the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender” means, inter alia, that, while the Tokyo Rules aim at guaranteeing more frequent use of non-custodial measures, such use should not lead to an increase in the number of people subject to penal measures or to an increase in the intensity of such measures; by emphasizing the observance of human rights, the Tokyo Rules seek to avoid the abuse of discretion in the implementation of non-custodial measures.¹⁴

¹⁰Ibid.

¹¹Ibid.

¹²Ibid.

¹³Ibid.

¹⁴Ibid., p. 7.

The primary purpose of non-custodial alternatives to imprisonment is to enable penal sanctions to be individualized to the needs of the offender, thereby making the sanctions more effective. Non-custodial measures are also less expensive for society in general than deprivation of liberty.

Individualized penal sanctions involving non-custodial measures must be considered in the light of the general aim of the criminal justice system, which is to reduce crime, and the need to recognize the needs and interests of the victims of crime.

The use of non-custodial measures must respect internationally recognized human rights.

3.2 The scope of non-custodial measures

3.2.1 The general scope of non-custodial measures

As noted in subsection 2.2 above, the Tokyo Rules are applicable to “all persons subject to prosecution, trial or the execution of a sentence” (Rule 2.1). They can thus apply either to measures imposed on a convicted person as a penalty for an offence, or to suspects and defendants before their trial. Lastly, they cover measures which allow some part of a prison sentence to be served in the community and measures that reduce the length of imprisonment and substitute for it some form of supervision.¹⁵ The use of non-custodial measures instead of pre-trial detention is particularly to be encouraged, since pre-trial custody should be an exceptional measure in view of the suspect’s right to be presumed innocent.¹⁶

3.2.2 The prohibition of discrimination

According to Rule 2.2, the Tokyo Rules “shall be applied without any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status”. As shown in this Manual, the prohibition on discrimination conditions the application of all aspects of international human rights law. It is therefore fully logical that non-custodial measures too must be resorted to in a non-discriminatory manner.

However, not all differences in treatment can be considered to be discriminatory, and, as held by the Human Rights Committee under article 26 of the International Covenant on Civil and Political Rights, “differentiation based on reasonable and objective criteria does not amount to prohibited discrimination” within the meaning of that article.¹⁷

¹⁵Ibid., p. 8.

¹⁶Ibid., loc. cit. and cf. Chapter 5 on “Human Rights and Arrest, Pre-trial and Administrative Detention”.

¹⁷See e.g. Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands* (Views adopted on 9 April 1987), GAOR, A/42/40, p. 150, para. 13.

Having regard to the fact that one of the great advantages of non-custodial measures is the possibility to adjust them to the needs of the individual offender, the element of discretion involved in the decision-making may increase the risk of discrimination against a person or group. Implementation of the measures may of course also reflect any discrimination currently being practised in that community.¹⁸ For example, it could prove more difficult to find training opportunities or work placements for members of ethnic minorities or even for women undergoing non-custodial measures.¹⁹ In spite of these problems, equality of treatment in the application of non-custodial measures *must* be ensured.

On the other hand, and as pointed out above, the prohibition on discrimination does not mean that all differences in treatment are prohibited, *but only those that have no reasonable and objective justification*. It may in fact be quite reasonable and justified objectively to treat persons differently in view of their particular background and personal needs and problems.²⁰

It may also be necessary to consider the religious beliefs and moral precepts of the groups to which the offender belongs.²¹ Furthermore, there are certain groups of people, such as children, women, elderly people and people with mental health problems, on whom imprisonment may have a particularly damaging effect, and it may therefore be not only desirable but even necessary to make certain distinctions between offenders in order to meet their special needs.²²

3.2.3 Flexibility in application

While emphasizing the importance of “consistent sentencing”, Rule 2.3 promotes considerable flexibility in the development and use of non-custodial measures based on the following four criteria:

- ❖ “the nature and gravity of the offence”;
- ❖ “the personality and background of the offender”;
- ❖ “the protection of society”; and
- ❖ the avoidance of “unnecessary use of imprisonment”.

The non-custodial measures can be much more flexible than pre-trial detention, for instance, and this is the potential recognized by Rule 2.3.²³ However, consistency is clearly in the interests of fairness and justice and sentencing guidelines that establish the equivalencies among the various types of non-custodial measures would assist those imposing such measures.²⁴

¹⁸ *Commentary*, pp. 8-9.

¹⁹ *Ibid.*, p. 9.

²⁰ *Ibid.*, loc. cit.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

In line with this flexible approach, Rule 2.4 provides that “the development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated”. The need for regular monitoring and systematic evaluation is particularly important given the flexibility inherent in non-custodial measures and in order to ascertain whether the objectives laid down in Rule 2.3 are met.²⁵ From the viewpoint of a rational criminal justice policy, new non-custodial measures should be added only if accompanied by systematic evaluation enabling the authorities to measure their operational effectiveness.²⁶

According to Rule 2.5, furthermore, “consideration shall be given to dealing with offenders in the community avoiding as far as possible resort to formal proceedings or trial by a court, in accordance with legal safeguards and the rule of law.” This rule is consistent with Rule 2.6 of the Tokyo Rules which provides that “non-custodial measures should be used in accordance with the principle of minimum intervention”.²⁷ Whenever feasible, a trial should be avoided, both because it spares the suspect and his or her family from the negative consequences of formal sanctioning and because it eases the economic burden on society.²⁸

The flexibility inherent in non-custodial measures implies that they can be used at any stage of the proceedings.

Non-custodial measures must be applied fairly and objectively; they must not involve discrimination. Differences in treatment are lawful only if they have a reasonable and objective justification.

Authorities must ensure consistent sentencing when resorting to non-custodial measures.

Non-custodial measures should be used in accordance with the principle of minimum intervention; all excessive measures must be avoided.

When resorting to non-custodial measures, the competent authorities must consider:

- *the nature and gravity of the offence;*
- *the personality and background of the offender;*
- *the protection of society (the prevention of crime); and*
- *the avoidance of unnecessary use of imprisonment.*

²⁵Ibid.

²⁶Ibid., pp. 9-10.

²⁷Ibid., p. 10.

²⁸Ibid., loc. cit.

3.3 Legal safeguards

3.3.1 The principle of legality

The importance of respecting the human rights of persons to whom non-custodial measures may be applied is a recurring theme in the Tokyo Rules, and the reason why legal safeguards are considered to be essential. Rule 3.1 thus provides that “the introduction, definition and application of non-custodial measures shall be prescribed by law”. The requirement that non-custodial measures must be defined and applied only as “prescribed by law” is consistent with the requirement in international human rights law that “restrictions on the exercise of human rights must be laid down in pre-established legal standards of general application”;²⁹ in other words, the principle of legality must be respected whenever the State authorities take measures interfering with the enjoyment of the rights and freedoms of an individual, whether within or outside the framework of criminal proceedings.

However, with regard to the application of non-custodial measures, it is not sufficient that the law defines the measures to be applied and the conditions for their application; it must also specify which authorities are responsible for their implementation and, where authority has been delegated to third parties, such delegation should be founded in law.³⁰

3.3.2 The criteria for resorting to non-custodial measures and the need for discretion

A second important legal safeguard in the application of non-custodial measures is that, as stipulated in Rule 3.2, the selection of a non-custodial measure shall be based on an assessment of established criteria in respect of:

- ❖ the nature and gravity of the offence;
- ❖ the personality and background of the offender;
- ❖ the purposes of sentencing; and
- ❖ the rights of victims.

The Tokyo Rules thus provide a clear framework for the selection of non-custodial measures, which considers the interests of the offender, as well as those both of society in general and of the victim or victims. These criteria constitute another recurring theme in the Tokyo Rules and are also reflected in Rules 1.4 and 2.3.

In spite of these basic criteria, the nature of the imposition of non-custodial measures requires that the competent judicial or other independent authorities enjoy a considerable degree of discretion, which, however, according to Rule 3.3, “shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law”.

²⁹ Anna-Lena Svensson-McCarthy, *The International Law of Human Rights and States of Exception - With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs* (The Hague/Boston/London, Martinus Nijhoff Publishers), 1998, p. 721.

³⁰ *Commentary*, p. 11.

This rule applies to all decisions relating to non-custodial measures, from the original decision imposing the measure to any subsequent decision about implementation.³¹ *The principle of legality is to be respected throughout the proceedings relating to the non-custodial measures.*

3.3.3 The requirement of consent

The requirement of consent of the offender to the imposition of non-custodial measures is an important precondition for its success, and, according to Rule 3.4, such consent is obligatory with regard to non-custodial measures “applied before or instead of formal proceedings or trial”. Consequently, the requirement of consent is a particular safeguard relating to persons accused but not yet tried or convicted.³² The *Commentary* explains that it is essential that the suspect or accused person consents to the non-custodial measure because, where it is imposed instead of formal proceedings, consent to it can lead to the renunciation of the legal safeguards that would exist if the case were proceeded with.³³

Furthermore, the accused should be informed about the potential consequences of refusing to consent to non-custodial measures, and any indirect pressure on the accused to consent to the measures should be avoided.³⁴ Lastly, a refusal to consent to the imposition of a non-custodial measure should not adversely affect the accused’s position in any way.³⁵

The requirement of consent to diversionary measures is also contained in Rule 11.3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules). In that context, it is either “the juvenile, or her or his parents or guardian” who must give consent to the recommended diversionary measure (see further Chapter 10, subsection 10.3).

3.3.4 The right to review

Rule 3.5 stipulates that “decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority, upon application by the offender”. This right of appeal is an additional safeguard against arbitrary decisions. In order for this safeguard to be truly effective, the offender must be informed of this right. In this respect, the *Commentary* advises that, at the time of the imposition of the measure, the offender and, where appropriate, his or her legal representative be given a document explaining the details of the review procedure, including information on the competent body and how to contact it.³⁶ The offender should have the right to appear in person or to have access to some other way of being heard by the review body. The review itself should be speedy.³⁷

³¹Ibid., p. 12.

³²Ibid., loc. cit.

³³Ibid.

³⁴Ibid.

³⁵Ibid.

³⁶Ibid.

³⁷Ibid.

The right to appeal does not only concern the initial non-custodial measure: Rule 3.6 also guarantees the offender the right “to make a request or complaint to a judicial or other competent independent authority on matters affecting his or her individual rights *in the implementation of non-custodial measures*” (emphasis added). Even after the offender has accepted the imposition of a non-custodial measure, he or she may need to seek recourse to complain about unfair or arbitrary implementation that violates his or her human rights and fundamental freedoms.³⁸

The body hearing the complaints should be *independent* of the authority implementing the measure, and should be a court, a review board or an ombudsman empowered to investigate. Here too, it is essential that the offender and his or her legal representative be informed in clear and simple terms of the existence of this entitlement and how it can be exercised.³⁹ Investigation should be speedy and the results communicated to the offender in terms that he or she can understand.⁴⁰

Lastly, Rule 3.7 provides that

“Appropriate machinery shall be provided for the recourse and, if possible, redress of any grievance related to non-compliance with internationally recognized human rights.”

This rule obliges States to set up an adequate complaints procedure to ensure that Rules 3.5 and 3.6 are duly implemented and that the legal machinery provides for the possibility of redress for any violation of international human rights obligations that may have been caused by the imposition and/or implementation of non-custodial measures. This provision is simply an expression of States’ duty under general international human rights law to remedy any violation of individual rights and freedoms for which they have been found responsible.

The right of appeal against diversionary measures is also guaranteed by Rule 11.3 of the Beijing Rules with regard to juvenile offenders (see Chapter 10, subsection 10.3).

3.3.5 Restrictions on the imposition of non-custodial measures

First, Rule 3.8 prohibits non-custodial measures involving “medical or psychological experimentation on, or undue risk of physical or mental injury to, the offender”. In any event, non-custodial measures may not, of course, violate the legally binding rules existing in international human rights law, such as the right to freedom from inhuman or degrading treatment or punishment (cf. *inter alia* art. 7 of the International Covenant on Civil and Political Rights and the saving clause contained in Rule 4.1 of the Tokyo Rules).

It is important to stress that the search for new non-custodial measures, which is encouraged in Rule 2.4 of the Tokyo Rules, must be seen in the light of Rule 3.8, since it is essential that offenders not be used as guinea-pigs.⁴¹ The implementation and

³⁸Ibid.

³⁹Ibid.

⁴⁰Ibid., pp. 12-13.

⁴¹Ibid., p. 13.

development of non-custodial measures must, in other words, always respect the rights and freedoms of the offenders, a requirement underlined by Rule 3.9, according to which “the dignity of the offender subject to non-custodial measures shall be protected at all times.”

Second, “in the implementation of non-custodial measures, the offender’s rights shall not be restricted further than was authorized by the competent authority that rendered the original decision” (Rule 3.10). This is a rule based on the principle of legality: any interference with a person’s rights must be based on law, and no further restrictions can be imposed without a decision taken by a duly authorized authority acting in accordance with the law.

Third, “in the application of non-custodial measures, the offender’s right to privacy shall be respected, as shall be the right to privacy of the offender’s family” (Rule 3.11). In this respect the *Commentary* advises against the use of methods of surveillance that treat offenders solely as objects of control; further, surveillance techniques should not be used without the offenders’ knowledge, and persons other than properly accredited volunteers should not be employed for the surveillance of offenders.⁴² Such measures could of course jeopardize the dignity of the offender, which must be guaranteed at all times.

Lastly, the right to dignity and the right to respect for the offender’s privacy are also protected by Rule 3.12, according to which “the offender’s personal records shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the offender’s case or to other duly authorized persons.” Offenders and their families are entitled to know that personal information about them will not be made public and will not be used to hinder their chances of social reintegration. It is therefore also important to keep the records in a safe place, and consideration should be given to the desirability of destroying them after a reasonable period.⁴³

*The **principle of legality** must be fully respected in employing non-custodial measures, i.e., recourse to and implementation of such measures must be in accordance with the law.*

Non-custodial measures must be based on the following criteria:

- *the nature and gravity of the offence;*
- *the personality and background of the offender;*
- *the purposes of sentencing; and*
- *the right of victims.*

The use of non-custodial measures requires the consent of the offender when applied before or instead of formal proceedings or trial.

The offender has a right to request a review by a judicial or other competent and independent authority of the non-custodial measures imposed.

⁴²Ibid., loc. cit.

⁴³Ibid., p. 14.

The dignity of an offender subjected to non-custodial measures must be respected at all times, as must his or her other rights and freedoms.

The non-custodial measure must not restrict the offender's rights further than was authorized by the original decision.

The right to privacy of the offender and his or her family must be guaranteed throughout the implementation of the non-custodial measures.

4. Non-custodial Options at the Different Stages of the Judicial Process

As explained above, non-custodial measures can be resorted to at any stage of the judicial proceedings, whether at the pre-trial, trial and sentencing or post-sentencing stages. They therefore constitute important and flexible tools in choosing the sanctions most likely to have a beneficial impact on the offender in the form of his or her reintegration into the community as a law-abiding citizen.

4.1 Non-custodial measures at the pre-trial stage

The possibility of resorting to non-custodial measures at the pre-trial stage is regulated in the following terms by Rule 5.1 of the Tokyo Rules:

“Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.”

Discharging the offender even before formal action has been taken is the earliest possible non-custodial measure in the pre-trial stage, but, as is seen in Rule 5.1, it is conditioned by

- ❖ the protection of society;
- ❖ crime prevention;
- ❖ the promotion of respect for the law; and
- ❖ the rights of victims.

Consequently, the individual interest the offender may have in agreeing to the conditions to be imposed must in all cases be weighed against these four other interests which are of a general nature, going to the heart of society's values as reflected in the criminal law of the State concerned. Whenever the four general interests outweigh the offender's personal interest in having the proceedings dismissed, he or she will have to face the relevant proceedings.

Whether or not formally recognized, discharge is frequently used in many legal systems as an effective means of dealing with certain categories of offence and types of offender in accordance with the *principle of minimum intervention* (cf. Rule 2.6).⁴⁴ It is considered a particularly appropriate method of dealing with juveniles, since keeping them out of the formal criminal justice process is believed to reduce the chances of them becoming more deeply involved in crime.⁴⁵

However, the discretionary power of the authorities to dismiss proceedings should be restricted by the aforementioned specific criteria. Such criteria are necessary in order to guide the authorities in their decision-making and enable them to take consistent decisions according to Rule 2.3, thereby also promoting legal security in the State concerned.

The use of non-custodial measures at the pre-trial stage should also be seen in the light of the basic rule reflected in Rule 6.1, according to which “pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim”. Rule 6.2 promotes the earliest possible use of alternatives to pre-trial detention.

As far as the various safeguards relating to pre-trial detention are concerned, general international human rights law provides a more detailed regulation than Rules 6.2 and 6.3 of the Tokyo Rules, and it is therefore sufficient in this respect to refer to Chapter 5 of this Manual, which deals in some depth with “Human Rights and Arrest, Pre-trial and Administrative Detention”.

4.2 Non-custodial measures at the trial and sentencing stage

As to the sentencing stage, the Tokyo Rules provide for a range of non-custodial measures which the judicial authorities “may” use, although in doing so, they “should take into consideration ... the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate” (Rules 8.1 and 8.2). According to Rule 8.2 (a) to (m), the sentencing authorities may dispose of cases in the following ways:

- ❖ verbal sanctions, such as admonition, reprimand and warning;
- ❖ conditional discharge;
- ❖ status penalties;
- ❖ economic sanctions and monetary penalties, such as fines and day-fines;

⁴⁴Ibid., p. 15.

⁴⁵Ibid., loc. cit.

- ❖ confiscation or an expropriation order;
- ❖ restitution to the victim or a compensation order;
- ❖ suspended or deferred sentence;
- ❖ probation and judicial supervision;
- ❖ a community service order;
- ❖ referral to an attendance centre;
- ❖ house arrest;
- ❖ any other mode of non-institutional treatment; or,
- ❖ some combination of these measures.

Just as the offender's personal needs and interests have to be weighed against society's interests at the pre-trial stage, so the offender's "rehabilitative needs" at the sentencing stage must be balanced against the need to protect society and "the interests of the victim". The participation of the *victim* in the proceedings is also encouraged by Principle 6(b) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which was adopted by the United Nations General Assembly in 1985. According to this principle, "the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by ... allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system." Indeed, the participation of the victim may raise the possibility of his or her obtaining restitution or compensation, a measure that may constitute a penalty in its own right and could make the imposition of further sanctions unnecessary.⁴⁶

As indicated above, the list of non-custodial measures in Rule 8.2, while not exhaustive, contains a wide range of non-custodial measures to suit different circumstances and achieve different objectives.⁴⁷ For example, verbal sanctions such as admonition or reprimand may be appropriate for young offenders, enabling them to realize that they have done wrong without being stigmatized as criminals.⁴⁸

Economic penalties such as fines and day-fines are widely used, but offenders with little money may have difficulty in paying them. Day-fines can solve this problem by linking the amount to be paid to the offender's level of disposable income.⁴⁹

Community service is a form of restitution that benefits the community rather than the individual victim, and has the advantage of making demands on the offender and, at the same time, producing a useful outcome in the form of the work done for the community.⁵⁰

⁴⁶Ibid., p. 18.

⁴⁷Ibid., loc. cit.

⁴⁸Ibid.

⁴⁹Ibid.

⁵⁰Ibid.

Various supervision measures can also be imposed on the offender, and can of course be adapted to the needs of individual offenders, helping them to reintegrate into society.⁵¹

An example of other non-custodial measures that might be of interest is the requirement for offenders sentenced for drunken driving to undergo traffic education. Other possibilities may involve upgrading sanctions that were originally ancillary to a principal sentence, such as revocation of a driving licence, or confiscation of unlawful gains. Lastly, combinations of custodial and non-custodial measures may also be considered.⁵²

4.3 Non-custodial measures at the post-sentencing stage

The use of non-custodial measures is also encouraged at the post-sentencing stage, and in this respect Rule 9.1 of the Tokyo Rules provides that “the competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society.” This rule is based on the principle that reducing the length of imprisonment can reduce the risk of offenders becoming institutionalized and thus unable to cope with society once they have been released. Consequently, it can be of advantage to grant offenders early release, while subjecting them, if necessary, to supervision.⁵³ Rule 9.4 also promotes the idea of releasing offenders from an institution to a non-custodial programme at the earliest possible stage.

Rule 9.2 enumerates the following post-sentencing dispositions:

- ❖ furlough and half-way houses;
- ❖ work or education release;
- ❖ various forms of parole;
- ❖ remission;
- ❖ pardon.

Some of these measures are substitutes for imprisonment. The offender is still under the authority of the prison administration but spends his or her days outside the prison working or undergoing training. The advantage of such an arrangement is that he or she can earn money that can be used to help meet family commitments, or saved to assist with reintegration upon release.⁵⁴ In a half-way house, the offender is still technically under the supervision of the prison authorities but lives in “semi-freedom”, readjusting to life in the community.⁵⁵

⁵¹Ibid., p. 19.

⁵²Ibid., loc. cit.

⁵³Ibid., p. 20.

⁵⁴Ibid., loc. cit.

⁵⁵Ibid.

The right to request review of decisions on post-sentencing disposition is guaranteed by Rule 9.3 of the Tokyo Rules except in the case of pardon; decisions on other non-custodial measures shall however “be subject to review by a judicial or other competent independent authority, upon application of the offender”. This rule is in full harmony with the general principles on judicial review both of decisions concerning non-custodial measures and of their implementation as laid down in Rules 3.5 and 3.6, which were dealt with above in subsection 3.3.4. It is recalled in this respect that in order to enable the offender to exercise the right to review effectively, he or she must be given clear information on the possibilities for review and on how to apply for it.⁵⁶

The *Commentary* stresses that, as a decision on early release or the granting of parole requires an implicit review of the previous sentencing decision, a formal decision-making procedure to be followed by the competent body should be developed. Well-defined criteria for the granting of early release or parole should be drawn up, and clearly explained to the prisoners. Such criteria also reduce abuses of the discretionary power of the competent authorities to a minimum, as well as enabling prisoners to work towards release knowing what criteria they will need to satisfy.⁵⁷

Non-custodial measures are flexible tools that can be used at the pre-trial stage, at the trial and sentencing stage or at the post-sentencing stage. They should always be considered in the light of the principle of minimum intervention.

*At the **pre-trial stage**, the interest of the offender in seeing the proceedings dismissed has to be weighed against:*

- *the protection of society;*
- *crime prevention/ the promotion of respect for the law; and*
- *the rights of victims.*

Dismissal of proceedings is a common non-custodial measure at this stage.

*At the **trial and sentencing stages**, recourse to non-custodial measures should consider:*

- *the rehabilitative needs of the offender;*
- *the protection of society; and*
- *the interests of the victims.*

The victims should be consulted whenever appropriate.

At the post-sentencing stage, the authorities should have a wide range of non-custodial measures at their disposal in order to ensure the prisoner's earliest possible release to assist his or her reintegration into society.

⁵⁶Ibid., p. 21.

⁵⁷Ibid., loc. cit.

5. Implementation of Non-custodial Measures

The remaining Tokyo Rules concern implementation of non-custodial measures, staff, volunteers and other community resources as well as research, planning, policy formulation and evaluation. However, since some of these provisions may be considered to be chiefly aimed at those involved in the implementation of the non-custodial measures rather than at the legal professions as such, only a few of the rules regarding *implementation* will be considered here. A more detailed knowledge can be acquired by reading the Tokyo Rules in their entirety in conjunction with the *Commentary*. The present section will therefore confine itself to dealing with the rules relating to the following issues, which are intrinsically linked to the implementation of non-custodial measures, namely: supervision, duration, conditions, the treatment process, and discipline and breach of conditions.

5.1 The supervision of non-custodial measures

As emphasized in Rule 10.1, “the purpose of supervision is to reduce reoffending and to assist the offender’s integration into society in a way which minimizes the likelihood of a return to crime.” In a sense, this is simply a restatement of the basic principle on which the concept of non-custodial measures in general is based, and which the authorities responsible for implementation should always bear in mind, namely, that their purpose is to help offenders to avoid a relapse into crime by strengthening their sense of responsibility, thereby also assisting their reintegration into society.

Non-custodial measures such as verbal sanctions and fines need no supervision at all, but others, such as transfer to attendance centres, probation, parole and community service, require supervision, since they are designed to provide the offenders with guidance and assistance towards their social rehabilitation.⁵⁸ Non-custodial measures of this kind are based on supervision, the principal element of which is the personal relationship between supervisor and offender. It is obvious that such measures cannot be implemented without the consent of the offender and that they depend for their success on his or her cooperation and participation.⁵⁹ The supervision can be described as having a twofold objective in that, on the one hand, it focuses on the responsibilities of offenders to the community, while, on the other hand, helping them to overcome the difficulties they may face in adjusting to life in the community.⁶⁰

It follows that supervision is a highly skilled task, as is reflected in Rule 10.2, which provides that “if a non-custodial measure entails supervision, the latter shall be carried out by a competent authority under the specific conditions prescribed by law”. According to the *Commentary*, some of the responsibilities involved in supervision can

⁵⁸Ibid., p. 22.

⁵⁹Ibid., loc. cit.

⁶⁰Ibid.

be delegated to community groups or volunteers, although when this is done it must be made clear that all statutory power rests with the competent authorities.⁶¹ On the other hand, when supervisory functions are delegated to agencies working for commercial profit, many questions arise which need careful consideration in the light of Rule 10.2.⁶²

Rule 10.3 provides that

“Within the framework of a given non-custodial measure, the most suitable type of supervision and treatment should be determined for each individual case aimed at assisting the offender to work on his or her offending. Supervision and treatment should be periodically reviewed and adjusted as necessary.”

This rule must, however, be interpreted in the light of Rule 2.6, according to which “non-custodial measures should be used in accordance with the principle of minimum intervention”. Consequently, the measure agreed on must not be stricter than is necessary in order to help the offender reintegrate into the community as a law-abiding citizen. Excessive intervention may undermine the offender’s self-confidence and result in him or her becoming overly dependent on the supervising officers.⁶³

It is important that the authorities show that they are convinced of the rightness of the decisions that they are taking on non-custodial measures, and they must also ensure that offenders are treated equally, so as to avoid unfair distinctions being made (cf. Rule 2.2 and subsection 3.2.2).

The offender must be involved to the greatest possible extent in the formulation of the treatment plan, the assessment of the intensity of the supervision and treatment, and its possible adjustment in the light of the progress made by the offender.⁶⁴ This does not mean that the supervision can be designed entirely in accordance with the offender’s own wishes: the decision-making authorities have also to take into account the nature and gravity of the original offence, the personality and background of the offender, the purpose of the sentencing and the rights of victims (cf. Rule 3.2).

As to the help which offenders may need in order to successfully reintegrate into society, Rule 10.4 mentions “psychological, social and material assistance and ... opportunities to strengthen links with the community”. Offenders may have a wide range of needs and problems. Some may need long-term psychological counselling while others may only need help in finding a place to live or a job. Again, on the basis of Rule 10.4 the assistance given must respect the principle of minimum intervention and should only comprise what is absolutely necessary to help the offender.⁶⁵

⁶¹Ibid., pp. 22-23.

⁶²Ibid., loc. cit.

⁶³Ibid.

⁶⁴Ibid.

⁶⁵Ibid.

5.2 The duration of non-custodial measures

As to the duration of the non-custodial measure, it “shall not exceed the period established by the competent authority in accordance with the law” (Rule 11.1), but “provision may be made for early termination of the measure if the offender has responded favourably to it” (Rule 11.2).

Rule 11.1 thus reinforces the principle of strict legality in the determination of the non-custodial measures, which must be fixed by a “competent authority” taking a decision “in accordance with the law”. It follows that the implementing authorities have no power to extend the duration of the measure.⁶⁶ However, an ongoing measure may be *extended* by the competent authority if doing so can be shown to be beneficial to the offender, for instance, to enable him or her to continue a course of treatment; any such extension must, however, be entirely voluntary, a point that must be made completely clear to the offender.⁶⁷

As provided by Rule 11.2, a measure can also be *terminated before the expiry of the duration originally foreseen*, and this again reflects the principle that non-custodial measures should be limited to the shortest possible time.⁶⁸ This should encourage offenders in their efforts to reintegrate into society, and the relevant procedures should be clear and well understood by them.⁶⁹

5.3 The conditions attached to non-custodial measures

According to Rule 12.1, whenever the competent authority has to determine the conditions to be observed by the offender, “it should take into account both the needs of society and the needs and rights of the offender and the victim”. Here again, it is a question of striking a fair balance between various legitimate interests: if the offender’s interests were given undue weight, the needs of society and the victim or victims might not be satisfied, and vice versa. It is thus for the individual judge or other competent decision-making authority to balance these interests in an equitable and objective manner. It follows from the principle of legality that the implementing authority should never impose conditions going beyond the requirements already fixed by the judicial authority.⁷⁰

The conditions to be observed by the offender shall, in the words of Rule 12.2, “be practical, precise and as few as possible”, the latter stipulation being yet another expression of the principle of minimum intervention as laid down in Rule 2.6. Furthermore, the conditions “shall be aimed at reducing the likelihood of an offender relapsing into criminal behaviour and at increasing the offender’s chances of social integration, taking into account the needs of the victim”. In other words, it is of

⁶⁶Ibid.

⁶⁷Ibid., p. 24.

⁶⁸Ibid., loc. cit.

⁶⁹Ibid.

⁷⁰Ibid.

fundamental importance that the conditions are both *realistic* and *precise*.⁷¹ Unless it is clear from the outset that the conditions are achievable by the offender, they may impede, rather than facilitating, his or her progress towards social integration. As to the requirement of precision, it is important both in order to help the offender to understand the conditions clearly, and also to avoid causing difficulties in the relationship between the offender and the supervisor.⁷²

The conditions envisaged in the Tokyo Rules may include those reinforcing the offender's responsibility to society and his or her family, keeping a job, pursuing an education, living at a specific address, refraining from involvement in criminal activities, and avoiding specific places.⁷³ If, for instance, the condition is the performance of community service, the work assigned to the offender should be socially useful, thereby enhancing his or her chances of social reintegration.⁷⁴

As provided by Rule 12.3, "at the beginning of the application of a non-custodial measure, the offender shall receive an explanation, orally and in writing, of the conditions governing the application of the measure, including the offender's obligations and rights." In order for the measure to be successful, it is of course essential that the offender is aware of what is expected from him or her. To have the conditions clearly defined is also important for the implementing authority, in that it establishes the criteria for assessing whether or not the obligations and conditions have been complied with.⁷⁵

Lastly, Rule 12.4 allows for the modification of the conditions "by the competent authority ... in accordance with the progress made by the offender". If the offender has made progress towards social integration, the conditions may be made less stringent, while the opposite is possible if the offender does not respond favourably. This flexibility enables the authorities to avoid revoking the non-custodial measure in case of difficulties, a measure that might result in the offender's imprisonment.⁷⁶

5.4 The treatment process

Rule 13.1 of the Tokyo Rules provides the following examples of various schemes which, "in appropriate cases ... should be developed to meet the needs of offenders more effectively":

- ❖ case-work;
- ❖ group therapy;
- ❖ residential programmes; and
- ❖ the specialized treatment of various categories of offenders.

⁷¹Ibid.

⁷²Ibid.

⁷³Ibid., p. 25.

⁷⁴Ibid., loc. cit.

⁷⁵Ibid.

⁷⁶Ibid.

The purpose of this provision is to find the most effective help for offenders with particular problems, and to call for the development of new programmes to try to deal with particularly difficult categories of offenders, such as drug-dependent persons and sex offenders.⁷⁷

A rather obvious principle is contained in Rule 13.2, according to which “treatment should be conducted by professionals who have suitable training and practical experience.” Yet, according to the *Commentary*, this rule should not be understood as a prohibition of the use of non-professionals in programmes of assistance, where the essential strength of such programmes lies in persons with practical experience rather than professional qualifications.⁷⁸

“When it is decided that treatment is necessary, efforts should be made to understand the offender’s background, personality, aptitude, intelligence, values and, especially, the circumstances leading to the commission of the offence” (Rule 13.3). Clearly, unless such an assessment of the offender and the offence is made, it will be difficult to choose an individualized and suitable treatment programme.

In line with the aim of promoting greater community involvement in the management of criminal justice, specifically in the treatment of offenders (Rule 1.2), the Tokyo Rules also authorize the competent authority to “involve the community and social support systems in the application of non-custodial measures” (Rule 13.4). This is a recognition that the community, in the form of the family, neighbourhoods, schools, the workplace and social or religious organizations, for instance, can contribute greatly to the successful social reintegration of offenders.⁷⁹

5.5 Discipline and breach of conditions

Even though the imposition of some non-custodial measures is dependent on the consent of the offender, most such measures are still sanctions that imply some restriction of liberty, and offenders may therefore fail to observe the conditions imposed on them.⁸⁰ Such “a breach of the conditions to be observed by the offender may result in a modification or revocation of the non-custodial measure” (Rule 14.1). However, according to the *Commentary*, not all breaches need lead to modification or revocation, and the supervisor or competent authority can deal with minor transgressions by less formal means.⁸¹

Considering that modification or revocation of a non-custodial measure can have serious consequences for the offender, it is for the competent authority to take a decision in the matter, but it shall do so only “after a careful examination of the facts adduced by both the supervising officer and the offender” (Rule 14.2). This means that the offender should have the right to see the documents on which the request for modification or revocation is based, to make representations and to be heard.⁸² In

⁷⁷Ibid., p. 26.

⁷⁸Ibid., loc. cit.

⁷⁹Ibid.

⁸⁰Ibid., p. 27.

⁸¹Ibid., loc. cit.

⁸²Ibid., p. 28.

examining the request, the competent authority should also consider the extent to which the offender has already complied with the non-custodial measures, such as, for instance, the fact that he or she may have already satisfactorily carried out a substantial proportion of the number of hours of community work imposed.⁸³

The principle that imprisonment should also be a penalty of last resort in cases of violation of the conditions imposed in connection with a non-custodial measure is clear from the terms of Rule 14.3, according to which “the failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure”. Furthermore, “in the event of a modification or revocation of the non-custodial measure, the competent authority shall attempt to establish a suitable alternative non-custodial measure”, and it is only if such other suitable alternative has not been found that a sentence of imprisonment may be imposed (Rule 14.4). Indeed, to impose imprisonment for a breach of the non-custodial measure may even be disproportionate to the original offence,⁸⁴ and the competent authorities will therefore need to proceed with considerable care in deciding on the consequences in the event of failure to comply with the relevant conditions.

Care must also be taken not to let the offender take the consequences of breaches of conditions for which he or she cannot be blamed; there could for instance be many reasons why an offender is unable to pay a fine, some of which may be beyond his or her control, and this aspect must be given due consideration when the competent authority examines the question of modification or revocation of non-custodial measures.⁸⁵

Rule 14.5 provides that “the power to arrest and detain the offender under supervision in cases where there is a breach of the conditions shall be prescribed by law”. Strict respect for the principle of legality is here again to be ensured, including all basic judicial guarantees which the offender has a right to enjoy when deprived of his or her liberty.⁸⁶ The *Commentary* points out the importance of laying down a maximum time for detention prior to investigation and decision by the competent authority; the period should be short and the decision made as soon as possible.⁸⁷

Lastly, consistent with the general legal safeguard in Rule 3.6, Rule 14.6 secures the offender “the right to appeal to a judicial or other competent independent authority” upon modification or revocation of the non-custodial measure.

Supervision of non-custodial measures is aimed at reducing reoffending and helping the offender’s social reintegration. The need for supervision depends on the nature of the non-custodial measure concerned.

The supervision shall be carried out by a competent authority in accordance with conditions prescribed by law.

⁸³Ibid., loc. cit.

⁸⁴Ibid.

⁸⁵Ibid.

⁸⁶Ibid.

⁸⁷Ibid.

The supervision must be adapted to the needs of the offender and depends for its success on his or her consent, participation and cooperation. It has to be reviewed periodically.

The duration of the non-custodial measures shall be established by the competent authority in accordance with law; the measure can be terminated early and may also be prolonged if necessary in the interest of the offender.

The conditions attached to non-custodial measures shall take into account the needs of society and the needs and rights of the offender and victim. The conditions shall be realistic and precise and shall be explained to the offender both orally and in writing.

It may be necessary to develop special treatment schemes to deal with the needs and problems of particularly difficult categories of offenders.

In case of breach of the conditions attached to non-custodial measures, the measures may be modified or revoked. However, such a breach should not automatically lead to deprivation of liberty.

6. The Role of Judges, Prosecutors and Lawyers in Choosing Alternatives to Imprisonment

Judges, prosecutors and lawyers have a fundamental role in deciding whether to subject offenders to non-custodial measures rather than to imprisonment. The powers granted to the legal professions by domestic law on this subject undoubtedly vary a great deal, but, given the adverse effect that imprisonment often has on juvenile offenders in particular, as well as the heavy social costs of imprisonment, every opportunity should be explored to provide offenders with a chance of rehabilitation by means of less drastic but possibly more efficient sanctions than imprisonment.

However, generalized use of non-custodial measures requires the development of a considerable network of skilled people, not only within the judicial and prosecuting bodies but also within the social and administrative authorities. Careful and concerted efforts are thus required by authorities at all levels in order to elaborate a range of non-custodial measures that can be applied flexibly and adjusted to the specific needs of individual offenders.

Judges, prosecutors and lawyers, with their particularly close links to and experience of suspected and accused offenders, have a particularly important role to play in defining the problems and the appropriate solutions, and in stimulating an open debate in society regarding crime and ways of sanctioning offenders.

7. Concluding Remarks

The present chapter has focused on explaining some of the major features of the United Nations Standard Minimum Rules for Non-custodial Measures, which is an instrument that strongly promotes the use of non-custodial measures whenever such measures are likely to promote the social reintegration of an offender, having regard to such community interests as the prevention of crime, respect for the law, and the interests of the victims. Non-custodial measures are a legal field that is far from having been fully explored, but which has important potential from which both the community and offenders could benefit. Sanctions for the commission of criminal offences are in general a subject of continuing debate and scrutiny, in particular, but not exclusively, as it relates to juvenile offenders. As our societies evolve and change, so to some extent do the crimes committed, and the question of sanctions *largo sensu* will thus continue to be a subject of great concern and interest to the community.

.....Chapter 10
**THE RIGHTS OF THE CHILD
IN THE ADMINISTRATION
OF JUSTICE**

Learning Objectives

- *To familiarize participants with the main international legal rules concerning the rights of the child in the administration of justice and their main purposes;*
- *To specify the procedural safeguards which should be accorded to the child in the administration of justice;*
- *To encourage participants to develop ways of ensuring that they routinely apply these rights and safeguards when confronted with children in the course of the administration of justice.*

Questions

- *What particular problems have you encountered in your work with regard to children and juveniles in the course of the administration of justice?*
- *How did you try to solve these problems?*
- *Did you try to invoke international legal rules such as the Convention on the Rights of the Child in order to solve the problem or problems concerned?*
- *What legal status does the Convention on the Rights of the Child have in your country? What legal impact has it had so far?*
- *Does the notion of the “best interests” of the child exist in the domestic legal system within which you work? If so, what does it mean, and how is it applied?*
- *To what extent is the child allowed to participate in decisions concerning him or her in the legal system within which you work? Examine the situation from the point of view of criminal, separation and adoption proceedings.*
- *What is the age of criminal responsibility in the country where you work?*
- *Can prison sentences be imposed on children below 18 years of age in the country where you work, and if so, of what duration?*

Questions (cont.d)

- *What non-custodial measures are available in response to offences committed by children or juveniles in your country?*
- *On what grounds can a child be separated from his or her parents in the country where you work?*
- *Are adoptions authorized in the country where you work? If so, does the child have a right to express his or her views on the desirability of the adoption?*
- *What measures have been taken in the country/ countries where you work in order to familiarize the legal professions with the legal principles contained in the Convention on the Rights of the Child and other relevant legal instruments?*

Relevant Legal Instruments

Universal Instruments

- International Covenant on Civil and Political Rights, 1966
 - Convention on the Rights of the Child, 1989
- *****
- Declaration of the Rights of the Child, 1959
 - United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), 1985
 - United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990
 - United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), 1990
 - Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, 1986
 - Guidelines for Action on Children in the Criminal Justice System, Annex to Economic and Social Council resolution 1997/30, on Administration of juvenile justice

Relevant Legal Instruments (cont.d)

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- African Charter on the Rights and Welfare of the Child, 1990
- American Convention on Human Rights, 1969
- European Convention on Human Rights, 1950

- Recommendation No. R (87) 20 of the Committee of Ministers of the Council of Europe to Member States on Social Reactions to Juvenile Delinquency

1. Introduction

As its title indicates, the present chapter will not deal with the subject of the rights of the child as such, but will be limited to explaining the principal international legal standards concerning *the rights of the child in the administration of justice*.¹ Although the general human rights treaties such as the International Covenant on Civil and Political Rights and the regional conventions are equally applicable to children, the point of departure for the analysis in this chapter will be the Convention on the Rights of the Child, which entered into force on 2 September 1990, and which, as of 8 February 2002, had been ratified by 191 States. This Convention has developed into an essential world-wide legal tool for the enhancement of the rights of the child in general and, inter alia, those children who are affected by the administration of justice through criminal, separation or adoption proceedings. The Convention was an overdue response to the urgent need to elaborate a legally binding document that would focus exclusively on the specific needs and interests of the child, which, as will be seen below, differ in important respects from those of adults. Prior to the adoption of this Convention, the child had been at the centre of the brief 1959 Declaration of the Rights of the Child, which does not, however, cover the various issues relating to the administration of justice per se.

This chapter will also examine the rules contained in particular in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines). Although these instruments do not as such create legally binding obligations, some of the rules contained therein are binding on

¹For a complete and useful resource book on the rights of the child, see *Implementation Handbook for the Convention on the Rights of the Child* (New York, UNICEF, 1998), 681 pp. (hereinafter referred to as *Implementation Handbook*).

States since they are also contained in the Convention on the Rights of the Child, while others can be considered to provide “more details on the contents of existing rights”.² They are also consistently invoked by the Committee on the Rights of the Child when it considers the reports of the States parties under articles 37, 39 and 40 of the Convention. Lastly, regional legal rules as well as both universal and regional jurisprudence will be referred to whenever relevant.

After briefly describing current concerns relating to the administration of juvenile justice, this chapter will consider the meaning of the term “child”, some basic principles governing the administration of justice, the aims of juvenile justice and the duty to create a juvenile justice system. The chapter will also explain in some detail the rules relating to both the accused child and the child deprived of liberty. Finally, the chapter will in turn consider the rights of the child and penal sanctions, the rights of the child in connection with separation and adoption proceedings, and the role of the legal professions in guaranteeing the rights of the child in the course of the administration of justice.

1.1 Terminology

To avoid confusion it should be pointed out that the expression “juvenile justice” will refer to criminal proceedings, while the term “administration of justice” will encompass all proceedings, such as criminal, separation and adoption proceedings.

2. The Administration of Justice and Children: Persistent Concerns

Although the Convention on the Rights of the Child has proved a major milestone in the universal promotion and protection of the rights of the child, numerous challenges remain to be overcome in many countries before the rights of the child can become a living reality, including in particular in situations where children come into conflict with the law. Police violence against children is not uncommon; nor are involuntary disappearances, arbitrary detentions and the use of imprisonment for minor infringements of the law by very young children, despite the fact that imprisonment should be used only as a means of last resort. Contrary to international law, children are also often detained in unacceptable conditions, subjected to violence while in detention, including corporal punishment as a disciplinary measure, and in some countries even executed for offences committed when they were below the age of 18. Young female offenders are particularly vulnerable and their needs must be effectively addressed. The challenges ahead are thus considerable, and in order to make

²See statement as to the Beijing Rules, “The United Nations and Juvenile Justice: A Guide to International Standards and Best Practice”, in *International Review of Criminal Policy*, Nos. 49 and 50, 1998-1999 (New York, United Nations, 1999), p. 5, para. 38 (hereinafter referred to as *The United Nations and Juvenile Justice*).

progress in this important field of legal protection, vigorous, concerted and effective efforts are required at both the international and national levels.³ The effective implementation of the rights of the child is thus the responsibility of all Governments and members of the legal professions as well as of all adults who deal with children, such as parents, relatives, friends and teachers.

3. The Definition of “Child”

3.1 The age of majority in general

Article 1 of the Convention on the Rights of the Child provides that, for the purposes of the Convention, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. With regard to *the beginning of childhood*, the Convention does not take a position as to whether it begins at birth or at some other particular point, such as the moment of conception. However, this is an issue that does not need to be considered further for the purposes of this chapter.⁴

As to the *end of childhood*, while the Convention contains some inherent flexibility, it must be presumed that States parties are not allowed to set the age of majority unduly low in order to avoid their legal obligations under the treaty. It is clear from the work of the Committee on the Rights of the Child, the body set up under the Convention to monitor its implementation, that the setting of minimum ages for, inter alia, marriage and employment must respect the Convention as a whole, and in particular the basic principle of the best interests of the child and the principle of non-discrimination.⁵

3.2 The age of criminal responsibility

As concerns the *age of criminal responsibility*, the Convention on the Rights of the Child fixes no limit, but provides in article 40(3)(a) that the States parties shall in particular seek “the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”. The Committee on the Rights of the Child has therefore noted with concern the “*lack of a minimum age* below which children are presumed not to have the capacity to infringe penal law” and recommended that such an age be fixed by law.⁶ It has also expressed concern with regard to penal codes which set the age of criminal responsibility at, for instance, *seven*

³For a survey of violations of the rights of the child, see e.g. Eric Sottas and Esther Bron, *Exactions et Enfants*, Geneva, OMT/C/SOS Torture, 1993, 84 pp.

⁴For a more detailed discussion of this issue see *Implementation Handbook*, pp. 1-4.

⁵UN doc. CRC/C/15/Add. 9, *Concluding Observations of the Committee on the Rights of the Child: El Salvador*, para. 10; and UN doc. CRC/C/15/Add.44, *Concluding Observations: Senegal*, paras. 11 and 25.

⁶UN doc. CRC/C/15/Add.44, *Concluding Observations: Senegal*, paras. 11 and 25; emphasis added.

or **ten years**, which, in its view, is “very low”.⁷ When examining the South African draft legislation aimed at increasing the legal minimum age of criminal responsibility from seven to ten years, the Committee noted that it remained concerned because this was “still a relatively low age for criminal responsibility”.⁸ In spite of the concern expressed several times at these very low ages of criminal responsibility at the domestic level, the Committee has not suggested what an appropriate minimum age might be.

The Committee has expressed particular concern when children aged 16 to 18 years are treated as adults for purposes of application of criminal law. In the view of the Committee the States parties to the Convention should extend to all minors under 18 years of age the special protection provided by penal law to children.⁹

It is noteworthy in this respect that, in its General Comment No. 17 on article 24 of the International Covenant on Civil and Political Rights, the Human Rights Committee emphasized that the age limit for purposes such as civil matters, **criminal responsibility** or labour law, “should not be set unreasonably low and that in any case a State party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law”.¹⁰

In General Comment No. 21 on article 10 of the Covenant, the Committee then noted that this article “does not indicate any limits of juvenile age”, adding that, while “this is to be determined by each State party in the light of relevant social, cultural and other conditions, the Committee is of the opinion that article 6, paragraph 5, suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice”.¹¹ It is noteworthy in this respect that, according to article 6(5) of the International Covenant, death sentences “shall not be imposed for crimes committed by persons below eighteen years of age”.

Rule 4(1) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter referred to as the Beijing Rules) provides that “in those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity”. The *Commentary* to this provision reads as follows:

⁷As to India (7 years), see UN doc. CRC/C/94, *Committee on the Rights of the Child: Report on the twenty-third session (2000)*, para. 58 and as to Sierra Leone (10 years), see *ibid.*, para. 143.

⁸*Ibid.*, para. 430.

⁹See e.g. as to the Maldives in UN doc. CRC/C/79, *Report on the eighteenth session (1998)*, paras. 219 and 240; as to the Democratic People’s Republic of Korea, *ibid.*, paras. 83 and 98; as to Fiji, *ibid.*, paras. 125 and 145, and as to Luxembourg, *ibid.*, para. 263.

¹⁰See *United Nations Compilation of General Comments*, p. 133, para. 4. See also *Implementation Handbook*, pp. 4-14. Article 24 of the Covenant prohibits, *inter alia*, discrimination against children and proclaims the right of every child to special measures of protection, to be registered immediately after birth, to have a name and to acquire a nationality.

¹¹*United Nations Compilation of General Comments*, p. 143, para. 13.

“The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.”

However, there continue to be wide discrepancies between countries even at the regional level; in Europe, for instance, the age of criminal responsibility varies from seven to eighteen years of age. Considering that there is not “at this stage any clear common standard amongst the member States of the Council of Europe”, the European Court of Human Rights has concluded that, although “England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States”.¹² The attribution of criminal responsibility to such a young child did not therefore per se constitute a breach of article 3 of the European Convention on Human Rights, which inter alia provides protection against inhuman and degrading treatment and punishment.¹³ However, to judge from the work of the Committee on the Rights of the Child as described above, the age of ten would appear to violate the Convention on the Rights of the Child.

*Unless otherwise decided, **the age of civil majority** is eighteen years. In fixing minimum ages for marriage, labour and military service, States are legally obliged to respect the best interests of the child and the principle of non-discrimination.*

*States shall establish **the minimum age for criminal responsibility**. Such minimum age must not be unduly low and must respect the best interests of the child and the principle of non-discrimination. Juveniles below eighteen years of age should be able to benefit from the special protection provided by criminal law to the child.*

¹²*Eur. Court HR, Case of T. v. the United Kingdom, judgment of 16 December 1999, para. 72; the text of this judgment can be found at www.echr.coe.int.*

¹³*Ibid., loc. cit. See also Eur. Court HR, V. v. the United Kingdom, judgment of 16 December 1999, Reports 1999-IX, p. 144, para. 74.*

4. The Rights of the Child in the Administration of Justice: Some Basic Principles

International human rights law provides a number of general principles which condition the consideration of all issues relating to the rights of the child, including the administration of juvenile justice. This section will deal with four of the most important of these principles, namely, (1) the principle of non-discrimination, (2) the best interests of the child, (3) the child's right to life, survival and development, and (4) the duty to respect the views of the child. These general principles are consistently considered by the Committee on the Rights of the Child in connection with its examination of periodic reports: the States parties must ensure that these principles “not only guide policy discussion and decision-making, but are also appropriately integrated in all legal revisions, as well as in judicial and administrative decisions and in projects, programmes and services which have an impact on children”.¹⁴

4.1 The principle of non-discrimination

Article 2 of the Convention on the Rights of the Child provides that:

“1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”

The Committee on the Rights of the Child has in general expressed concern with regard to certain vulnerable groups of children, such as *children in the juvenile justice system*.¹⁵ During the general discussion on the administration of juvenile justice organized by the Committee on 13 November 1995, particular concern was aired “about instances where criteria of a subjective and arbitrary nature (such as with regard to the attainment of puberty, the age of discernment or the personality of the child) still prevailed in the assessment of the criminal responsibility of children and in deciding upon the measures applicable to them”.¹⁶ Lastly, the Committee has expressed concern “at the insufficiency of measures to prevent and combat discrimination practised against Roma children, disabled children and children born out of wedlock” in Bulgaria.¹⁷

¹⁴See e.g. as to Vanuatu, in UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 149.

¹⁵See e.g. as to Belize, in UN doc. CRC/C/84, *Report on the twentieth session (1999)*, para. 75.

¹⁶UN doc. CRC/C/46, *Report on the tenth session (1995)*, para. 218.

¹⁷UN doc. CRC/C/15/Add.66, *Concluding Observations: Bulgaria*, para. 12.

The principle of non-discrimination is also, *inter alia*, contained in article 3 of the African Charter on the Rights and Welfare of the Child and Rule 2(1) of the Beijing Rules. The provisions on non-discrimination and equality in other human rights instruments of a general nature also remain equally valid when applied to children (e.g. arts. 2(1) and 26 of the International Covenant on Civil and Political Rights, art. 2 of the African Charter on Human and Peoples' Rights, arts. 1 and 24 of the American Convention on Human Rights and art. 14 of the European Convention on Human Rights).

More detailed information on the principle of equality and non-discrimination is to be found in Chapter 13 of this Manual.

4.2 The best interests of the child

Article 3(1) of the Convention on the Rights of the Child is the key provision on the principle of best interests and reads as follows:

“1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

The Committee on the Rights of the Child examines whether the States parties have given due consideration to the principle of the best interests of the child in their domestic legislation and its application in such areas as the legal definition of the child, in particular as regards the minimum age for marriage, employment and military service.¹⁸ It has for instance expressed concern with regard to Bulgaria at “the insufficient consideration of the principle of the best interests of the child in tackling situations of detention, institutionalization and abandonment of children, as well as in relation to the right of the child to testify in court”.¹⁹

The fact that the best interests of the child “shall be a *primary* consideration” (emphasis added) in the decision affecting the child is an indication that “the best interests of the child will not always be the single, overriding factor to be considered”, but that “there may be competing or conflicting human rights interests, for example between individual children, between different groups of children and between children and adults”.²⁰ However, the child’s interest “must be the subject of active consideration”, and “it needs to be demonstrated that children’s interests have been explored and taken into account as a primary consideration”.²¹

¹⁸See e.g. UN doc. CRC/C/15/Add.9, *Concluding Observations: El Salvador*, para. 10.

¹⁹UN doc. CRC/C/15/Add. 66, *Concluding Observations: Bulgaria*, para. 12.

²⁰*Implementation Handbook*, p. 40.

²¹*Ibid.*, loc. cit.

Article 4(1) of the African Charter on the Rights and Welfare of the Child also provides that “in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration”. Although the principle of the best interests of the child is not expressly included in the International Covenant on Civil and Political Rights, the Human Rights Committee has emphasized that “the paramount interest of the children” must be borne in mind in connection with the dissolution of the marriage of the parents.²²

4.3 The child’s right to life, survival and development

Article 6 of the Convention on the Rights of the Child provides that “States Parties recognize that every child has the inherent right to life” (para. 1) and that they “shall ensure to the maximum extent possible the survival and development of the child” (para. 2). Article 5 of the African Charter on the Rights and Welfare of the Child guarantees to every child “an inherent right to life”, which “shall be protected by law” (para. 1). The States parties further undertake to “ensure, to the maximum extent possible, the survival, protection and development of the child” (para. 2).

A child’s right to life is of course also equally protected under article 6 of the International Covenant on Civil and Political Rights, article 4 of the African Charter on Human and Peoples’ Rights, article 4 of the American Convention on Human Rights and article 2 of the European Convention on Human Rights.

The wording of article 6(2) of the Convention on the Rights of the Child also makes it clear that the States parties may have to take *positive measures* in order to maximize “the survival and development” of the children within their jurisdiction. It may thus be necessary for States to “take appropriate measures”, inter alia “to diminish infant and child mortality”, or to provide children with “necessary medical assistance and health care” (cf. art. 24 of the Convention on the Rights of the Child). Other measures that States may have to take in order to protect the child’s inherent right to life may be, among many others: to provide adequate nutritious food and clean drinking water, to prohibit the death penalty, and to prevent and prohibit extrajudicial, arbitrary or summary executions and enforced disappearances.²³ It may further be necessary for States parties to take effective measures to protect children against the negative effects of armed confrontations and to establish rehabilitation measures for child victims of such confrontations.²⁴

²²See General Comment No. 17 on article 24 of the International Covenant on Civil and Political Rights, in *United Nations Compilation of General Comments*, p. 133, para. 6; see also General Comment No. 19 on article 23, *ibid.*, p. 138, para. 9.

²³*Manual on Human Rights Reporting 1997*, p. 424 (also in *Implementation Handbook*, p. 87).

²⁴As to Mexico, in UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para.179.

As pointed out by the Human Rights Committee in General Comment No. 6 on article 6 of the International Covenant, “the right to life has been too often narrowly interpreted”; in its view, “the expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures”.²⁵ It would therefore “be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics”.²⁶

4.4 The child’s right to be heard

Another important general principle is found in article 12 of the Convention on the Rights of the Child, according to which:

- “1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

The Committee on the Rights of the Child has consistently promoted children’s participatory rights and emphasized the duty of the States parties “to guarantee their effective enjoyment of the fundamental freedoms, including those of opinion, expression and association” as contained in articles 13, 14 and 15 of the Convention.²⁷ This is an expression of the fact that the child must be regarded as a person in its own right or “as an active subject of rights”.²⁸

Article 12(2) of the Convention, indeed, covers “a very wide range of court hearings and also formal decision-making affecting the child, in for example, education, health, planning, the environment and so on”.²⁹

A child’s right to be heard under article 12 of the Convention does not mean, however, that the child has “a right to self-determination”, but only that it has a right “to involvement in decision-making”.³⁰ This participation must be genuine and cannot be reduced to a formality. Moreover, the older and maturer the child is, the more weight will be given to its views. This means that juveniles’ views must be given particular weight in the course of proceedings concerning their person.

²⁵ *United Nations Compilation of General Comments*, p. 115, para. 5.

²⁶ *Ibid.*, loc. cit.

²⁷ As to Mexico, in UN doc. CRC/C/90, *Report on the twenty-second session, 20 September-8 October 1999*, para. 181.

²⁸ *Implementation Handbook*, p. 145.

²⁹ *Ibid.*, loc. cit.

³⁰ *Ibid.*

With regard to *the adjudication and disposition of juveniles*, Rule 14(2) of the Beijing Rules also provides that

“The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.”

The right to be heard in judicial proceedings concerning oneself is, as has been seen in Chapters 5 to 7 of this Manual, recognized for adults and constitutes an important procedural safeguard. It is however a right that acquires particular emphasis where children are concerned, as special efforts may be needed in order to ensure that a child is genuinely heard.

The four above-mentioned general principles identified by the Committee on the Rights of the Child have to be borne in mind throughout this chapter, because they qualify the proceedings linked to the administration of juvenile justice, which consequently must respect the principles of non-discrimination, the best interests of the child, the child’s inherent right to life and the child’s right to be heard.

In the administration of justice, i.e. in criminal proceedings as well as in proceedings concerning inter alia the separation of a child from its parents or in adoption proceedings, States are required to respect the following basic principles:

- *the principle of non-discrimination;*
- *the best interests of the child;*
- *the child’s right to life, survival and development; and*
- *the child’s right to be heard.*

5. The Aims of Juvenile Justice

The declared aim of the juvenile justice system as a whole in international human rights law is *the child’s rehabilitation and social reintegration*. This is in particular clear from article 40(1) of the Convention on the Rights of the Child, which reads:

“1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and *the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society*” (emphasis added).

In connection with its consideration of the reports submitted by States parties, the Committee on the Rights of the Child has expressed concern at the insufficient number of facilities and programmes for the physical and psychological recovery and social reintegration of juveniles,³¹ “the lack of rehabilitation measures and educational facilities for juvenile offenders”, as well as “the placement of ‘potential delinquents’ in detention centres instead of care institutions for their rehabilitation”.³²

Article 10(3) of the International Covenant on Civil and Political Rights also provides, *inter alia*, that “the penitentiary system shall comprise treatment of prisoners ***the essential aim of which shall be their reformation and social rehabilitation***” (emphasis added).

As stated by the Human Rights Committee, “no penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner”.³³

According to Rule 5.1 of the Beijing Rules,

“The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.”

According to the accompanying *Commentary*, this rule “refers to two of the most important objectives of juvenile justice”.³⁴ The ***first objective*** is thus “the promotion of the well-being of the juvenile”, which should not only be emphasized by those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but also “in those legal systems that follow the criminal court model” in order that they contribute “to the avoidance of merely punitive sanctions”.³⁵

The ***second objective*** is the principle of proportionality, which in this particular context means that “the response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances”, such as “social status, family situation, the harm caused by the offence or other factors affecting personal circumstances”.³⁶ Such circumstances “should influence the proportionality of the reactions (for example, by having regard to the

³¹As to Guinea, UN doc. CRC/C/84, *Report on the twentieth session, 11-29 January 1999*, para. 126 and as to South Africa, UN doc. CRC/C/94, *Report on the twenty-third session, 10-28 January 2000*, para. 445(h).

³²See as to Yemen, UN doc. CRC/C/84, *Report on the twentieth session, January 1999*, para. 184 on the lack of centres for rehabilitation of children in conflict with the law; see also as to Nicaragua, UN doc. CRC/C/87, *Report on the twenty-first session, 17 May-4 June 1999*, para. 247.

³³General Comment No. 21 in *United Nations Compilation of General Comments*, p. 143, para. 10.

³⁴UN doc. ST/HR/1/Rev.4 (vol. I/Part 1) *Human Rights – A Compilation of International Instruments*, vol. I (First Part), Universal Instruments, p. 360 (hereinafter referred to as *Human Rights – A Compilation of International Instruments*).

³⁵*Ibid.*, loc. cit.

³⁶*Ibid.*

offender's endeavour to indemnify the victim or to her or his willingness to turn to wholesome and useful life)".³⁷

The principle of proportionality must however also be safeguarded in ensuring the welfare of the young offender so that the measures taken do not go beyond what is necessary, failing which the fundamental rights of the young offender may be infringed.³⁸

In other words, Rule 5 "calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime. The issues combined in the rule may help to stimulate development in both regards: new and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles."³⁹

The primary focus on the rehabilitation of the juvenile offender is also present in article 17(3) of the African Charter on the Rights and Welfare of the Child, according to which "the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her **reformation, re-integration into his or her family and social rehabilitation**" (emphasis added). Although not limited to juvenile offenders, article 5(6) of the American Convention on Human Rights stipulates that "punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners". The European Convention on Human Rights is silent on this issue, but in Recommendation No. R (87) 20 on Social Reactions to Juvenile Delinquency, the Committee of Ministers of the Council of Europe expresses its conviction "that the penal system for minors should continue to be characterized by its objective of education and social integration and that it should as far as possible abolish imprisonment for minors".⁴⁰

Under international human rights law the overall aim of the juvenile justice system must be to promote the child's rehabilitation and social reintegration, including the child's sense of the dignity and worth of its own person as well as his or her respect for the fundamental rights of others.

³⁷Ibid.

³⁸Ibid.

³⁹Ibid.

⁴⁰For the text of this recommendation, see Council of Europe web site: <http://cm.coe.int/ta/rec/1987/87r20.htm>.

6. The Duty to Create a Juvenile Justice System

In order to be able to give effect to their obligations deriving from the many international legal rules governing the administration of juvenile justice, States are required to pass specific laws and regulations at the national level. According to article 40(3) of the Convention on the Rights of the Child, “States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law”. In particular they shall seek to establish a minimum age of criminal responsibility, as well as measures to deal with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected (art. 40(3)(a) and (b)).

The Committee on the Rights of the Child has had occasion to express its serious concern at the absence of such a system of juvenile justice, and in particular the absence of laws, procedures and juvenile courts.⁴¹ On other occasions it has stated its concern at the lack of an efficient and effective administration of juvenile justice and in particular its lack of compatibility with the Convention, as well as with other relevant United Nations standards.⁴²

States have a legal duty to set up a specific legal system of juvenile justice, including juvenile courts, to deal with young offenders and to establish a minimum age for criminal responsibility.

7. The Accused Child and the Administration of Justice

The procedural safeguards in relation to arrest, detention, criminal investigation and trial proceedings dealt with in Chapters 5 to 7 above are of course equally valid when children are suspected of having committed a criminal offence. In other words, *children must be granted the same rights as adults at all relevant stages of the criminal procedure*, and the Committee on the Rights of the Child has expressed concern where due process has not always been so guaranteed.⁴³

Because of the peculiarities of juvenile justice, the procedural safeguards take on additional importance since they must, inter alia, protect the best interests of the child and ensure respect for its rights to be heard and to social reintegration. In this section some of the most fundamental rights of the accused child will be highlighted,

⁴¹As to Armenia, UN doc. CRC/C/94, *Report on the twenty-third session (2000)*, para. 350.

⁴²As to Grenada, *ibid.*, para. 411(a) and as to South Africa, *ibid.*, para. 455(a).

⁴³As to Nicaragua, see UN doc. CRC/C/87, *Report on the twenty-first session (1999)*, para. 247.

without any attempt to provide an exhaustive analysis of these important rights. Emphasis will be laid on those rules that are derived from the specific needs of the accused child.

7.1 The right to freedom from torture and from cruel, inhuman or degrading treatment or punishment

According to article 37(a) of the Convention on the Rights of the Child, “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”; while article 17(2)(a) of the African Charter on the Rights and Welfare of the Child stipulates that the States parties “shall ... ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment”.

The child does of course also benefit from the general protection against physical and mental abuses found in article 7 of the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the African Charter on Human and Peoples’ Rights, article 5 of the American Convention on Human Rights and article 3 of the European Convention on Human Rights. This prohibition is *absolute* and cannot in any circumstances be derogated from.

The prohibition on ill-treatment is of course particularly relevant to children deprived of their liberty but it also concerns those children who, for instance, are being investigated by the police without being arrested or detained. Indeed, the most critical periods for a child suspected or accused of having committed a crime are the police investigation and pre-trial detention, when he or she is most likely to be subjected to ill-treatment and other forms of abuse. *It is important to be aware that acts which may not be considered to constitute unlawful treatment of an adult might be unacceptable in the case of children because of their specific sensitivity and particular vulnerability.* During the Day of General Discussion on the administration of juvenile justice organized by the Committee on the Rights of the Child, “it was suggested that serious consideration be given to the development of independent mechanisms, at the national and international levels, to ensure periodic visits to and an effective monitoring” of institutions where children are held.⁴⁴ Such visits would be an important tool in preventing maltreatment of children. Another important measure to prevent unlawful treatment of children by law enforcement officials, for instance, would be the organization of courses to train these professionals in methods of dealing with young persons constructively.

When considering the periodic report of India, the Committee on the Rights of the Child expressed concern about the “numerous reports of routine ill-treatment, corporal punishment, torture and sexual abuse of children in detention facilities, and alleged instances of killings of children living and/or working on the streets by law enforcement officials”.⁴⁵ The Committee therefore recommended “that the registration of each child taken to a police station be mandatory, including time, date

⁴⁴UN doc. CRC/C/46, *Report on the tenth session (1995)*, para. 229.

⁴⁵UN doc. CRC/C/94, *Report on the twenty-third session (2000)*, para. 70.

and reason for detention, and that such detention be subject to frequent mandatory review by a magistrate”. The Committee also encouraged the State party to amend the Code of Criminal Procedure “so that medical examination, including age verification, is mandatory at the time of detention and at regular intervals”.⁴⁶ Lastly, it also recommended that the Juvenile Justice Act be amended “to provide for complaints and prosecution mechanisms for cases of custodial abuse of children”.⁴⁷

According to article 39 of the Convention on the Rights of the Child, the States parties have a legal duty to “take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of ... torture or any other form of cruel, inhuman or degrading treatment or punishment... . Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child”. In the view of the Committee on the Rights of the Child, this article “deserves greater attention”, and programmes and strategies should therefore be developed to promote the physical and psychological recovery and social reintegration of, inter alia, children in the system of administration of justice.⁴⁸

On the interpretation of article 7 of the International Covenant on Civil and Political Rights, the Human Rights Committee has held that the prohibition on ill-treatment “must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure”, emphasizing, moreover, that this article “protects, in particular, children, pupils and patients in teaching and medical institutions”.⁴⁹ For more details on the issue of corporal punishment, see also Chapter 8, subsection 2.3.3.

The child has at all times an absolute right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This prohibition includes corporal punishment imposed as punishment for an offence or as an educative or disciplinary measure.

A child victim of abuse has the right to appropriate measures to promote his or her physical and psychological recovery and social reintegration.

7.2 General treatment of the child/the child’s best interests

According to both articles 3(1) and 40(1) of the Convention on the Rights of the Child, the best interests of the child shall be the basic principle guiding all institutions and authorities, including courts of law in all actions concerning children. A child “alleged as, accused of, or recognized as having infringed the penal law” has the

⁴⁶Ibid., para. 71.

⁴⁷Ibid., para. 72.

⁴⁸UN doc. CRC/C/15/Add.34, *Concluding Observations: United Kingdom*, para. 39.

⁴⁹General Comment No. 20, in *United Nations Compilation of General Comments*, p. 139, para. 5.

right “to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society” (art. 40(1)) of the Convention).

Article 17(1) of the African Charter on the Rights and Welfare of the Child provides that “every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others”. The question of the child’s social reintegration is dealt with in article 17(3), according to which “the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.”

On the question of the best interests of the child, see also subsection 4.2 above.

The notion of the “best interests” of the child must guide all institutions and authorities, including courts of law, in all actions concerning children, with the ultimate aim of promoting his or her social reintegration.

7.3 Some fundamental procedural rights

Every child alleged as, or accused of, having infringed the penal law shall have, *as a very minimum*, the guarantees enumerated in article 40(2)(a) and (b) of the Convention on the Rights of the Child. While some of these guarantees are principles generally established in international human rights law, others are designed to meet the specific needs and interests of children.⁵⁰ At the same time it must be borne in mind that, whenever relevant, the procedural rights contained in other international human rights treaties must also be ensured during the administration of juvenile justice. However, since those procedural rights have been dealt with in some depth in Chapters 5 to 7, they will not be repeated here.

7.3.1 The principle of *nullum crimen sine lege*

The principle of *nullum crimen sine lege* is a fundamental principle guaranteed by article 40(2)(a) of the Convention on the Rights of the Child, according to which “no child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed”. This is such an important legal principle that it has been made non-derogable under article 4(2) of the International Covenant on Civil and Political Rights, article 27(2) of the American Convention on Human Rights and article 15(2) of the European Convention on Human Rights. On this principle see also Chapter 7, section 3.11.

⁵⁰Implementation Handbook, p. 547.

7.3.2 The right to be presumed innocent

The right of the child “to be presumed innocent until proven guilty according to law” is contained in article 40(2)(b)(i) of the Convention on the Rights of the Child, while article 17(2)(c)(i) of the African Charter on the Rights and Welfare of the Child guarantees the right of the child to be “presumed innocent until duly recognized guilty”.

The Committee on the Rights of the Child expressed concern that the United Kingdom’s Criminal Evidence (N.I.) Order 1988 “appears to be incompatible with” article 40 of the Convention and, “in particular with the right to presumption of innocence and the right not to be compelled to give testimony or confess guilt”; according to this law “silence in response to police questioning can be used to support a finding of guilt against a child over 10 years of age in Northern Ireland. Silence at trial can be similarly used against children over 14 years of age.”⁵¹ The Committee therefore recommended “that the emergency and other legislation, including in relation to the system of administration of juvenile justice, ... in operation in Northern Ireland should be reviewed to ensure its consistency with the principles and provisions of the Convention”.⁵² On the right to be presumed innocent until proved guilty see also Chapter 6, section 5.

7.3.3 The right to prompt information and the right to legal assistance

Article 40(2)(b)(ii) proclaims the right of the child “to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence”. If compared with other similar international legal provisions, such as articles 9(2) and 14(3)(a) of the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child differs, first, in that “if appropriate”, the child may be informed through his or her parents or legal guardians; secondly, in that the reference to the right of the child “to have legal *or other appropriate assistance*” (emphasis added) in the preparation and presentation of his or her defence is a modification compared to general human rights law.⁵³ The reference to “other appropriate assistance” makes it possible for a child to have his or her defence assured by non-lawyers. However, it must be presumed that, in the best interests of the child and for reasons of justice, such assistance should only be resorted to in cases of minor infringements of the law.

The African Charter on the Rights and Welfare of the Child provides in this respect that every child accused of infringing penal law “shall be informed promptly in a language that he understands and in detail of the charge against him” (art. 17(2)(c)(ii)) and “shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence” (art. 17(2)(c)(iii)).

⁵¹UN doc. CRC/C/15/Add. 34, *Concluding Observations: United Kingdom*, para. 20.

⁵²Ibid., para. 34.

⁵³As to the first requirement, cf. *Implementation Handbook*, p. 548.

7.3.4 The right to be tried without delay

Article 40(2)(b)(iii) provides that the child has the right “to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians”. Article 17(2)(c)(iv) of the African Charter on the Rights and Welfare of the Child more laconically proclaims that the accused child “shall have the matter determined as speedily as possible by an impartial tribunal ...”.

As was seen in Chapter 7, international human rights treaties guarantee the right to be tried “without undue delay” (art. 14(3)(c) of the International Covenant on Civil and Political Rights) or “within a reasonable time” (art. 6(1) of the European Convention on Human Rights). *With regard to children, however, the question of swiftness of the proceedings is particularly important and the child must therefore be tried “without delay”, the adjective “undue” having been omitted from article 40 of the Convention on the Rights of the Child.*

Article 40(2)(b)(iii) otherwise reflects the fundamental principle that the adjudication of persons accused of having committed a criminal offence must be made by a **competent, independent and impartial** body which must guarantee the accused a **fair bearing**. For more details about these fundamental principles, see Chapters 4 and 7.

This provision also implies that there may be cases when it is considered to be in the best interest of the child concerned to exclude his or her parents or legal guardians from the proceedings. On this same issue Rule 15.2 of the Beijing Rules provides that

“The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.”

According to the *Commentary* to Rule 15.2, the right of parents or guardians to participate in the proceedings “should be viewed as general psychological and emotional assistance to the juvenile – a function extending throughout the procedure”.⁵⁴ The *Commentary* provides the following explanation of the possibility of excluding parents or legal guardians from the procedure:

“The competent authority’s search for an adequate disposition of the case may profit, in particular, from the co-operation of the legal representatives of the juvenile (or, for that matter, some other personal assistant who the juvenile can and does really trust). Such concern can be thwarted if the presence of parents or guardians at the hearings plays a negative role, for instance, if they display a hostile attitude towards the juvenile, hence, the possibility of their exclusion must be provided for.”⁵⁵

⁵⁴ *Human Rights – A Compilation of International Instruments*, p. 368.

⁵⁵ *Ibid.*, pp. 368-369.

It is reasonable to conclude that the same ground could also justify exclusion of the child's parents or legal guardian under article 40(2)(b)(iii) of the Convention on the Rights of the Child.

It is of course particularly important that children have *prompt* access to legal counsel.⁵⁶

7.3.5 The right not to incriminate oneself and the right to examine and have witnesses

Article 40(2)(b)(iv) of the Convention on the Rights of the Child contains two separate rights namely, the right of the child “not to be compelled to give testimony or to confess guilt”; and, second, the right “to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality”.

As noted above, the Committee on the Rights of the Child expressed concern about a law authorizing the police to use silence in response to questioning to support a finding of guilt against a child over ten years of age, since such a rule appeared to be incompatible *inter alia* with the right not to be compelled to give testimony or confess guilt.⁵⁷ It must also be emphasized in this context that international human rights law prohibits the use of confessions obtained by illegal means, and this prohibition holds true *a fortiori* in the framework of the administration of juvenile justice.

As to “the right not to be compelled to testify against oneself or to confess guilt”, see also Chapter 7, section 3.7.

7.3.6 The right to review

If a child has been found to have infringed penal law, article 40(2)(b)(v) prescribes that he or she has the right “to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law”. The right to “an appeal by a higher tribunal” is also guaranteed by article 17(2)(c)(iv) of the African Charter on the Rights and Welfare of the Child.

The right to appeal against conviction and sentence is further contained in article 14(5) of the International Covenant on Civil and Political Rights, article 8(2)(h) of the American Convention on Human Rights and article 2 of Protocol No. 7 to the European Convention on Human Rights, although the latter authorizes exceptions *inter alia* “in regard to offences of a minor character”.

The Committee on the Rights of the Child encouraged Denmark to withdraw its reservation to article 40(2)(b)(v), whereby it justified a limitation on the right to appeal in certain circumstances.⁵⁸

⁵⁶UN doc. CRC/C/15/Add.66, *Concluding Observations: Bulgaria*, para. 34.

⁵⁷UN doc. CRC/C/15/Add.34, *Concluding Observations: United Kingdom*, paras. 20 and 34.

⁵⁸UN doc. CRC/C/15/Add.33, *Concluding Observations: Denmark*, paras. 8 and 16.

7.3.7 The right to free assistance of an interpreter

According to article 40(2)(b)(vi) of the Convention on the Rights of the Child, the child has the right “to have the free assistance of an interpreter if [he or she] cannot understand or speak the language used”. The same rule is contained in article 17(2)(c)(ii) of the African Charter on the Rights and Welfare of the Child.

This is yet another rule that also exists in other international human rights treaties, such as in article 14(3)(f) of the International Covenant on Civil and Political Rights, article 8(2)(a) of the American Convention on Human Rights and article 6(3)(e) of the European Convention on Human Rights. This rule is important not only for children who speak a different language but also for those who are disabled.⁵⁹

7.3.8 The right to respect for privacy

The accused child has the right “to have his or her privacy fully respected at all stages of the proceedings” (art. 40(2)(b)(vii)). This right is further developed in Rule 8 of the Beijing Rules, according to which “the juvenile’s right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of a juvenile offender shall be published” (Rule 8.1 and 8.2).

As explained in the *Commentary*, this rule “stresses the importance of the protection of the juvenile’s rights to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as ‘delinquent’ or ‘criminal’”.⁶⁰ Secondly, Rule 8 “stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted).” Thus, “the interest of the individual should be protected and upheld, at least in principle”.⁶¹

The need to protect the juvenile’s right to privacy justifies an exception to the basic rule that court proceedings shall be held in public, as established in particular in article 14(1) of the International Covenant on Civil and Political Rights, article 8(5) of the American Convention on Human Rights and article 6(1) of the European Convention on Human Rights. Such an exception is also foreseen by article 14(1) of the International Covenant, according to which “the Press and the public may be excluded from all or part of a trial for reasons of morals ... in a democratic society, or when the interest of the private lives of the parties so requires ...”. It is further stipulated that “any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”.

⁵⁹ *Implementation Handbook*, p. 549.

⁶⁰ *Human Rights – A Compilation of International Instruments*, p. 362.

⁶¹ *Ibid.*, loc. cit.

Article 6(1) of the European Convention on Human Rights does not make any exception for juveniles with regard to the public pronouncement of judgements, but allows for *in camera* proceedings “where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”. Article 8(5) of the American Convention on Human Rights is more laconic on the issue of publicity and provides only that “criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice”. Since it is normally considered to be in the best interests of juveniles that they should enjoy the benefit of closed proceedings, that would logically also seem to be implied by article 8(5) of the American Convention. Article 17(2)(d) of the African Charter on the Rights and Welfare of the Child categorically affirms that the States parties “shall ... prohibit the press and the public from the trial”.

In order to protect the juvenile’s right to privacy, Rule 21 of the Beijing Rules also regulates *the handling of records of juvenile offenders* in the following terms:

“21.1 Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.

21.2 Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.”

According to the *Commentary*, this rule “attempts to achieve a balance between conflicting interests connected with records or files: those of the police, prosecution and other authorities in improving control versus the interests of the juvenile offender”.⁶² As to the reference to “other duly authorized persons”, it “would generally include, among others, researchers”.⁶³

In its report on the general discussion on the administration of juvenile justice held in November 1995, the Committee on the Rights of the Child emphasized that “the privacy of the child should be fully respected in all stages of proceedings, including in relation to criminal records and possible reporting by the media”.⁶⁴

As can be seen from the above provisions, the right of the accused child/juvenile to enjoy respect for his or her privacy in connection with criminal proceedings is far-reaching, extending far beyond the protection from which adult offenders have a right to benefit.

⁶²Ibid., p. 373.

⁶³Ibid., p. 374.

⁶⁴UN doc. CRC/C/46, *Report on the tenth session (1995)*, para. 227.

Every child alleged as, or accused of, having infringed penal law has the right to full due process guarantees. In particular, every child has:

- *the right to have his or her best interests taken into consideration throughout the legal proceedings and to be accorded treatment likely to promote his or her future reintegration into society;*
- *the right to benefit from the principle of **nullum crimen sine lege**;*
- *the right to be presumed innocent until proved guilty;*
- *the right to prompt information and prompt legal assistance;*
- *the right to be tried **without delay** by a competent, independent and impartial authority or judicial body guaranteeing the child a fair hearing;*
- *the right not to incriminate himself or herself and the right to examine witnesses or have witnesses called under conditions of equality with the prosecution;*
- *the right to appeal;*
- *the right to free assistance of an interpreter whenever necessary;*
- *the right to respect for his or her privacy.*

8. The Child and Deprivation of Liberty

Deprivation of the liberty of a child poses a special problem in that the child, who is still at a very sensitive stage of development, may suffer serious and even irreversible adverse psychological effects if removed from its family for purposes of detention. For this reason, international human rights law tries to reduce the deprivation of liberty of children to a minimum. In order to mitigate the negative effects of the deprivation of liberty when it occurs, international law likewise provides special rules based on the best interests of the child concerned. The principal legal sources referred to in this section are the Convention on the Rights of the Child, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the African Charter on the Rights and Welfare of the Child. Although the United Nations Rules for the Protection of Juveniles (hereinafter referred to as the United Nations Rules) are not, as such, binding on Governments, many of the rules contained therein are binding either because they are also found in the Convention on the Rights of the Child or because they constitute “facets of rights enshrined in the Convention”.⁶⁵

⁶⁵*The United Nations and Juvenile Justice: A Guide to International Standards and Best Practice*, p. 24, para. 243.

Although the present chapter primarily concerns the rights of children suspected of having committed a criminal offence, the rules described below are applicable to all forms of deprivation of liberty irrespective of the grounds invoked in support thereof (suspected crime, welfare of the child, mental health reasons and so forth).

8.1 The meaning of deprivation of liberty

The notion of deprivation of liberty as applicable to children and juveniles is not defined in article 37 of the Convention on the Rights of the Child, but according to Rule 11(b) of the United Nations Rules,

“The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.”

Consequently, the rules are “applicable to all forms of deprivation of liberty in whatever type of institution the deprivation of liberty occurs”.⁶⁶

8.2 Deprivation of liberty: a measure of last resort

Article 37(b) of the Convention on the Rights of the Child provides, first, that “no child shall be deprived of his or her liberty unlawfully or arbitrarily”. Secondly, it specifies in this respect that

“The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.

In order to be consistent with international standards, the deprivation of liberty of a child must consequently:

- ❖ be lawful and not arbitrary;
- ❖ be imposed as a measure of last resort, i.e. when no other appropriate alternative measures are at the authorities’ disposal to deal with the child concerned; and finally,
- ❖ last only “for the shortest appropriate period of time”.

The rule that the deprivation of liberty of a juvenile shall be a measure of last resort is confirmed in Rules 1 and 2 of the United Nations Rules. Rule 2 further provides that the deprivation of liberty “should be ... for the minimum necessary period and should be limited to exceptional cases”. Lastly, according to this rule, “the length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release”.

⁶⁶Ibid., para. 240.

In its report on the general discussion on the administration of juvenile justice, the Committee on the Rights of the Child emphasized that “deprivation of liberty, in particular pre-trial detention, should never be unlawful or arbitrary and should only be used once all other alternative solutions would have proved inadequate”.⁶⁷ During its consideration of the States parties’ reports, the Committee has several times expressed concern at the fact that deprivation of liberty is not (systematically) used as a measure of last resort⁶⁸ and for the shortest possible period of time.⁶⁹ The Committee has also complained of “extended periods of pre-trial detention of juvenile detainees at the discretion of the Procurator” in the Russian Federation.⁷⁰ In line with these concerns, the Committee has emphasized the need for strengthening and increasing efforts to develop alternatives to deprivation of liberty.⁷¹

According to Rule 30 of the United Nations Rules, open detention facilities should be established, “with no or minimal security measures. The population in such detention facilities should be as small as possible. The number of juveniles detained in closed facilities should be small enough to enable individualized treatment”.

In accordance with article 2 of the Convention on the Rights of the Child, deprivation of liberty must also be resorted to in a non-discriminatory manner.

8.3 The rights of the child deprived of liberty

While the civil rights of detained persons as explained in Chapters 5 to 7 are also applicable to children, the arrested, detained or imprisoned child has additional rights on account of his or her young age, which requires that the treatment of the child be adjusted so as to meet his or her specific needs. In other words, the treatment of the child must at all times be defined according to his or her best interests.

8.3.1 The right to humane treatment

Article 37(c) of the Convention on the Rights of the Child complements the prohibition on ill-treatment in article 37(a) by providing that “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, *and in a manner which takes into account the needs of persons of his or her age*” (emphasis added). The positive right to humane treatment is in general also expressly guaranteed by article 10(1) of the International Covenant on Civil and Political Rights and article 5(2) of the American Convention on Human Rights, while article 17(1) of the African Charter on the Rights and Welfare of the Child, as already noted, stipulates that “every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others”.

⁶⁷ UN doc. CRC/C/46, *Report on the tenth session (1995)*, para. 227.

⁶⁸ See e.g. as to Venezuela, in UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 61(b) and as to Mexico, *ibid.*, para. 192(b).

⁶⁹ See as to Iraq, in UN doc. CRC/C/80, *Report on the nineteenth session (1998)*, para. 86.

⁷⁰ UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 130.

⁷¹ See as to Peru, in UN doc. CRC/C/94, *Report on the twenty-third session (2000)*, para. 381(c), and as to Honduras, in UN doc. CRC/C/87, *Report on the twenty-first session (1999)*, para. 130.

8.3.2 The right of the child to be separated from adults

Article 37(c) provides in this respect that “in particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so”, while, according to article 17(2)(b) of the African Charter on the Rights and Welfare of the Child, the States parties “shall ... ensure that children are separated from adults in their place of detention or imprisonment”.

Article 10(2)(b) of the International Covenant on Civil and Political Rights confines itself to stating that “accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication”. Article 5(5) of the American Convention on Human Rights stipulates in this respect that minors “while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors”.

The Committee on the Rights of the Child has expressed concern about the fact that some States parties have found it necessary to make reservations to the provision obliging them to separate children from adults in the course of detention or imprisonment, and has recommended that such reservations be withdrawn.⁷² The Committee has also several times expressed concern about the fact that juveniles are detained with adults.⁷³ With regard to Sweden, it suggested that “further consideration should be given to ensuring that children in detention are separated from adults, taking into account the best interests of the child and alternatives to institutional care”.⁷⁴ The Committee deplored the fact that, in Jordan, untried children have been kept in the same premises as convicted persons.⁷⁵ It is clear from the work of the Committee that the requirement that juveniles be separated from adults applies to *all institutions*, including psychiatric establishments.⁷⁶

The Committee against Torture has recommended that juveniles in the United States “are not held in prison with the regular prison population”.⁷⁷

According to article 10(2)(a) of the International Covenant, accused persons shall, furthermore, “save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as

⁷²See e.g. UN doc. CRC/C/15/Add.37, *Concluding Observations: Canada*, paras. 10 and 18.

⁷³See as to Guinea, in UN doc. CRC/C/84, *Report on the twentieth session (1999)*, para.126; as to Bolivia, see UN doc, CRC/C/80, *Report on the nineteenth session (1998)*, para. 117, and as to Mexico, see UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para.192(c), concerning detention in police stations.

⁷⁴UN doc. CRC/C/15/Add.2, *Concluding Observations: Sweden*, para. 12.

⁷⁵UN doc. CRC/C/15/Add.21, *Concluding Observations: Jordan*, para. 16.

⁷⁶UN doc. CRC/C/15/Add.53, *Concluding Observations: Finland*, paras. 16 and 27.

⁷⁷UN doc. GAOR, A/55/44, p. 32, para. 180(e).

unconvicted persons”. A similar provision is contained in article 5(4) of the American Convention on Human Rights. Rule 17 of the United Nations Rules provides that “untried detainees should be separated from convicted juveniles”.

8.3.3 The right of the child to remain in contact with his or her family

According to article 37(c), every child deprived of liberty “shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances”. These exceptional circumstances must be examined in the light of the basic principles underlying the Convention, including, in particular, the best interests of the child.⁷⁸

The Committee has on several occasions expressed its concern with regard to children’s right of access to their parents and families during detention,⁷⁹ and has for instance recommended to the Government of Benin that it “ensure that children remain in contact with their families while in the juvenile justice system”.⁸⁰

Rules 59 to 62 of the United Nations Rules contain more detailed instructions with regard to the right of the detained or imprisoned child to contacts with the wider community, including family and friends.

8.3.4 The child’s rights to prompt access to legal assistance and to legal challenge of detention

In the words of article 37(d) of the Convention on the Rights of the Child,

“Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.”

Rule 18(a) of the United Nations Rules adds to this that juveniles should also “be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications.”

The fundamental rights to legal assistance as well as to legal challenge of one’s deprivation of liberty have been explained in some detail in sections 6 and 7 of Chapter 5 and need not be repeated here. Two differences exist, however, between article 37(d) of the Convention on the Rights of the Child and the rules laid down in general international human rights law. In the first place, article 37(d) refers to “legal *and* other appropriate assistance” (emphasis added), an addition that may for instance cover a social assistant in whom the juvenile has particular confidence. The help of such an assistant in addition to a practising lawyer may well be in the best interests of the child.

⁷⁸Cf. *Implementation Handbook*, p. 502.

⁷⁹UN doc. CRC/C/15/Add.4, *Concluding Observations: Russian Federation*, para. 14 and UN doc. CRC/C/15/Add.61, *Concluding Observations: Nigeria*, para. 23.

⁸⁰UN doc. CRC/C/87, *Report on the twenty-first session (1999)*, para. 165.

The second difference relates to the right to challenge the legality of the deprivation of liberty. In accordance with article 9(4) of the International Covenant on Civil and Political Rights, for instance, the decision on the lawfulness of the deprivation of liberty shall be taken by a “court”, while under article 37(d) of the Convention on the Rights of the Child it is either a “court *or* other competent, independent and impartial authority” (emphasis added). Reference can in this respect also be made to Rule 10(2) of the Beijing Rules, according to which “a judge or other competent official or body shall, without delay, consider the issue of release” of a juvenile upon his or her apprehension. According to the *Commentary* to this rule, the term “competent official or body” “refers to any person or institution in the broadest sense of the term, including community boards or police authorities having power to release an arrested person”.⁸¹

The question arises, however, whether community boards or police authorities possess the requisite independence and impartiality to rule on the question of lawfulness of the detention and/or the release of the juvenile concerned.

The Committee on the Rights of the Child has expressed concern about the fact that juveniles in Mexico “have insufficient access to legal assistance”.⁸²

8.3.5 The child and the general conditions of detention

The duty of States to provide special treatment to detained and imprisoned children adjusted to their needs is an expression of the “best interests” approach which permeates the entire Convention. This is also a fundamentally logical rule given that the juvenile justice system “should uphold the rights and safety and promote the physical and mental well-being of juveniles” (Rule 1 of the United Nations Rules), and, further, that the legal rules taken together are aimed at “counteracting the detrimental effects of all types of detention and ... fostering integration in society” (Rule 3 of the United Nations Rules).

This specifically child-oriented approach implies, furthermore, that “juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society” (Rule 12 of the United Nations Rules).

According to article 24(1) of the Convention on the Rights of the Child, moreover, children are entitled to enjoy “the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health”. Further, “States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services”. This provision is thus also applicable to children in detention. Rule 31 of the United Nations Rules provides, furthermore, that “juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of

⁸¹ *Human Rights – A Compilation of International Instruments*, p. 363.

⁸² UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 192(f).

health and human dignity”. These Rules contain details not only on medical care (Rules 49-55), but also on the physical environment and accommodation (Rules 31-37), education, vocational training and work (Rules 38-46), recreation (Rule 47) and religion (Rule 48).

The question of access to *education* is, of course, of particular importance in preparing a detained or imprisoned juvenile for his or her release. Rule 38 of the United Nations Rules provides in this respect that

“Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education.”

As to juveniles *above* compulsory school age who wish to continue their education, they “should be permitted and encouraged to do so, and every effort should be made to provide them with access to appropriate educational programmes” (Rule 39 of the United Nations Rules). Needless to say, “diplomas or educational certificates awarded to juveniles while in detention should not indicate in any way that the juvenile has been institutionalized” (Rule 40).

Any juvenile deprived of his or her liberty should also “have the right to receive vocational training in occupations likely to prepare him or her for future employment” (Rule 42), and, “with due regard to proper vocational selection and to the requirements of institutional administration, juveniles should be able to choose the type of work they wish to perform” (Rule 43).

It is essential that the right to education of the detained child or juvenile should be guaranteed *throughout* his or her deprivation of liberty.

The Committee on the Rights of the Child has often had occasion to express concern about the treatment to which juveniles are subjected while detained or imprisoned, and also about conditions of detention in general, inter alia in educational institutions in the Russian Federation.⁸³ Another recurring concern is that of overcrowding of detention facilities.⁸⁴

⁸³See as to Russian Federation, UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 130.

⁸⁴See as to South Africa, in UN doc. CRC/C/94, *Report on the twenty-third session (1999)*, para. 455, and as to Belize, in UN doc. CRC/C/84, *Report on the twentieth session (1999)*, para. 89.

The Committee has likewise repeatedly expressed concern about the insufficiency of facilities and programmes for the physical and psychological recovery and social reintegration of juveniles,⁸⁵ means which should constitute the cornerstone of any system for the administration of justice.

8.3.6 *The rights of the child and disciplinary measures*

Recourse to disciplinary measures against juveniles deprived of their liberty is legitimate for the purpose of maintaining “the interest of safety and an ordered community life”, but “should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person” (Rule 66 of the United Nations Rules). According to Rule 67, this means that the following measures “shall be strictly prohibited”:

- ❖ measures constituting cruel, inhuman or degrading treatment;
- ❖ corporal punishment;
- ❖ placement in a dark cell;
- ❖ closed or solitary confinement;
- ❖ any other punishment that may compromise the physical or mental health of the juvenile concerned.

Moreover, the following measures “should” also be prohibited:

- ❖ the reduction of diet and the restriction or denial of contact with family members “for any purpose”;
- ❖ labour, since it “should always be viewed as an educational tool and a means of promoting the self-respect of the juvenile in preparing him or her for return to the community and should not be imposed as a disciplinary sanction”;
- ❖ more than one sanction for the same disciplinary infraction; and
- ❖ collective sanctions.

States should adopt legislation or regulations establishing norms concerning the following matters, “taking full account of the fundamental characteristics, needs and rights of juveniles”: (1) conduct constituting a disciplinary offence; (2) type and duration of disciplinary sanctions that may be inflicted; (3) the authority competent to impose such sanctions; and (4) the authority competent to consider appeals (Rule 68).

The juvenile should be disciplined only “in strict accordance with the terms of the law and regulations in force”, and only after “he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile and given a proper opportunity of presenting his or her defence”. The juvenile should have “the right of appeal to a competent impartial authority”, and “complete records should be kept of all disciplinary proceedings” (Rule 70).

⁸⁵See as to Benin, in UN doc. CRC/C/87, *Report on the twenty-first session (1999)*, para. 165 (f).

The Committee on the Rights of the Child *inter alia* recommended that Grenada prohibit and eradicate the use of corporal punishment such as whipping in the juvenile justice system, and it expressed particular concern regarding “the use of physical punishment, including flogging, and torture in detention centres” in Yemen.⁸⁶ It is not clear whether the physical ill-treatment in these cases was imposed for the purpose of discipline or as a penal sanction, but in either case the measures would be unlawful. The Committee expressed concern, however, about “the recourse to whipping as a disciplinary measure for boys in Zimbabwe.”⁸⁷

On the question of corporal punishment see also Chapter 8, sub-section 2.3.3 of this Manual.

The deprivation of liberty of juveniles should be used only as a measure of last resort, i.e. when no other appropriate measures are available to deal with the child concerned.

A child deprived of liberty has the right to be treated with humanity in a manner that takes into account his or her specific needs.

A child deprived of liberty has the right to be separated from adults and, if not convicted, he or she has the right not to be detained with convicted persons.

A child deprived of liberty has the right to remain in regular contact with his or her family, unless such contact would not be in the best interest of the child.

The child deprived of liberty has the right to prompt access to legal assistance and to challenge the lawfulness of his or her detention before a court or other competent, independent and impartial authority.

*The child deprived of liberty has the right to conditions of detention that will promote his or her physical and mental well-being as well as foster his or her reintegration into society. In this respect, effective access to **continuous education** during the deprivation of liberty is a cornerstone of any system for the administration of justice.*

A child deprived of liberty may not be subjected to disciplinary measures involving either physical chastisement or solitary confinement.

Disciplinary measures must respect the right of the child to his or her inherent dignity.

⁸⁶See as to Grenada, in UN doc. CRC/C/94, *Report on the twenty-third session (2000)*, para. 412(b) (whipping), and as to Yemen, in UN doc. CRC/C/84, *Report on the twentieth session (1999)*, para. 184 (physical punishment, flogging and torture in detention centres).

⁸⁷UN doc. CRC/C/15/Add.55, *Concluding Observations: Zimbabwe*, para. 21.

9. The Rights of the Child and Penal Sanctions

International human rights law sets certain limits on the kind of penal sanctions that can be imposed on a child found guilty of having committed a criminal offence. Article 37(a) of the Convention on the Rights of the Child stipulates, for instance, that “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age”.

As to *capital punishment*, article 6(5) of the International Covenant on Civil and Political Rights outlaws its imposition “for crimes committed by persons below eighteen years of age”. At the regional level, article 4(5) of the American Convention on Human Rights inter alia forbids capital punishment “upon persons who, at the time the crime was committed, were under 18 years of age”.

With regard to the prohibition of *life sentences without the possibility of release*, this is a principle which is fully logical given that, under article 37(b) of the Convention on the Rights of the Child, the detention or imprisonment of a child “shall be used only as a measure of last resort and for the shortest appropriate period of time”. A life sentence would ipso facto be contrary to this rule and also to the notion of the bests interest of the child, which implies that a child shall be given a chance of psychological recovery for the purposes of social reintegration (cf. inter alia art. 39 of the Convention on the Rights of the Child). Consistent with the rule that imprisonment of a child shall be only for the shortest possible time, the Committee on the Rights of the Child expressed concern with regard to Zimbabwe about “the lack of a clear legal prohibition of life imprisonment without possibility of release and indeterminate sentencing”.⁸⁸

Similarly, the Committee has expressed concern where the possibility of imposing the *death penalty* has not been expressly prohibited by law,⁸⁹ and where the law allows for young persons between 16 and 18 years of age “to be tried as adults and thereby face the imposition of a death sentence or a sentence of life imprisonment”.⁹⁰ Further, in respect of China, where the national legislation permits the imposition of a two-year suspension of death sentences on persons aged 16 to 18, the Committee is of the opinion that such sentencing of children “constitutes cruel, inhuman or degrading treatment or punishment”.⁹¹ The Committee was also “deeply concerned” about the fact that in Guatemala the national legislation prohibited neither capital punishment nor life imprisonment without the possibility of release.⁹²

⁸⁸Ibid., loc. cit.

⁸⁹Ibid.

⁹⁰UN doc. CRC/C/15/Add.38, *Concluding Observations: Belgium*, para. 11.

⁹¹UN doc. CRC/C/15/Add.56, *Concluding Observations: China*, para. 21.

⁹²UN doc. CRC/C/15/Add.58, *Concluding Observations: Guatemala*, para. 15.

As pointed out in the preceding section, *corporal punishment* such as whipping and flogging is also prohibited inter alia under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. It will further be recalled that, in the *Tyrer* case, the European Court of Human Rights ruled that the corporal punishment – consisting of three strokes with a cane – imposed by a juvenile court in the Isle of Man, constituted degrading treatment within the meaning of article 3 of the European Convention on Human Rights (cf. Chapter 8, subsection 2.3.3).

International human rights law prohibits the imposition of capital punishment for crimes committed by persons below the age of eighteen.

Life imprisonment without the possibility of release may not be imposed on persons below eighteen years of age.

Corporal punishment is contrary to international human rights law.

10. The Accused Child and the Question of Diversion

10.1 The meaning of the term “diversion”

As explained in the *Commentary* to Rule 11 of the Beijing Rules, the term *diversion* means “removal from criminal justice processing and, frequently, redirection to community support services” and “is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence)”.⁹³

The question of diversion is dealt with in article 40(3)(b) of the Convention on the Rights of the Child, which reads as follows:

“3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

...

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”

⁹³Human Rights – A Compilation of International Instruments, pp. 364-365.

This alternative approach is confirmed in Rule 11(1) of the Beijing Rules, according to which “consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority...”. The *Commentary* to this Rule explains that “in many cases, non-intervention would be the best response”, that is to say, “diversion at the outset and without referral to alternative (social) services”.⁹⁴ This is in particular the case “where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner”.⁹⁵

Article 40(4) of the Convention on the Rights of the Child gives some other examples of non-institutional measures that “shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence”. In addition to the non-interventionist approach which may be the most appropriate alternative in many situations, the following measures, among others, should be envisaged instead of criminal proceedings, which should always be used only as a last resort:

- ❖ care;
- ❖ guidance and supervision orders;
- ❖ counselling;
- ❖ probation;
- ❖ foster care;
- ❖ education and vocational training programmes.

On the issue of viable diversionary measures, Rule 11.4 of the Beijing Rules emphasizes the importance of community-based alternatives to juvenile justice processing, by stipulating that “in order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims”. As noted in the *Commentary* to this provision, “programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended. The merits of individual cases would make diversion appropriate, even when more serious offences have been committed”, such as, for instance, in the case of a first offence or when the juvenile has committed an unlawful act under peer pressure.⁹⁶

10.2 Diversion and the responsible authorities

According to Rule 11(2) of the Beijing Rules, “the police, prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules”. This means that “diversion may be used at any

⁹⁴Ibid., p. 365.

⁹⁵Ibid., loc. cit.

⁹⁶Ibid.

point of decision-making” by the responsible authorities, and may be exercised by one, several or all of them.⁹⁷ Moreover, recourse to diversion in relation to juveniles “need not necessarily be limited to petty cases, thus rendering diversion an important instrument” in dealing with juveniles in trouble with the law.⁹⁸

10.3 Diversion and consent of the child

Rule 11.3 of the Beijing Rules requires the consent of the juvenile, or her or his parents or guardian before referring the juvenile to appropriate community or other services; a decision to resort to diversion shall however “be subject to review by a competent authority, upon application”. The *Commentary* underlines the importance of securing the consent of the young offender or his or her parent or guardian to the recommended diversionary measure or measures, one reason being that diversion to community service without such consent would contradict the ILO Abolition of Forced Labour Convention.⁹⁹ The consent of the person concerned by the diversionary measure is of course also essential for its success.

Such consent should not however be left unchallengeable, since, as noted in the *Commentary*, “it might sometimes be given out of sheer desperation on the part of the juvenile”.¹⁰⁰ The idea behind the Rule is, in other words, that “care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process. Juveniles should not feel pressured (for example in order to avoid court appearance) or be pressured into consenting to diversion programmes.”¹⁰¹

When considering the reports of the States parties to the Convention on the Rights of the Child, the Committee on the Rights of the Child consistently examines what alternatives to deprivation of liberty exist in the country concerned to deal with juvenile offenders, and it has repeatedly called for the strengthening of such measures.¹⁰²

Whenever appropriate and desirable, juvenile offenders shall be diverted away from the ordinary criminal proceedings towards alternative services and care.

Such diversionary measures can be taken by the competent authorities at any stage of the decision-making.

The juvenile concerned, or her or his parents or guardian, shall consent to the diversion and may bring an appeal to the competent authority in case of disagreement.

⁹⁷Ibid.

⁹⁸Ibid.

⁹⁹Ibid.

¹⁰⁰Ibid.

¹⁰¹Ibid.

¹⁰²See as to Honduras, in UN doc. CRC/C/87, *Report on the twenty-first session (1999)*, para. 130; as to Kuwait, in UN doc. CRC/C/80, *Report on the nineteenth session (1998)*, para. 150; and as to Peru, in UN doc. CRC/C/94, *Report on the twenty-third session (2000)*, para. 381.

11. The Child as Victim or Witness in Judicial Proceedings

The appearance of a child as a victim or witness in judicial proceedings causes special problems since he or she is at a sensitive age when contact with the justice system might be deeply traumatic. Yet in spite of the negative impact that criminal proceedings can have on child victims or witnesses, this serious question has only recently been accorded attention at the international level, for example in the Guidelines for Action on Children in the Criminal Justice System, annexed to Economic and Social Council resolution 1997/30, on Administration of juvenile justice (hereinafter referred as the “Guidelines”). Although not legally binding on States, these Guidelines provide some useful principles which should inspire the work of police, prosecutors, lawyers and judges at the domestic level.

Basing itself on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which will be further considered in Chapter 15 of this Manual, paragraph 43 of the Guidelines stipulates that “States should undertake to ensure that child victims and witnesses are provided with appropriate access to justice and fair treatment, restitution, compensation and social assistance. If applicable, measures should be taken to prevent the settling of penal matters through compensation outside the justice system, when doing so is not in the interests of the child”.

As regards *child victims*, more specifically, paragraph 45 of the Guidelines provides that they “should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm they have suffered”. Child victims should further “have access to assistance that meets their needs, such as advocacy, protection, economic assistance, counselling, health and social services, social reintegration and physical and psychological recovery services. Special assistance should be given to those children who are disabled or ill. Emphasis should be placed upon family- and community-based rehabilitation rather than institutionalization” (para. 46).

Furthermore, “judicial and administrative mechanisms should be established and strengthened where necessary to enable child victims to obtain redress through formal or informal procedures that are prompt, fair and accessible. Child victims and/or their legal representatives should be informed accordingly” (para.47). The competent authorities thus have a positive duty to provide the necessary information to the victims.

According to paragraph 48 of the Guidelines, “access *should*” (emphasis added) also “be allowed to fair and adequate compensation for all child victims of violations of human rights, specifically torture and other cruel, inhuman or degrading treatment or punishment, including rape and sexual abuse, unlawful or arbitrary deprivation or liberty, unjustifiable detention and miscarriage of justice. Necessary legal representation to bring an action within an appropriate court or tribunal, as well as interpretation into the native language of the child, if necessary, should be available.”

It is noteworthy that the wording of this paragraph is weaker than that contained in the legally binding human rights treaties, all of which grant the right to an effective remedy to victims of human rights violations. That right is, of course, equally applicable to children who are victims of such violations. For further details on this right, see Chapter 15 of this Manual.

In order to be able to deal with cases involving child victims, “police, lawyers, the judiciary and other court personnel should receive training”, a need that is recognized in paragraph 44 of the Guidelines. In addition, according to the same provision, “States should consider establishing, if they have not yet done so, specialized offices and units to deal with cases involving offences against children”. Lastly, “States should establish, as appropriate, a code of practice for proper management of cases involving child victims”.

With regard to *child witnesses*, paragraph 49 of the Guidelines states that they “need assistance in the judicial and administrative process”. Consequently, “States should review, evaluate and improve, as necessary, the situation for children as witnesses of crime in their evidential and procedural law to ensure that the rights of children are fully protected. In accordance with the different law traditions, practices and legal framework, direct contact should be avoided between the child victim and the offender during the process of investigation and prosecution as well as during trial hearings as much as possible. The identification of the child victim in the media should be prohibited, where necessary to protect the privacy of the child. Where prohibition is contrary to the fundamental legal principles of Member States, such identification should be discouraged.”

According to paragraph 50 of the Guidelines, States should also consider, “if necessary, amendments of their penal procedural codes to allow for, inter alia, videotaping of the child’s testimony and presentation of the videotaped testimony in court as an official piece of evidence. In particular, police, prosecutors, judges and magistrates should apply more child-friendly practices, for example, in police operations and interviews of child witnesses”.

Lastly, paragraph 51 provides that “the responsiveness of judicial and administrative processes to the needs of child victims and witnesses should be facilitated by:

- (a) Informing child victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved;
- (b) Encouraging the development of child witness preparation schemes to familiarize children with the criminal justice process prior to giving evidence. Appropriate assistance should be provided to child victims and witnesses throughout the legal process;
- (c) Allowing the views and concerns of child victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and in accordance with the relevant national criminal justice system;

(d) Taking measures to minimize delays in the criminal justice system, protecting the privacy of child victims and witnesses and, when necessary, ensuring their safety from intimidation and retaliation.”

Given the increasing number of children who appear in court proceedings as victims and witnesses, in particular in cases of abuse, it is of primordial importance that members of the legal professions focus on ways and means of respecting these children’s rights and needs, while at the same time also respecting the rights and needs of the accused, who must be granted due process.

It is important to bear in mind that the appearance of a child as victim or witness in criminal proceedings may have a traumatizing effect. It is therefore the duty of the members of the legal profession to respect the rights and needs of the child and to treat him or her with understanding and sympathy.

Child victims are entitled to prompt redress for the harm suffered and, to this end, they have the right of access to various kinds of assistance to meet their needs during the legal proceedings and thereafter.

Child victims should be able to obtain redress through formal or informal procedures that are prompt, fair and accessible, and they and/or their legal representatives should be informed about the availability of such procedures.

Children who are victims of human rights violations have a right under international human rights law to an effective remedy for the harm suffered.

Child witnesses need special assistance in the judicial and administrative process and the members of the legal profession must ensure that their rights are fully protected.

The police, prosecutors, magistrates and judges should endeavour to apply more child-friendly practices in their work with child witnesses.

Both child victims and witnesses need special assistance throughout the legal proceedings in which they are involved.

12. The Child and His or Her Parents: When Separation May be Justified

Judges and lawyers may have to deal with children not only in the administration of criminal justice and diversionary proceedings, but also in connection with proceedings concerning the separation of a child from its parents and adoption, the latter question being briefly considered in the next section.

Article 9 of the Convention on the Rights of the Child provides for the exceptional separation of children from their parents in the following words:

“1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.”

12.1 The best interests of the child

Given the child-oriented approach adopted by the Convention, it is logical that the basic principle flowing from this provision is that the separation must be “necessary for the best interests of the child”. It is noteworthy, however, that the words “against their will” refer “either to the parents’ will or to the parents’ and the child’s will together”, but clearly do not mean only the child’s will.¹⁰³ This is a plausible interpretation given that children are not able to choose their caregivers, but “are dependent on their family, community and the State to make that choice for them”.¹⁰⁴

12.2 The grounds justifying separation

Article 9(1) expressly refers to parental “abuse or neglect of the child” as a first ground that might justify the separation of a child from his or her parents; as a second ground it mentions the situation where parents are living apart and a decision must be made as to where the child should live. However, as indicated by the words “such as”, these possible grounds of separation are illustrative and not exhaustive, and there may be other situations in which domestic judges could be called upon to settle residential disputes, for instance, if the parents have themselves agreed where the child should live, but the child itself is unhappy with the agreement.¹⁰⁵ In such cases States might have an important role to fulfil as arbitrator in order to solve the dispute between the child and

¹⁰³ *Implementation Handbook*, p. 121.

¹⁰⁴ *Ibid.*, loc. cit.

¹⁰⁵ *Ibid.*

his or her parents, if only by “establishing judicial machinery for the child to make a case for arbitration”.¹⁰⁶

12.3 The legal safeguards

Article 9 refers to three legal safeguards aimed at providing protection against abuses and which will ensure fairness of the proceedings. Consequently, the decision to separate a child from his or her parents must:

- ❖ be taken by “competent authorities” applying existing law and procedures (art. 9(1));
- ❖ be subject to judicial review to determine the lawfulness thereof (art. 9(1)); and
- ❖ be taken only after all interested parties have had “an opportunity to participate in the proceedings and make their views known” (art. 9(2)).

The notion of *competent authorities* means in this context organs having both the legal authority to determine whether a separation is in the best interests of the child and the necessary skills to do so.¹⁰⁷

The requirement that the decision on separation must be taken *in accordance with applicable law and procedures* means that States must legislate in this area in order carefully to define the grounds and circumstances that may justify such a drastic measure. However, since no law can be so precise as to provide guidance sufficiently detailed to foresee the wide range of individual situations which may necessitate intervention, the competent authorities and the courts may need a certain degree of discretion allowing social workers, judges and lawyers to seek alternatives conforming to the best interests of the child.

Laws on separation must not be discriminatory and must not be applied in a discriminatory manner (cf. art. 2 of the Convention); consequently, homelessness, poverty or ethnic origin must not per se be grounds for removing a child from his or her parents.¹⁰⁸ The Committee on the Rights of the Child expressed concern with regard to Croatia that “children might be removed from their families because of their health status or the difficult economic situation faced by their parents”.¹⁰⁹ With regard to the United Kingdom, it expressed concern that “children of certain ethnic minorities appear to be more likely to be placed in care”.¹¹⁰ When examining the report of Belgium, the Committee pointed out that “children belonging to the disadvantaged groups of the population appear more likely to be placed in care”, and it recalled in this regard “the importance of the family in the upbringing of a child”, emphasizing its view “that the separation of the child from his or her family must take the child’s best interest as a primary consideration”.¹¹¹

¹⁰⁶Ibid.

¹⁰⁷Ibid., p. 124.

¹⁰⁸Ibid., p. 125.

¹⁰⁹UN doc. CRC/C/15/Add.52, *Concluding Observations: Croatia*, para. 17.

¹¹⁰UN doc. CRC/C/15/Add.34, *Concluding Observations: United Kingdom*, para. 12.

¹¹¹UN doc. CRC/C/15/Add.38, *Concluding Observations: Belgium*, para. 10.

The requirement of *judicial review* of the decision taken by the competent authority in turn ensures a determination of its lawfulness, on the basis of existing law and procedure, by an independent and impartial body applying due process guarantees and rendering a reasoned decision. Such review should include an examination of any discretion that the competent authorities may have had in deciding on the question of separation so as to ensure that the discretion has been applied carefully, in the best interests of the child.

Article 9(2) of the Convention adds an additional guarantee to the fairness of the proceedings relating to separation in that “all *interested* parties shall be given an opportunity to participate in the proceedings and make their views known” (emphasis added). The words “interested parties” are not defined in the Convention but include, in the first place, the child himself or herself. This follows from a reading of article 9(2) in the light of article 12(2) of the Convention, according to which “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”. The views of the child shall be “given due weight in accordance with the age and maturity of the child” (art.12(1)). Furthermore, the reference to “interested” parties also means that both parents must be heard although they may not live together; other members of the child’s extended family might also have a right to be heard on the basis of this provision, as well as “professionals with a specialist knowledge of the child”.¹¹²

12.4 The child’s right to remain in contact with his or her parents

Article 9(3) of the Convention provides that “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with *both* parents on a regular basis, except if it is contrary to the child’s best interests” (emphasis added). The stress here is on the child’s right to remain in contact with both parents, and not on the parents’ right to maintain contact with their child. It enables a child to stay in touch not only with the residential parent but also with the non-residential father or mother.¹¹³

A child may in exceptional situations be separated from his or her parents, provided that this is in the child’s best interests. Situations that may justify such separation are, in particular, abuse or neglect.

*Laws on separation must not be discriminatory and must not be applied in a discriminatory manner. Homelessness, poverty or ethnic origin, for instance, must not *per se* be grounds for removing a child from his or her parents.*

¹¹²Implementation Handbook, p. 126.

¹¹³Ibid., p. 127. As to the rights of children, parents and other family members to receive “essential information” concerning the whereabouts of a parent or child, see also article 9(4) of the Convention and Implementation Handbook, p. 127.

The decision on separation must be taken by a competent authority acting in accordance with law and it must be subject to judicial review. A decision to separate a child from his or her parents shall be taken only after all interested parties have been able to take part in the proceedings and make their views known.

A child separated from his or her parents has a right to maintain regular contact with them, unless it would not be in the child's best interests to do so.

13. The Rights of the Child and Adoption Proceedings

The final area to be dealt with in this chapter where judges and lawyers will be called upon to intervene is that of *adoption*.¹¹⁴ Article 21 of the Convention on the Rights of the Child provides some basic rules, which are applicable to “States Parties that recognize and/or permit the system of adoption”.¹¹⁵ Article 20 mentions adoption as one of several ways of caring for children deprived of a family environment, but the Convention, as such, does not take a position on the desirability of adoption. However, wherever it exists, adoption shall be regulated by domestic law, which must give paramount consideration to the best interests of the child, to the exclusion of other interests such as economic gain.¹¹⁶ The legislation on adoption must also respect the following minimum rules :

First, it must “ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary” (art. 21(a)).

As to the notion of *competent authorities*, this covers both judicial and professional authorities who are qualified to decide what is in the best interest of the child and ensure that proper consent has been given;¹¹⁷ as recommended by the Committee on the Rights of the Child with regard to Panama, adequate training should be provided to the professionals concerned.¹¹⁸

¹¹⁴This section will be exclusively based on the Convention on the Rights of the Child and will leave aside other international treaties dealing with the question of adoption.

¹¹⁵States applying Islamic law, for instance, do not recognize adoption: *Implementation Handbook*, p. 271.

¹¹⁶On the notion of best interests in connection with adoption, see *Implementation Handbook*, p. 272.

¹¹⁷*Ibid.*, p. 273.

¹¹⁸UN doc. CRC/C/15/Add.68, *Concluding Observations: Panama*, para. 31.

The requirement that an adoption must be based on the *informed consent* of the persons concerned was inserted in order to prevent children from being “wrongfully removed from their parents”, although the Convention leaves it to each State party to include this requirement or not in its domestic legislation.¹¹⁹ Notwithstanding the failure of domestic law to contain a proper consent clause, a lack of informed consent to an adoption might in any event violate the right of both the child and his or her natural parents as guaranteed by in particular articles 7 and 9 of the Convention, which are based on the presumption “that children’s best interests are served by being with their parents wherever possible”.¹²⁰ As to the views of the child itself, they are, as previously mentioned, required under article 12 of the Convention and must be considered essential also in connection with adoption procedures envisaged under article 21.¹²¹ It is worthy of note that some countries require the child’s own consent to adoption as from a certain age: in Mongolia, the agreement of the child has to be secured if he or she is nine years old or more;¹²² in the Canadian province of Nova Scotia the law provides that in situations where the person proposed to be adopted is twelve years of age or more, “written consent must be obtained”,¹²³ and in Croatia “the attitude of the child over 10 is relevant with respect to his or her agreeing to adoption”.¹²⁴ The Committee on the Rights of the Child has recommended that States parties ensure that their domestic legislation is in conformity in particular with articles 3, 12 and 21 of the Convention¹²⁵ and that, accordingly, children be granted broadened involvement in family decisions affecting them, including in proceedings relating to family reunification and adoption.¹²⁶

Second, article 21(b) recognizes that “inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin”. As indicated by the Committee on the Rights of the Child in its recommendations to Mexico, inter-country adoptions should be seen as a measure of last resort to provide care for a child,¹²⁷ and the States parties are not, consequently, obliged to permit such adoptions. The Committee has on various occasions expressed its concern about the lack of a normative framework or sufficiency of measures to implement the provisions of the Convention concerning adoption in general and in particular in the field of inter-country adoptions and the consequential risk of illegal inter-country adoptions and trafficking in children.¹²⁸ With regard to Denmark and

¹¹⁹ *Implementation Handbook*, p. 273.

¹²⁰ *Ibid.*, loc. cit.

¹²¹ *Ibid.*

¹²² UN doc. CRC/C/3/Add.32, *Initial reports of States parties due in 1992: Mongolia*, para. 136.

¹²³ UN doc. CRC/C/11/Add.3, *Initial reports of States parties due in 1994: Canada*, para. 1129.

¹²⁴ UN doc. CRC/C/8/Add.19, *Initial reports of States parties due in 1993: Croatia*, para. 103.

¹²⁵ UN doc. CRC/C/15/Add.43, *Concluding Observations: Germany*, para. 29; and UN doc. CRC/C/15/Add.24, *Concluding Observations: Honduras*, para. 26.

¹²⁶ UN doc. CRC/C/15/Add.43, *Concluding Observations: Germany*, para. 29.

¹²⁷ UN doc. CRC/C/15/Add.13, *Concluding Observations: Mexico*, para. 18.

¹²⁸ See e.g. UN doc. CRC/C/15/Add.27, *Concluding Observations: Paraguay*, para. 11; UN doc. CRC/C/15/Add.36, *Concluding Observations: Nicaragua*, para. 18; and UN doc. CRC/C/15/Add.42, *Concluding Observations: Ukraine*, para. 11.

Sweden the Committee also recommended that steps be taken to monitor the situation of foreign children adopted by families in these countries.¹²⁹

Third, the States parties shall “ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption”. This means that “every international adoption must be authorized as being in the best interests of the child by competent authorities of the child’s State, on the basis of proper investigation and information and with proper consents (with counselling, if necessary) having been obtained” (cf. art. 21(a)).¹³⁰ The Committee on the Rights of the Child has recommended in this respect that the States parties consider ratifying the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, 1993, which lays down details on this subject.¹³¹

Fourth, the States parties shall “take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it” (art. 21(d)). This provision is aimed at preventing “the sale of or traffic in children for any purpose or in any form”, as required by article 35 of the Convention on the Rights of the Child. It is evident that, while “payments by adoptive couples may be made in good faith and without harm to the child, a system that puts a price on a child’s head is likely to encourage criminality, corruption and exploitation”.¹³²

Finally, the States parties recognizing or permitting adoption shall “promote, where appropriate, the objectives of [article 21 of the Convention] by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs” (art. 21(e)). The principal treaty to be considered in this respect is the aforementioned Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, which is based on article 21 of the Convention on the Rights of the Child as well as the 1986 United Nations Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.¹³³ It is recalled that the Committee on the Rights of the Child consistently encourages those countries that have not yet ratified the Hague Convention to do so.

¹²⁹UN doc. CRC/C/15/Add.33, *Concluding Observations: Denmark*, para. 27; and UN doc. CRC/C/15/Add.2, *Concluding Observations: Sweden*, para. 13.

¹³⁰*Implementation Handbook*, p. 275.

¹³¹UN doc. CRC/C/15/Add.68, *Concluding Observations: Panama*, para. 31; and UN doc. CRC/C/15/Add.33, *Concluding Observations: Denmark*, para. 27. For more information about the Hague Convention, see “*Proceedings*”, a CD published by the Hague Conference on Private International Law, on the children’s conventions concerning child abduction, adoption co-operation and protection of children. The text of the Convention can also be found at <http://www.hcch.net>.

¹³²*Implementation Handbook*, pp. 275-276.

¹³³*Ibid.*, p. 276.

For States that recognize or permit adoptions, paramount consideration shall be given to the best interests of the child.

The domestic legislation on adoption must also ensure that the adoption of a child is authorized only:

- *by competent authorities who determine the permissibility of the adoption;*
- *in accordance with applicable law and procedures and on the basis of all pertinent and reliable information;*
- *and after having obtained, if required by the law, the informed consent to the adoption of the persons concerned.*

International or inter-country adoptions are considered to be a measure of last resort to provide care for a child.

A child concerned by inter-country adoptions has the right to enjoy safeguards and standards equivalent to those existing in the case of national adoption.

States must take all appropriate measures to ensure that inter-country adoptions do not result in improper financial gain for those involved in them.

The sale of, or trafficking in, children for any purpose or in any form is strictly prohibited by international law.

14. The Role of Judges, Prosecutors and Lawyers in Guaranteeing the Rights of the Child in the Course of the Administration of Justice

As seen throughout Chapters 4 to 8 of this Manual, the role of judges, prosecutors and lawyers is essential for the protection of the human rights of all persons suspected or accused of having committed criminal offences. The responsibility of these legal professions is particularly great when the judicial proceedings concern children under age, who are in trouble with the law or involved in separation or adoption proceedings. Such proceedings require special knowledge and skills on the part of judges, prosecutors, lawyers and other professionals concerned, and the Committee on the Rights of the Child has therefore often recommended that States parties introduce or strengthen training programmes on relevant international standards for all professionals involved in the juvenile justice system.¹³⁴ It has also consistently suggested that the States parties consider seeking technical assistance in the

¹³⁴See as to Venezuela, in UN doc. CRC/C/90, *Report on the twenty-second session (1999)*, para. 61, and as to Mexico, *ibid.*, para. 192.

area of juvenile justice, including the police, from the Office of the United Nations High Commissioner for Human Rights and the United Nations Children's Fund (UNICEF), among other organizations.¹³⁵

15. Concluding Remarks

The present chapter has provided a survey of some of the important international legal principles relevant to the rights of the child in the administration of justice. This legal system takes as its point of departure the fact that children are persons in their own right and possess rights and obligations which have to be considered and respected by both administrative and judicial authorities. Furthermore, children have special rights, needs and interests which must be considered. The administration of justice, whether criminal or otherwise, must also at all times be guided, *inter alia*, by the overriding principles of non-discrimination, the best interests of the child, the child's right to life and development and its right to be heard.

However, in order to make these principles a reality for the children of the world, States must incorporate all relevant international rules into their own domestic legal systems, as well as providing proper training and financial means to the legal professions, police and social authorities, enabling them to acquire the necessary knowledge and skills to carry out their duties in conformity with States' legal undertakings.

Furthermore, more generally, States have to do their utmost to eradicate poverty, social injustice and widespread unemployment, failing which even the best of intentions with regard to social reeducation and reintegration of juvenile delinquents may be of little real help.

Without such wholehearted and concerted efforts on the part of humankind, which "owes to the child the best it has to give",¹³⁶ the problems confronting the world's growing population of children may pose well-nigh insurmountable challenges.

¹³⁵See references in preceding note.

¹³⁶Fifth preambular paragraph of the Declaration of the Rights of the Child.

.....Chapter 11
**WOMEN'S RIGHTS IN
THE ADMINISTRATION
OF JUSTICE**

Learning Objectives

- *To sensitize the participants to the specific human rights problems faced by women in different spheres of life*
- *To familiarize the participants with existing international legal rules designed to protect the rights of women*
- *To increase the participants' awareness of their own potential as judges, prosecutors and lawyers to contribute to improved protection of the rights of women*

Questions

- *How are the rights of women protected by legislation in the country in which you work?*
- *In your view, is this legislation efficiently enforced?*
- *What are the specific problems facing women in the country in which you work?*
- *Are these problems due to shortcomings in the de jure protection of women or to a failure to enforce existing legal rules?*
- *Are there any other factors that might account for the problems facing women in the country in which you work?*
- *If so, what are they?*
- *Does the girl child face any specific problems in the country in which you work?*
- *If so, what are these problems and what may be their root cause?*
- *How, and to what extent, does the law deal with the specific problems of the girl child?*
- *What can you do as judges, prosecutors and lawyers to improve the protection of the rights of women in the country in which you work?*

Relevant Legal Instruments

Universal Instruments

- Charter of the United Nations, 1945
- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949
- Convention on the Political Rights of Women, 1953
- Convention on the Nationality of Married Women, 1957
- Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962
- Convention on the Rights of the Child, 1989
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 1999
- UNESCO Convention against Discrimination in Education, 1960
- Rome Statute of the International Criminal Court, 1998
- United Nations Convention against Transnational Organized Crime, 2000
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000

- Statute of the International Tribunal for the Former Yugoslavia, 1993
- Statute of the International Tribunal for Rwanda, 1994

- Universal Declaration of Human Rights, 1948
- Declaration on the Elimination of Violence against Women, 1993
- Vienna Declaration and Programme of Action, 1993
- Beijing Declaration and Platform for Action, 1995

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 1994
- European Convention on Human Rights, 1950

1. Introduction

International human rights law as a whole is, of course, fully applicable to women. The rights described in other chapters of this Manual are therefore equally relevant to women and the female juvenile. However, as evidenced by the above list of treaties and declarations, it has been considered necessary, in order to deal more efficiently with the serious and multiple violations of the rights of women that still exist in the majority of countries, including widespread discriminatory practices, to draw up separate gender-specific legal documents focusing on the particular needs of women. While women in some countries have made great strides towards securing increased respect for their human rights, including the right to equality with men, in areas such as family law and the law of succession and in access to education, adequate health care and the labour market, the majority of women still suffer violations of their most basic human rights. For instance, they are not always allowed to enter freely into marriage or to divorce on the same conditions as men, and in some countries they do not enjoy equal rights with men in terms of succession. Women's right to life, personal liberty and security, including the right to health, are also frequently violated through domestic, institutional and community violence such as dowry killings, "honour" killings, battering, sexual violence, traditional practices, trafficking and forced prostitution. Further, women may be denied the right to education or even to the most basic health care services. They may also be subject to strict dress codes, the violation of which can result in severe corporal punishment. Discrimination against the female gender sometimes occurs even before birth in the form of selective pre-natal testing that may lead to abortion of the female foetus.

The seriousness of these violations is compounded by the fact that many of the victims are living in poverty or extreme poverty and lack the financial means to alter their situation. They cannot afford to hire a lawyer, for instance, to help them vindicate their rights, and even if they could, the legal system may often be such that women's rights are not given the same weight as the rights of men or the rights of the affluent strata of society. The legal system may be unfairly biased in favour of men so that a woman has an unduly heavy burden of proof to bear in cases of violence, including rape. Further, lawyers representing women are sometimes threatened in various ways, even with murder.

The legal and factual situation of women is also in many cases particularly precarious owing to their status as migrants, refugees or displaced persons, or simply because they are part of an ethnic or racial minority. Governments and members of the legal professions therefore have a duty to be alert to such problems and to identify possible solutions.

Reluctance and failure to promote and protect women's rights effectively can often be explained – though not justified – by the fear that such rights constitute a threat to accepted societal values and interests.¹ But this marginalization of women has a devastating human, social and financial cost that goes far beyond the life of the

¹On this issue, see the United Nations Development Programme's *Human Development Report 2000* (New York/Oxford, Oxford University Press, 2000), p. 30.

individual women concerned; it affects society as a whole, since women are excluded from the decision-making process that would have enabled them to play a constructive role in building a community free from fear, want and intolerance.

Women living in industrialized countries are by no means immune to violations of their rights. They may have to contend with a variety of systemic and attitudinal problems and may suffer discrimination, which is often, however, more indirect than direct.

Women are thus frequently caught up in a vicious social, cultural, religious, political and legal circle and may be unable to break out of it alone. To do so, they need, inter alia, the support of independent and impartial legal professions that are familiar with international human rights law and its application to women, and are capable of exercising their responsibilities diligently and fearlessly. Enhancement of awareness among judges, prosecutors and lawyers of acts and practices that violate the most fundamental rights of women and girls constitutes an important step towards providing half of humanity with an acutely needed remedy and a means of redress.

The problems involved in promoting and protecting women's rights are too varied and numerous to be dealt with in depth in this chapter, which will confine itself to highlighting some of the most serious quandaries facing women and the response provided by international law. It will begin with a general description of women's right to legal personality and move on to consider women's right to equality before the law and equal protection of the law. The subsequent sections will deal with women's right to respect for their life and their physical and mental integrity; women's right to freedom from slavery, the slave trade, forced and compulsory labour, and trafficking; and women's right to equality in respect of marriage, in civil matters and in terms of participation in public affairs. After touching on various other fields of law where gender discrimination is commonplace, the chapter will briefly describe women's right to an effective remedy, including their right of access to the courts. Lastly, the role of the legal professional in promoting and protecting the rights of women will be emphasized, and the chapter will close with some concluding remarks. Whenever relevant, reference will be made to gender issues dealt with in other chapters of the Manual.

Albeit equally important, women's rights in the areas of employment and health and other rights pertaining to the social, economic or cultural fields will not, for reasons of space, be considered in this context, although some pertinent references will be made. Instead, **Handout No. 1** will provide a short list of relevant legal documents. For further resource material on the rights of women, see **Handout No. 2**, which contains a list of useful books, reports and web sites.

2. Women's Right to Legal Personality

The right to recognition as a person before the law lays the basis for the right of women to enjoy full human rights and freedoms. Although the right to legal/judicial personality is inherent in international human rights law, it has been included *expressis verbis* in both article 16 of the International Covenant on Civil and Political Rights and article 3 of the American Convention on Human Rights. Moreover, pursuant to article 4(2) of the International Covenant and article 27(2) of the American Convention, this is a right that cannot in any circumstances be derogated from in times of public emergency. The right of women to legal personality on an equal basis with men must, in other words, be respected in times of peace and in times of war or warlike situations.

As emphasized by the Human Rights Committee, “the right of everyone under article 16 to be recognized everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status.”² As pointed out by the Committee,

“this right implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground. It also implies that women may not be treated as objects to be given, together with the property of the deceased husband, to his family.”³

Legal personality also means that women must have full and unimpeded access to the legal institutions of their country for the purpose of vindicating their rights and obtaining compensation or restoration where they are violated.⁴

Women have a right to legal personality on an equal basis with men. This right is absolute and must be guaranteed in all circumstances and at all times.

²General Comment No. 28 (Article 3 – Equality of rights between men and women), in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (hereinafter referred to as *United Nations Compilation of General Comments*), p. 171, para. 19.

³*Ibid.*, loc. cit.

⁴See further *infra*, section 10.

3. Women's Right to Equality Before the Law and Equal Protection of the Law

3.1 The Charter of the United Nations and the International Bill of Human Rights

According to article 1(3) of the Charter of the United Nations, one of the purposes of the Organization is “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, **sex**, language, or religion” (emphasis added). The same principle of equality between men and women is stated in articles 13(1)(b), 55(c) and 76(c). The drafters were thus convinced of the need for gender equality in the enjoyment of rights in the post-war world. At the universal level, the prohibition of discrimination on the basis of sex was subsequently included in article 2 of the Universal Declaration of Human Rights, articles 2(1), 4(1) and 26 of the International Covenant on Civil and Political Rights and article 2(2) of the International Covenant on Economic, Social and Cultural Rights. By virtue of article 3 of both Covenants, the States parties further expressly undertake to ensure the equal right of men and women to the enjoyment of all the rights guaranteed by the respective Covenant.

3.2 The Convention on the Elimination of All Forms of Discrimination against Women, 1979

Discrimination based on sex became the exclusive focus of the *1979 Convention on the Elimination of All Forms of Discrimination against Women*, which entered into force on 3 September 1981. As of 10 May 2001, there were 168 States parties. The Convention was preceded by the *Declaration on the Elimination of Discrimination against Women*, proclaimed by the General Assembly in 1967. The Convention has become an important legal means of promoting the protection of the equal rights of women within the framework of the United Nations. The implementation of its provisions is reviewed by the Committee on the Elimination of Discrimination against Women.

For the purposes of the Convention, article 1 states that:

“the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil *or any other field*.” (emphasis added).

As explained by the Committee on the Elimination of Discrimination against Women, this definition also includes

“gender-based violence, that is, violence that is directed against a women because she is a women or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”⁵

It is important to note that this wide interpretation of the definition of discrimination means that “gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”⁶

The prohibition of discrimination against women thus extends beyond traditional categories of human rights to other fields where discrimination might occur. However, “temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination” as defined in the Convention; on the other hand, such measures “shall be discontinued when the objectives of equality of opportunity and treatment have been achieved” (art. 4(1)).

It is also important to point out that, contrary to the International Convention on the Elimination of All Forms of Racial Discrimination, which only refers to discrimination in the “field of public life” (art. 1(1)), the Convention on the Elimination of All Forms of Discrimination against Women has a wider field of application and also covers acts falling within the private sphere. As emphasized by the Committee on the Elimination of Discrimination against Women,

“discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”⁷

Under article 2 of the Convention, States parties more particularly “agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women” and to this end they undertake:

- ❖ “To embody the principle of equality of men and women in their national constitutions or other appropriate legislation ... and to ensure ... the practical realization of this principle” (art. 2(a));
- ❖ “To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women” (art. 2(b));
- ❖ “To establish effective legal protection of the equal rights of women ... and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination” (art. 2(c));

⁵General Recommendation No. 19 (Violence against women), *United Nations Compilation of General Comments*, p. 216, para. 6.

⁶*Ibid.*, loc. cit.

⁷*Ibid.*, p. 217, para. 9. On the possible responsibility of States under international human rights law for acts of private persons, see also Chapter 1, subsection 2.9 and Chapter 15.

- ❖ “To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation” (art. 2(d));
- ❖ “To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise” (art. 2(e));
- ❖ “To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” (art. 2(f));
- ❖ “To repeal all national penal provisions which constitute discrimination against women” (art. 2(g)).

The subsequent articles provide further details of States parties' obligations to eliminate discrimination against women, which include the following:

- ❖ “To modify the social and cultural patterns of conduct of men and women ... which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (art. 5(a));
- ❖ “To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases” (art. 5(b));
- ❖ To take “all appropriate measures, including legislation, to suppress all forms of trafficking in women and exploitation of prostitution of women” (art. 6), to eliminate discrimination against women in the political and public life of the country (arts. 7 and 8), and in education (art. 10), employment (art. 11), health care (art. 12) and other areas of economic and social life (art. 13), and to ensure the application of the Convention to women in rural areas (art. 14).

While many articles of the Convention are framed as general legal obligations of States parties to take “all appropriate measures” to eliminate discrimination against women, some set forth specific rights that must be guaranteed on a basis of equality to men and women such as:

- ❖ the right to education: women have the right, *inter alia*, to the same conditions for career and vocational guidance and for access to studies and to the same opportunities for access to scholarships and other grants (art. 10);
- ❖ the right to work, to the same employment opportunities, to free choice of profession and employment, to equal remuneration, to social security and to protection of health and safety in working conditions (art. 11);
- ❖ the right to family benefits, to bank loans, mortgages and other forms of financial credit and to participate in recreational facilities, sports and all aspects of cultural life (art. 13);
- ❖ the right of rural women to participate in the elaboration and implementation of development plans, to have access to adequate health care facilities, to benefit directly from social security programmes, to obtain all types of training and education, to organize self-help groups, to participate in all community activities, to have access to agricultural credit and loans, and to enjoy adequate living conditions (art. 14).

Lastly, the Convention imposes a specific duty on States parties to accord to women “equality with men before the law” and a legal capacity in civil matters identical to that of men (art. 15(1) and (2)), and requires them to ensure, “on a basis of equality of men and women” a number of rights relating to marriage and the family (art. 16). The meaning of a number of these obligations will be dealt with further below.

Other relevant universal treaties aiming at ensuring the equality of women in terms of the enjoyment of specific rights will be considered in the appropriate section below.

3.3 Regional human rights treaties

At the regional level, article 2 of the African Charter of Human and Peoples' Rights, article 1 of the American Convention on Human Rights, article 14 of the European Convention on Human Rights and Part V, article E, of the European Social Charter (Revised), 1996, all stipulate that the rights and freedoms set forth in these treaties shall be enjoyed without discrimination based on **sex**. Like article 26 of the International Covenant on Civil and Political Rights, Protocol No. 12 to the European Convention on Human Rights contains a general and independent prohibition of discrimination on certain grounds, which is not linked to the enjoyment of the rights guaranteed by the treaty. However, as of 8 June 2002, only Cyprus and Georgia had ratified this Protocol, which needs ten ratifications to enter into force. It should be pointed out that the non-discrimination provision contained in article 14 of the European Convention is linked to enjoyment of the rights and freedoms guaranteed by the Convention and its Additional Protocols and hence does not have an existence independent of those rights and freedoms.

Article 3 of the African Charter and article 24 of the American Convention further guarantee the right to equality before the law and the right to equal protection of the law.

3.4 The meaning of the principle of gender equality and non-discrimination between women and men

The general meaning of equality and non-discrimination is dealt with in some depth in Chapter 13, and references are made there to relevant examples of international case law and legal comments. The present chapter will therefore merely summarize the general meaning of the notion of equality of treatment and non-discrimination in international human rights law and then examine how the international monitoring bodies have dealt with the specific issue of gender equality.

3.4.1 The general meaning of equality and non-discrimination

The Human Rights Committee has emphasized that non-discrimination, “together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights”.⁸ However, not all distinctions made between persons and groups of persons can be regarded as discrimination in the true sense of the term. This follows from the consistent case law of the international monitoring bodies, according to which distinctions between people are justified provided that, in general terms, they are reasonable and imposed for an objective and legitimate purpose. The common features of the case law (also with respect to the equal rights of women) of the Human Rights Committee and the Inter-American and European Courts of Human Rights is summarized as follows in Chapter 13 in the light of some of their most detailed and authoritative rulings on the notion of equality of treatment and non-discrimination:

The principle of equality and non-discrimination does not mean that all distinctions made between people are illegal under international law.

Differentiations are legitimate and hence lawful provided that they:

- *pursue a legitimate aim such as affirmative action in order to deal with factual inequalities, and*
- *are reasonable given their legitimate aim.*

Alleged purposes for differential treatment that cannot be objectively justified and measures that are disproportionate to the attainment of a legitimate aim are unlawful and contrary to international human rights law.

In order to ensure the right to equality, States may have to treat differently persons whose situations are significantly different.

This basic interpretation is the point of departure for any member of the legal professions who has to consider allegations of discrimination in the exercise of rights and freedoms, including complaints regarding discrimination based on gender.

3.4.2 The meaning of equality between women and men

Although the principle of equality and non-discrimination in general human rights treaties is gender neutral in that it is equally applicable to alleged discrimination whether it originates from women or from men, it was considered necessary, as already noted, to include in the two International Covenants specific provisions emphasizing the obligation of States to ensure the equal right of men and women to the enjoyment of all the rights guaranteed by the respective treaty.

⁸See General Comment No. 18 (Non-discrimination), *United Nations Compilation of General Comments*, p. 134, para. 1.

In the case of the International Covenant on Civil and Political Rights, the Human Rights Committee believes that, contrary to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, which “deal only with cases of discrimination on specific grounds”,

“the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”⁹

The Human Rights Committee thus has a much wider field of competence in dealing with issues of discrimination than the Committees overseeing the implementation of the other two treaties.

With regard to the equality of rights between women and men as provided by article 3 of the Covenant, it implies, according to the Committee,

“that all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality. The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right. Consequently, States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant.”¹⁰

The obligation to ensure the rights contained in the Covenant without discrimination

“requires that States parties take all necessary steps to enable every person to enjoy those rights. These steps include the removal of obstacles to the equal enjoyment of such rights, the education of the population and of State officials to human rights, and the adjustment of domestic legislation so as to give effect to the undertakings set forth in the Covenant. The State party must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.”¹¹

Moreover, in the Committee’s view, articles 2 and 3 of the Covenant mandate the States parties “to take all steps necessary, including the prohibition of discrimination on the ground of sex, to put an end to discriminatory actions, *both in the public and the private sector*, which impair the equal enjoyment of rights”.¹²

⁹Ibid., p. 135, para. 7.

¹⁰Ibid., General Comment No. 28 (Article 3 – Equality of rights between men and women), p. 168, para. 2.

¹¹Ibid., p. 168, para. 3.

¹²Ibid., p. 168, para. 4; emphasis added.

The Committee adds in this connection that:

“Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incidence of prenatal sex selection and abortion of female fetuses. States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s right to equality before the law and to equal enjoyment of all Covenant rights.”¹³

The legal duty of States parties to ensure full and equal enjoyment of rights for all and, in particular, for men and women, thus covers all sectors of society. It should be noted that this obligation is immediate and thus neither progressive nor dependent on the available resources of the States parties concerned.

The Committee that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women has not yet made any general recommendation on article 1 of the Convention as such. The best sources of information about the Committee’s understanding of the concept of “discrimination against women” are therefore its comments on reports submitted by States parties and its general recommendations on specific issues.

Suffice it to recall in this regard that, as pointed out by the Committee, “discrimination under the Convention is not restricted to action by or on behalf of Governments”¹⁴ but also extends to private entities. In support of its view, the Committee refers to articles 2(e), 2(f) and 5 of the Convention which impose on States parties the legal duty to take all appropriate measures both “to eliminate discrimination against women by any person, organization or enterprise” and to modify existing laws, regulations, customs and practices as well as social and cultural patterns that constitute discrimination against women.¹⁵

These legal provisions clearly show that the States parties to this Convention also have a legal duty to take specific positive steps in all fields of society where gender discrimination exists, including positive steps to change entrenched discriminatory practices in the private domain, where women often suffer serious hardship, inter alia as a consequence of violence.

¹³Ibid., pp. 168-169, para. 5.

¹⁴Ibid., General Recommendation No. 19 (Violence against women), p. 217, para. 9.

¹⁵Ibid. For further details of these legal provisions see above (sub-section 3.2).

Although not legally binding per se, the *Vienna Declaration and Programme of Action* is an important statement of principles and policy that was unanimously adopted by the States participating in the World Conference on Human Rights in 1993; according to the Declaration, the “human rights of women and of the girl child are an inalienable, integral and indivisible part of universal human rights” and the “full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are *priority objectives* of the international community.”¹⁶ The *Beijing Declaration and Platform for Action* was likewise adopted unanimously by the participating States; paragraph 1 of the Mission Statement opening the Platform states that it aims inter alia at “removing all the obstacles to women’s active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making”.¹⁷

Given that the world’s Governments have an all-inclusive legal duty to eliminate gender-based discrimination in their countries, judges, prosecutors and lawyers also have a professional responsibility to examine alleged violations of the right to equality and non-discrimination on the basis of gender, regardless of the origin of the alleged discrimination.

Women have the right to equality with men before the law. This right to legal equality is independent of a woman’s civil status.

The prohibition of discrimination based on sex includes gender-based violence.

Women’s right to legal equality with men means that States have to eliminate all legal and factual discrimination against women in both the public and private sectors. It also implies that States are duty bound, as a minimum, to take all appropriate measures to modify local customs and traditions that may impede the full realization of women’s right to equality.

¹⁶See UN doc. A/CONF.157/23, Part I, para. 18; emphasis added. The United Nations General Assembly subsequently endorsed the Declaration and its recommendations without a vote by resolution 48/121 of 20 December 1993.

¹⁷For the text of the Beijing Declaration and Platform for Action, see www.un.org/womenwatch/daw/beijing/platform; the Declaration and Platform for Action was subsequently endorsed by the United National General Assembly without a vote by resolution 50/42 of 8 December 1995. For information about the Special Session of the General Assembly that assessed progress made since the 1995 Beijing Conference, see www.un.org/womenwatch/confer/beijing5/.

4. Women's Right to Respect for their Life and their Physical and Mental Integrity

4.1 Relevant legal provisions

Women have the right to respect for their life, their right to freedom from torture and cruel, inhuman or degrading treatment and punishment, and their right to liberty and security of person as guaranteed by all general human rights treaties (e.g. articles 6, 7 and 9 of the International Covenant on Civil and Political Rights, articles 4, 5 and 6 of the African Charter on Human and Peoples' Rights, articles 4, 5 and 7 of the American Convention on Human Rights and articles 2, 3 and 5 of the European Convention on Human Rights).¹⁸

The only universal legal document dealing *expressis verbis* with violence against women, is the ***Declaration on the Elimination of Violence against Women***, which was adopted by the United Nations General Assembly in 1993¹⁹ and which states that:

“the term ‘violence against women’ means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.”

Violence against women is given a wide meaning in article 2 of the Declaration. It is understood to encompass, but is not limited to, the following:

- “(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.”

Article 3 of the Declaration confirms, in a limited way, what is already evident from the general application of international human rights law, namely that “women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” It may be

¹⁸On these issues, see Chapters 5 and 8 of this Manual.

¹⁹General Assembly resolution 48/104 adopted on 20 December 1993.

noted that the ensuing list, which is admittedly non-exhaustive, makes no reference to such important rights as freedom of opinion, belief, religion, expression and movement, without which women are unlikely to be able to vindicate their rights efficiently.

The Declaration also identifies measures to be taken both by individual States and by the organs and specialized agencies of the United Nations to eliminate violence against women in both the public and private spheres (arts. 4-5).

Although it is not legally binding per se, the Declaration provides strong evidence that the violent acts it describes constitute infringements of international human rights law by the States Members of the United Nations. The Declaration can thus also be useful in interpreting relevant provisions of both international and national law aimed at protecting the physical and mental integrity of women.

While there is no treaty dealing *expressis verbis* with gender violence at the universal level, the Committee on the Elimination of Discrimination against Women has made it clear, as noted in sub-section 3.2 above, that the definition of discrimination contained in article 1 of the Convention on the Elimination of All Forms of Discrimination against Women also covers gender-based violence, notwithstanding the fact that the provisions of the Convention do not expressly mention violence. The Committee has also interpreted articles 2, 5, 11, 12 and 16 of the Convention as requiring the States parties “to act to protect women against violence of any kind occurring within the family, at the workplace or in any area of social life”.²⁰ The Committee further holds that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men,”²¹ and such violence, “which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention”.²²

So far, only one treaty deals exclusively with the widespread problem of violence against women, namely the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women*, which is also called the “Convention of Belém do Pará” and which was adopted by the General Assembly of the Organization of American States in 1994. According to article 2 of this Convention:

²⁰General Recommendation No. 12 (Violence against women), *United Nations Compilation of General Comments*, p. 209.

²¹*Ibid.*, General Recommendation No. 19 (Violence against women), p. 216, para. 1.

²²*Ibid.*, p. 217, para. 7. The General Recommendation also gives examples of how violence can negatively affect the enjoyment of a number of rights such as those in articles 6, 11, 12, 14 and 16(5), and provides a list of specific recommendations to States parties aimed at overcoming gender-based violence.

“Violence against women shall be understood to include physical, sexual and psychological violence:

- a. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the women, including, among others, rape, battery and sexual abuse;
- b. that occurs in the community and is perpetrated by the person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and
- c. that is perpetrated or condoned by the state or its agents regardless of where it occurs.”

The Convention goes on to state that “every woman has the right to be free from violence in both the public and private spheres” (art. 3) and the States Parties recognize that “violence against women prevents and nullifies the exercise” of the civil, political, economic, social and cultural rights embodied in regional and international human rights instruments, the “free and full exercise” of which women are entitled to enjoy (art. 5).

According to article 6 of the Convention, a woman’s right to be free from violence, includes, inter alia, “the right ... to be free from all forms of discrimination” and “the right to be valued and educated free of stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination”.

Articles 7 and 8 lay down measures that States parties have to take either “without delay” (art. 7) or “progressively” (art. 8) in order to prevent, punish and eradicate violence against women. In adopting such measures:

“the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.”

This provision is an important admission of the precariousness (to which reference was already made in the Introduction) of special groups of women, whose situation is particularly dramatic and who may therefore need special protection from the legal professions against acts of violence.

Every woman has the right to respect for her life and for her physical and mental integrity on an equal basis with men.

Gender-based violence and threats of such violence are prohibited by international human rights law, whether such acts occur in the public or private sphere.

Violence against women impairs or nullifies their right to enjoy their rights and freedoms on a basis of equality with men.

Women in vulnerable situations must be given special attention and protection against acts of violence.

4.2 The right to life

While the terms of the various human rights treaties vary to some extent, their common basic rule is that women, like men, have the right not to be arbitrarily deprived of life (article 6 of the International Covenant on Civil and Political Rights, article 4 of the African Charter on Human and Peoples' Rights, article 4 of the American Convention on Human Rights and article 2 of the European Convention on Human Rights). Article 4(a) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women states that every woman has “the right to have her life respected”.

With regard to the *death penalty*, article 6(5) of the International Covenant and article 4(5) of the American Convention contain a specific provision outlawing its application to pregnant women, a case in which “the enjoyment of rights and freedoms on an equal footing ... does not mean identical treatment in every instance”.²³

The Human Rights Committee states that the “inherent right to life” as guaranteed by article 6 of the International Covenant “cannot properly be understood in a restrictive manner” and that its protection “requires that States adopt positive measures”.²⁴ Basing itself on this wide interpretation, the Committee also considers, for instance, “that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics”.²⁵

4.2.1 Abduction and murder

Violence against women involving abduction and murder as well as extrajudicial killings by security forces are, of course, strictly forbidden under international human rights law. Whether committed by government officials or family members, such illegal acts must be investigated and punished. Moreover, Governments have a legal duty under international law to prevent them from taking place.²⁶

The Human Rights Committee expressed concern in the case of Mexico “at the level of violence against women, including the many reported cases of abduction and murder which have not led to the arrest or trial of the perpetrators”; the State Party should

²³Human Rights Committee, General Comment No. 18 (Non-discrimination), *United Nations Compilation of General Comments*, p. 135, para. 8.

²⁴*Ibid.*, General Comment No. 6 (art. 6), p. 115, para. 5.

²⁵*Ibid.*, loc. cit.

²⁶On the duty of Governments to prevent, investigate and remedy human rights abuses, see Chapter 15 of this Manual.

“take effective measures to protect the security of women to ensure that no pressure is brought to bear on them to deter them from reporting such violations, and to ensure that all allegations of abuse are investigated and the perpetrators brought to justice”.²⁷

The Committee also expressed concern about the level of violence against women in Venezuela, “including the many reported cases of kidnapping and murder that have not resulted in arrests or prosecution of those responsible”. It recommended that the State Party “should take effective measures to guarantee women’s safety”, stating that the issue raised “serious concerns” under article 6 of the Covenant.²⁸

In the case of *Velásquez Rodríguez*, the Inter-American Court of Human Rights held that the practice of disappearances violated many provisions and constituted “a radical breach” of the American Convention on Human Rights in that it showed “a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention”.²⁹ For a State party to incur responsibility under the Convention for an alleged disappearance, it is not conclusive that there is evidence that the State itself is directly responsible for the act. As stated by the Court, “what is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible;” in other words, the State has “a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.³⁰ States’ legal responsibilities are thus far-reaching, although they may not themselves be directly involved, for instance, in the abductions. For more information on States’ duty to prevent, investigate, punish and compensate human rights violations, see Chapter 15 of this Manual.

4.2.2 Dowry violence and “honour” killings

In some countries, the bride’s family has to pay a dowry to the bridegroom’s family, the sum of which is agreed upon by the families. If for some reason the dowry is not paid or is considered to be too small, violence against the bride can ensue, and in some communities she may even be burned alive or disfigured by sulphuric acid either by her husband or by his family.³¹ “Honour” killings take place in a number of countries. A male member of the family kills a girl or woman who has “erred” in her

²⁷UN doc. GAOR, A/54/40 (vol. I), p. 64, para. 328.

²⁸UN doc. GAOR, A/56/49 (vol. I), p. 52, para. 17.

²⁹I-A Court HR, *Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C, No. 4*, p. 149, para. 158.

³⁰*Ibid.*, pp. 154-155, paras. 173-174.

³¹See, for example, Carin Benninger-Budel and Anne-Laurence Lacroix, *Violence against Women – A Report* (Geneva, World Organization against Torture (OMCT), 1999), pp. 119-120.

conduct, a “mistake” that is considered to justify the taking of her life; alternatively, a man from outside the family circle may be hired to commit the crime.

The Committee on the Elimination of Discrimination against Women has stated with regard to articles 2(f), 5 and 10(c) of the Convention on the Elimination of All Forms of Discrimination against Women that “traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.”³²

The Committee expressed concern about violence against women in Jordan and Iraq in the form of “honour” killings; under article 340 of the Jordanian Penal Code, for instance, “a man who kills or injures his wife or his female kin caught in the act of adultery” is excused.³³ The Committee urged Jordan “to provide all possible support for the speedy repeal of article 340 and to undertake awareness-raising activities that make ‘honour killings’ socially and morally unacceptable”.³⁴ As women in Jordan threatened by “honour” killings are jailed for their own protection, the Committee also urged the Government “to take steps that ensure the replacement of protective custody with other types of protection for women”.³⁵ The Committee urged Iraq “in particular to condemn and eradicate honour killings and ensure that these crimes are prosecuted and punished in the same way as other homicides”.³⁶

The Committee on Economic, Social and Cultural Rights also expressed concern, in the case of Jordan, “at the fact that crimes against women perpetrated in the name of honour go unpunished”.³⁷

4.2.3 Female genital mutilation

Female genital mutilation is a practice that is widespread in certain parts of the world and may have serious implications for girls’ health, even causing death through the use of unsterilized surgical tools or owing to poor general hygiene during the intervention. The harmfulness of female genital mutilation has been documented by the World Health Organization.³⁸

³²See General Recommendation No. 19 (Violence against women), *United Nations Compilation of General Comments*, pp. 217-218, para. 11.

³³UN doc. GAOR, A/55/38, p. 20, para. 178 (Jordan), and p. 69, para. 193 (Iraq).

³⁴*Ibid.*, p. 20, para. 179.

³⁵*Ibid.*, loc. cit.

³⁶*Ibid.*, p. 69, para. 194.

³⁷UN doc. E/2001/22 (E/C.12/2000/21), p. 51, para. 236.

³⁸See in general WHO web site: www.ilo.int/ and also references in **Handout No. 1**.

The Committee on the Elimination of Discrimination against Women has recommended that States parties to the Convention on the Elimination of All Forms of Discrimination against Women should ensure “the enactment and effective enforcement of laws that prohibit female genital mutilation”.³⁹ It has also recommended that States parties “take appropriate and effective measures with a view to eradicating the practice of female circumcision”. Such measures could include:

- ❖ the collection and dissemination of basic data about such traditional practices;
- ❖ the support of women’s organizations working for the elimination of female circumcision and other practices harmful to women;
- ❖ the encouragement of politicians, professionals, religious and community leaders at all levels including the media and the arts to cooperate in influencing attitudes towards the eradication of female circumcision;
- ❖ the introduction of appropriate educational and training programmes and seminars based on research findings about the problems arising from female circumcision;
- ❖ the inclusion in national health policies of appropriate strategies aimed at eradicating female circumcision in public health care.⁴⁰

With regard to Egypt, the same Committee welcomed the Minister of Health’s Decree of 1996 imposing a ban on female genital mutilation, but it still expressed concern at the lack of information about implementation of the Decree.⁴¹

4.2.4 Abortion

The question of abortion is not expressly dealt with in the general international human rights treaties, but article 4(1) of the American Convention on Human Rights stipulates that the right to life “shall be protected by law, and, in general, from the moment of conception”, a provision that seems to exclude any unconditional resort to abortion even during the first weeks of pregnancy. On the other hand, it has been argued that unduly restrictive abortion laws may endanger the life and health of pregnant women who resort to clandestine interruptions of pregnancy.

Examining this issue under article 6 of the International Covenant on Civil and Political Rights, the Human Rights Committee stated, with regard to the situation in Guatemala, that “the criminalization of all abortion, with the severe penalties imposed by the legislation in force except where the mother’s life is in danger, gives rise to serious problems, especially in the light of unchallenged reports of serious impact on maternal mortality of clandestine abortions and the lack of information on family planning;” in the Committee’s view, the State party therefore had the duty

³⁹See General Recommendation No. 24 (Article 12 – Women and health), *United Nations Compilation of General Comments*, p. 248, para. 15(d).

⁴⁰*Ibid.*, General Recommendation No. 14 (Female circumcision), pp. 211-212, subparagraphs (a) and (b).

⁴¹UN doc. *G.AOR*, A/56/38, p. 36, para. 348.

“to adopt the necessary measures to guarantee the right to life (art. 6) of pregnant women who decide to interrupt their pregnancy by providing the necessary information and resources to guarantee their rights and amending the legislation to provide for exceptions to the general prohibition of all abortions, except when the mother’s life is in danger”.⁴²

The Committee also suggested that Costa Rican legislation on abortion be amended to allow for exceptions to the general prohibition of the interruption of pregnancy in that country.⁴³ Peruvian legislation has also been “a matter of concern” to the Committee, since it penalizes abortions even where pregnancy is the result of rape. Noting that clandestine abortion continues to be the main cause of maternal mortality in Peru,⁴⁴ the Committee reiterated that such legal provisions “are incompatible with articles 3, 6 and 7 of the Covenant” and recommended “that the legislation should be amended to establish exceptions to the prohibition and punishment of abortion”.⁴⁵

The Committee on the Elimination of Discrimination against Women expressed concern, in the case of Jordan, “that the prohibition of abortion also applies to cases where pregnancy is due to rape or incest” and called on the Government “to initiate legislative action to permit safe abortion for victims of rape and incest”.⁴⁶

4.2.5 *Infant mortality and life expectancy*

Given its wide understanding of the right to life and the ensuing responsibilities of States parties to act positively to protect it, including the aforementioned duty to take measures to reduce infant mortality and increase life expectancy, the Human Rights Committee stated, in the case of the Democratic People’s Republic of Korea, that it remained “seriously concerned about the lack of measures taken by the State party to deal with the food and nutrition situation in the DPRK and the lack of measures taken to address, in cooperation with the international community, the causes and consequences of the drought and other natural disasters which seriously affected the country’s population in the 1990s”.⁴⁷ This duty of States parties under article 6 of the Covenant to take positive measures to reduce infant mortality and increase life expectancy by dealing with the root causes of the problems affecting the population’s life cycle is particularly important in the case of women and the girl child, who often have to carry an undue burden in times of scarcity of food and inadequate health care. Women and children must therefore at all times have access to food and health care on an equal footing with men.

⁴²UN doc. GAOR, A/56/40 (vol. I), p. 96, para. 19.

⁴³UN doc. GAOR, A/54/40 (vol. I), p. 55, para. 280.

⁴⁴UN doc. GAOR, A/56/40 (vol. I), p. 48, para. 20.

⁴⁵Ibid., loc. cit.

⁴⁶UN doc. GAOR, A/55/38, p. 20, paras. 180-181.

⁴⁷UN doc. GAOR, A/56/40 (vol. I), p. 100, para. 12.

Women's right to life must be respected at all times.

States have a corresponding legal duty positively to protect women's life.

Violence, including abduction, murder and extrajudicial killings, are strictly prohibited at all times.

Violence linked to dowry or "honour" killings are strictly prohibited by international law and must be prevented, prosecuted and punished by the State concerned.

Female genital mutilation is harmful to the health and life of women and contrary to international law. States have a duty to take appropriate and effective measures to eradicate this practice.

To prevent maternal mortality, national legislation must, as a minimum, provide for the possibility of abortion in cases where, for example, the health of the mother is in danger, and in cases of rape or incest.

The death penalty may not be imposed on pregnant women.

States have a legal responsibility under international law to take positive measures to reduce infant mortality and increase life expectancy by dealing with the root causes and providing women with equal access to food and health care.

4.3 The right to freedom from torture and other cruel, inhuman or degrading treatment or punishment

Women have the basic right at all times effectively to enjoy freedom from torture and from cruel, inhuman or degrading treatment or punishment (see article 7 of the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 5 of the African Charter on Human and Peoples' Rights, article 5(2) of the American Convention on Human Rights, article 4 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, article 3 of the European Convention on Human Rights and the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment). The right to freedom from torture and other ill-treatment must be ensured at all times and cannot be derogated from in public emergencies (article 4(2) of the International Covenant, article 27(2) of the American Convention and article 15(2) of the European Convention).

Without being in any way exhaustive, this sub-section will consider institutional, institutionalized, domestic and community violence against women.

4.3.1 Violence against women deprived of their liberty

The general international human rights treaties do not *expressis verbis* recognize the fact that women deprived of their liberty are in a particularly vulnerable situation and therefore need special protection against violence such as sexual abuse on the part of prison officials. Only in article 7(a) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women do the States parties undertake to refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with the obligation to prevent, punish and eradicate violence against women.

With regard to the treatment of detainees, article 10(1) of the International Covenant on Civil and Political Rights stipulates, more specifically, that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” In a similar vein, article 5(2) of the American Convention on Human Rights stipulates that “all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.” Lastly, according to Rule 8(a) of the United Nations Standard Minimum Rules for the Treatment of Prisoners:

“Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate.”

If strictly applied, this rule of separation of categories of prisoners helps to protect female prisoners. However, they are still vulnerable to abuse by prison officials and guards, especially if they are men.

The international monitoring bodies have so far paid relatively scant attention to the problem of abuse of women in police custody or otherwise deprived of their liberty. However, in General Comment No. 28, the Human Rights Committee emphasizes that “States parties must provide all information relevant to ensuring that the rights of persons deprived of their liberty are protected on equal terms for men and women. In particular, States parties should report on whether men and women are separated in prisons and whether women are guarded only by female guards. States parties should also report about compliance with the rule that *accused juvenile females* shall be separated from adults and on any difference in treatment between male and female persons deprived of liberty, such as access to rehabilitation and education programmes and to conjugal and family visits. *Pregnant women who are deprived of their liberty* should receive humane treatment and respect for their inherent dignity at all times, and in particular during the birth and while caring for their newborn children.”⁴⁸

⁴⁸General Recommendation No. 28 (Article 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 170, para. 15. Emphasis added.

The Human Rights Committee has stated, for instance, that the many allegations of rape and torture of women detained in Mexico and Venezuela by the security forces in those countries raise “serious concerns” under article 7 of the International Covenant on Civil and Political Rights; the States Parties should therefore “take effective measures to guarantee women’s safety, ensure that no pressure is put on them to dissuade them from reporting such violations, that all allegations of abuses are investigated and that those committing such acts are brought to justice”.⁴⁹

The Committee against Torture has recently begun to ask States parties to the Convention against Torture to provide data disaggregated by gender “on civil and military places of detention as well as on juvenile detention centres and other institutions where individuals may be vulnerable to torture or ill-treatment”.⁵⁰ When examining the initial report of Kazakhstan, the Committee expressed concern about “the absence of information in the report regarding torture and ill-treatment affecting women and girls, particularly in view of the rise in imprisonment rates of females and allegations of abusive treatment of women in police custody”.⁵¹ In the case of Canada, it expressed concern about allegations that female detainees had been “treated harshly and improperly by the authorities of the State party, and that many recommendations of the Arbour report [had] yet to be implemented”.⁵²

The Committee against Torture also expressed concern, in the case of the United States, about alleged “cases of sexual assault upon female detainees and prisoners by law enforcement officers and prison personnel”; in the Committee’s view, female “detainees and prisoners are also very often held in humiliating and degrading circumstances”.⁵³ The Committee recommended in general that the State party take “such steps as are necessary to ensure that those who violate the Convention are investigated, prosecuted and punished, especially those who are motivated by discriminatory purposes or sexual gratification”.⁵⁴ In the case of the Netherlands, the Committee expressed concern about the “inadequate deployment of female officers” (i.e. law enforcement officers).⁵⁵

When examining the third periodic report of Egypt, the Committee further expressed concern at the allegation by the World Organization against Torture concerning the “treatment of female detainees, by both the police and the State Security Intelligence, which sometimes involves sexual abuse or threat of such abuse in order to obtain information relating to husbands or other family members”; the Committee therefore recommended that “effective steps be taken to protect women from threats

⁴⁹UN docs. *GAOR*, A/54/40 (vol. I), p. 64, para. 328 (Mexico), and *GAOR*, A/56/40 (vol. I), p. 52, para. 17 (Venezuela); the quotation is from the latter report but the content is the same as in the report concerning Mexico.

⁵⁰See, for example, with regard to Kazakhstan, UN doc. *GAOR*, A/56/44, p. 55, para. 129(m).

⁵¹*Ibid.*, p. 54, para. 128(f).

⁵²*Ibid.*, p. 26, para. 58(b); the report referred to was: *Commission of Inquiry into Certain Events at the Prisons for Women at Kingston*, Commissioner: The Honorable Louise Arbour, Canada, 1996.

⁵³UN doc. *GAOR*, A/55/44, p. 32, para. 179(d).

⁵⁴*Ibid.*, p. 32, para. 180(b).

⁵⁵*Ibid.*, p. 34, para. 187(a).

of sexual abuse by police and officers of the State Security Intelligence as a means of obtaining information from them”.⁵⁶

For information on case law concerning rape as torture, see Chapter 8, sub-section 2.3.1, of this Manual.

It is vitally important that judges, prosecutors and lawyers pay particular attention to the special needs and vulnerability of women in custody, that they examine allegations of ill-treatment, including sexual abuse, with diligence and efficiency and that they are alert to any sign of torture or other kinds of ill-treatment of women, who might not dare to denounce the perpetrators of such violence.

4.3.2 Unlawful punishments

According to the Human Rights Committee, “the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim;” in the Committee’s view, moreover, “the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.”⁵⁷ This view was confirmed in the *Osbourne* case, where the author had been given a 15-year prison sentence with hard labour and ordered to receive ten strokes of the tamarind switch for illegal possession of a firearm, robbery with aggravation and wounding with intent. It was “the firm opinion of the Committee” in this case that, irrespective of “the nature of the crime that is to be punished, however brutal it may be, ... corporal punishment constitutes *cruel, inhuman and degrading treatment or punishment*” contrary to article 7 of the Covenant, which was thus violated.⁵⁸ The Committee informed the Government that it was “under an obligation to refrain from carrying out the sentence of whipping upon Mr. Osbourne” and, further, that it “should ensure that similar violations do not occur in the future by repealing the legislative provisions that allow for corporal punishment”.⁵⁹

With regard to Namibia, the Committee against Torture recommended “the prompt abolition of corporal punishment” insofar as it was still legally possible under Namibian law to impose such punishment.⁶⁰

⁵⁶UN doc. GAOR, A/54/44, p. 23, paras. 209 and 212.

⁵⁷General Comment No. 20 (Article 7), *United Nations Compilation of General Comments*, p. 139, para. 5.

⁵⁸Communication No. 759/1997, *G. Osbourne v. Jamaica* (Views adopted on 15 March 2000), in UN doc. GAOR, A/55/40 (vol. II), p. 138, para. 9.1; emphasis added

⁵⁹Ibid., p. 138, para. 11.

⁶⁰UN doc. GAOR, A/52/44, p. 37, para. 250.

The prohibition of corporal punishment is, of course, equally applicable to women, who may, for instance, run the risk of flogging or stoning if they have not complied with a certain *dress code* or if, as illustrated by the two cases described below, they have committed *adultery*. The Human Rights Committee has therefore asked States parties to provide information in their reports “on any specific regulation of clothing to be worn by women in public”, stressing that such regulations “may involve a violation of a number of rights” contained in the International Covenant on Civil and Political Rights, such as article 7, “if corporal punishment is imposed in order to enforce such a regulation”.⁶¹ The following two cases involving the possible imposition of corporal punishment for having committed adultery were brought, respectively, under the Convention against Torture and the European Convention on Human Rights. The outcome of these cases showed, quite importantly, that there is consistency among the international monitoring bodies in their understanding of the concept of “torture” and other kinds of ill-treatment outlawed by international human rights law.

Female refugees and asylum-seekers may have an interest in not being returned to their country of origin because they risk being subjected, for instance, to torture or cruel punishment. In the case of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, this possibility has to be considered under article 3(1), which reads as follows:

- “1. No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

The Committee against Torture has described the determination of risk under article 3 in the following terms:

“The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of

⁶¹General Comment No. 28 (Article 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 170, para. 13. Other articles of the Covenant that may be violated by regulations imposing a dress code are: article 26 on non-discrimination; article 9 “when failure to comply with the regulation is punished by arrest”; article 12, “if liberty of movement is subject to such a constraint”; article 17, “which guarantees all persons the right to privacy without arbitrary or unlawful interference”; articles 18 and 19, “when women are subjected to clothing requirements that are not in keeping with their religion or their right of self-expression”; and, lastly, article 27, “when the clothing requirements conflict with the culture to which the women can lay a claim”.

human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.”⁶²

In this particular case, the author, an Iranian citizen, had applied for asylum in Sweden for herself and her son. The author stated that she was “the widow of a martyr and as such supported and supervised by the *Bonyad-e Shabid* Committee of Martyrs”; she claimed furthermore that she had been forced into a *sighe* or *mutab* marriage and that she had “committed and been sentenced to stoning for adultery”.⁶³ Although the Swedish Government questioned her credibility, the Committee against Torture ruled in her favour and decided that the State Party had “an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the author to the Islamic Republic of Iran or to any other country where she [ran] a risk of being expelled or returned to the Islamic Republic of Iran”.⁶⁴ The Committee thus accepted that the author would run the risk of being sentenced to stoning for adultery if returned to her country of origin. In arriving at its decision the Committee referred to a report of the United Nations Special Representative on the situation of human rights in the Islamic Republic of Iran as well as to “numerous reports of non-governmental organizations”, which confirmed that married women had recently been sentenced to death by stoning for adultery.⁶⁵

The situation in the case of *Jabari* – which was brought under article 3 of the European Convention on Human Rights – was similar in that the applicant, an Iranian citizen, alleged that “she would be subjected to a real risk of ill-treatment and death by stoning if expelled from Turkey” to the Islamic Republic of Iran.⁶⁶ While attending a secretarial college in the Islamic Republic of Iran, the applicant had met a man with whom she fell in love; after some time they decided to get married but her friend’s family opposed the marriage and he married another women; however, the applicant and her former friend continued to see each other and to have sexual relations until they were stopped one day by policemen and detained.⁶⁷ The applicant underwent a virginity test in custody but was eventually released with the help of her family; she entered Turkey illegally and then tried to go to Canada via France where she was caught using a forged Canadian passport.⁶⁸ She was thereupon returned to Istanbul. Back in Turkey, the Office of the United Nations High Commissioner for Refugees (UNHCR) granted her refugee status “on the basis that she had a well-founded fear of persecution if removed to Iran as she risked being subjected to inhuman punishment, such as death by stoning, or being whipped or flogged”.⁶⁹

⁶²See Communication No. 149/1999, *A.S. v. Sweden* (Views adopted on 24 November 2000), in UN doc. *GAOR*, A/56/44, pp. 184-185, para. 8.3.

⁶³*Ibid.*, p. 185, para. 8.4.

⁶⁴*Ibid.*, pp. 185-185, paras. 8.5 and 9.

⁶⁵*Ibid.*, p. 185, para. 8.7.

⁶⁶*Eur. Court HR, Case of Jabari v. Turkey, Judgment of 11 July 2000*, para. 3. The text used is that found at the Court’s web site: www.echr.coe.int/

⁶⁷*Ibid.*, paras. 9-11.

⁶⁸*Ibid.*, paras. 12-14.

⁶⁹*Ibid.*, para. 18.

The European Court recalled its well established case law, according to which

“expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country.”⁷⁰

Importantly, the Court added that

“having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose that individual to treatment prohibited by Article 3.”⁷¹

In the case before it, the Court was “not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability” and it consequently gave “due weight to the UNHCR's conclusion on the applicant's claim in making its own assessment of the risk which would face the applicant if her deportation were to be implemented”; the UNHCR had “interviewed the applicant and had the opportunity to test the credibility of her fears and the veracity of her account of the criminal proceedings initiated against her in Iran by reason of her adultery”.⁷² Lastly, the Court stated that it was “not persuaded that the situation in the applicant's country [had] evolved to the extent that adulterous behaviour [was] no longer considered a reprehensible affront to Islamic law”, since adultery by stoning remained on the statute books and might be resorted to by the authorities.⁷³ Consequently, the Court found it “substantiated” that there was “a real risk of the applicant being subjected to treatment contrary to Article 3 if ... returned to Iran” and that her deportation to that country would constitute a violation of that article.⁷⁴

4.3.3 Violence against women and the girl child in families and the community in general

Violence, including sexual abuse of women and the girl child, is all too common in families, schools and the community in general, and its existence is, as seen above, a clear breach of various provisions of international human rights law, such as the right to freedom from ill-treatment and the right to personal security. *Although much of this violence takes place in the domestic sphere, Governments have a responsibility to act with due diligence to eradicate it.*

⁷⁰Ibid., para. 38.

⁷¹Ibid., para. 39.

⁷²Ibid., paras. 40-41.

⁷³Ibid., para. 41.

⁷⁴Ibid., para. 42.

In this connection, the Committee on the Elimination of Discrimination against Women has recommended that the States parties to the Convention on the Elimination of All Forms of Discrimination against Women “should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act” and that they should also, *inter alia*:

“ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention.”⁷⁵

In accordance with its recommendations, the Committee requested Iraq, for instance, to provide “a comprehensive picture with regard to violence against women in the State party, including information on legislation, statistical data on the types and incidence of violence against women and the responses to such violence by law enforcement officials, the judiciary, social workers and health-care providers”. It urged the Government “to encourage and support the establishment of facilities for women victims of domestic violence, such as telephone hotlines and shelters for battered women, and to launch a zero-tolerance campaign on violence against women so as to raise awareness about the problem and the need to combat it effectively”.⁷⁶

The Committee also urged the Government of the Republic of Moldova “to place high priority on measures to address violence against women in the family and in society, and to recognize that such violence, including domestic violence, constitutes a violation of the human rights of women under the Convention”; the Committee called on the Government “to ensure that such violence constitutes a crime punishable under criminal law, that it is prosecuted and punished with the required severity and speed, and that women victims of violence have immediate means of redress and protection”.⁷⁷ It further recommended “that measures be taken to ensure that public officials, especially law enforcement officials and the judiciary, are fully sensitized to all forms of violence against women”; lastly, it invited the Government “to undertake awareness-raising measures, including a campaign of zero tolerance, to make such violations socially and morally unacceptable”.⁷⁸

The Committee on the Elimination of Discrimination against Women also expressed concern about violence against women in Lithuania, in particular domestic violence, and urged the Government to amend article 118 of the Criminal Code “in order explicitly to define rape as sexual intercourse without consent”; it further urged the Government “to continue to pay serious attention to domestic violence against women, including through ongoing training of police officials, future lawyers and judges and through easy access to courts by the victims of domestic violence”.⁷⁹ Lastly, it recommended “the introduction of a specific law prohibiting domestic violence

⁷⁵General Recommendation No. 19 (Violence against women), *United Nations Compilation of General Comments*, p. 219, para. 24(a) and (b).

⁷⁶UN doc. GAOR, A/55/38, p. 68, para. 190.

⁷⁷*Ibid.*, p. 59, para. 102.

⁷⁸*Ibid.*, loc. cit.

⁷⁹*Ibid.*, p. 64, para. 151.

against women, which would provide for protection and exclusion orders and access to legal aid and shelters”.⁸⁰

The increase in violence against women in Romania was also an issue of concern to the Committee as well as “the absence of legislation criminalizing domestic violence, including marital rape, and the recognition of the defence of a so-called ‘reparatory marriage’ in the Criminal Code, which eliminates criminal liability of a rapist if the rape victim consents to marry him”; the Committee was also concerned that there was “no legislation concerning sexual harassment”.⁸¹

Lastly, the Committee expressed concern in the case of India about the exposure of women “to the risk of high levels of violence, rape, sexual harassment, humiliation and torture in areas where there are armed insurrections”; it therefore recommended “a review of prevention of terrorism legislation and the Armed Forces Special Provisions Act ... so that special powers given to the security forces do not prevent the investigation and prosecution of acts of violence against women in conflict areas and during detention and arrest”.⁸²

The Human Rights Committee has also focused on violence against women in *the private sphere*. With regard to Cambodia, for instance, the Committee expressed concern that marital rape was not an offence and that the authorities did not provide support for women complaining about domestic violence; the State party should therefore, in its view, “introduce measures to enable women to seek effective protection of the law in case of domestic violence”.⁸³ The Committee also expressed concern “that violence against women and domestic violence in particular is on the increase in Costa Rica” and it recommended “that all necessary measures, including the enactment of appropriate legislation, be taken to protect women in these areas”.⁸⁴

The Committee expressed concern about the continued existence in Venezuela “of a legal provision exempting a rapist from any penalty if he marries the victim”, adding that the State party “should immediately repeal this legislation, which is incompatible with articles 3, 7, 23, 26, 2(3) and 24 of the Covenant, particularly taking into account the early age at which girls can enter into marriage”.⁸⁵ The same concern was expressed with regard to the legislation of Guatemala which, moreover, requires a woman to be “honest” for the offence of rape to be held to have been committed; the Committee informed the State party that it should “immediately repeal this legislation, which is incompatible with articles 3, 23, 26 and 2(3) of the Covenant”.⁸⁶

⁸⁰Ibid., loc. cit.

⁸¹Ibid., p. 80, para. 306.

⁸²Ibid., p. 11, paras. 71-72. On the issue of “Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997/2000)”, see, for example, UN doc. E/CN.4/2001/73, *Violence against Women – Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy*, 45 pp.

⁸³UN doc. GAOR, A/54/40 (vol. I), p. 60, para. 309.

⁸⁴Ibid., p. 55, para. 281.

⁸⁵UN doc. GAOR, A/56/40 (vol. I), p. 52, para. 20.

⁸⁶Ibid., p. 97, para. 24.

The Committee on Economic, Social and Cultural Rights noted “with concern” that the problem of domestic violence against women in Egypt “is not being sufficiently addressed and that marital rape is not criminalized”.⁸⁷ With regard to Mongolia, the Committee stated that it was “deeply concerned about the adverse effects of the prevailing traditional values and practices and of poverty on women” and it deplored “the lack of facilities and the inefficiency of remedies for victims of domestic violence”, which was estimated to affect a third of the country’s women; the Committee urged the Government “to organize public campaigns to raise awareness about domestic violence, to criminalize spousal rape and to provide victims with shelters and adequate remedies”.⁸⁸ The “phenomenon of violence against women, including marital violence” was also a matter of concern in the case of Portugal.⁸⁹

The European Court of Human Rights made an important ruling in the case of *X and Y v. the Netherlands* regarding ***the duties of the Contracting States to the European Convention on Human Rights to provide victims of abuse caused by private individuals with “practical and effective protection”***. The case concerned the impossibility of having criminal proceedings instituted against the alleged perpetrator of a sexual assault carried out on a mentally handicapped girl, Miss Y. The alleged perpetrator was the son-in-law of the directress of the privately run home for mentally handicapped children where the girl was staying. The police took the view that Miss Y was incapable of filing a complaint herself and, as she was over 16 years of age, her father’s complaint could not be considered as a substitute; hence nobody was legally empowered to bring a criminal complaint on Miss Y’s behalf.⁹⁰

The Court stated that:

“although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life ... These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”⁹¹

It then found that:

“the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed it is by such provisions that the matter is normally regulated.”⁹²

⁸⁷UN doc. E/2001/22 /E/C.12/2000/21), p. 41, para. 162.

⁸⁸Ibid., p. 55, para. 270, and p. 56, para. 281.

⁸⁹Ibid., p. 72, para. 414.

⁹⁰*Eur. Court HR, Case of X and Y v. the Netherlands, Judgment of 26 March 1985, Series A, No. 91*, pp. 8-9, paras. 9-13.

⁹¹Ibid., p. 11, para. 23.

⁹²Ibid., p. 13, para. 27.

Considering that, for persons in the situation of Miss Y, there was a procedural obstacle to bringing criminal proceedings against the alleged perpetrator of an assault, the Court concluded that the Netherlands Criminal Code did not provide Miss Y “with practical and effective protection”; “taking account of the nature of the wrongdoing in question”, the Court concluded that she was a victim of a violation of article 8 of the European Convention on Human Rights.⁹³

Another notable case in this regard is that of *A v. the United Kingdom*, which, although it concerns the beating of a boy child by his stepfather, has equally important implications for the duty of States to protect the girl child. The applicant, who was nine years old at the relevant time, was “found by the consultant paediatrician ... to have been beaten with a garden cane which had been applied with considerable force on more than one occasion”; in the view of the Court, this treatment reached the level of severity prohibited by article 3 of the European Convention on Human Rights.⁹⁴ The question that had to be determined therefore was “whether the State should be held responsible, under Article 3, for the beating of the applicant by his stepfather”.⁹⁵ The Court considered:

“ that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, **including such ill-treatment administered by private individuals** ... Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity. ”⁹⁶

Under English law, it was “a defence to a charge of assault on a child that the treatment in question amounted to ‘reasonable chastisement’”, and it was “on the prosecution to establish beyond reasonable doubt that the assault went beyond the limits of lawful punishment”; although the applicant had been subjected to treatment considered to be of sufficient severity to fall within the scope of article 3 of the Convention, his stepfather had been acquitted by the jury.⁹⁷ In the Court’s opinion, therefore, the law did not provide adequate protection to the applicant and this failure constituted a violation of article 3 of the Convention.⁹⁸

For more information on the duty of States to protect human rights, see Chapter 15 below.

⁹³Ibid., p. 13, para. 27, and p. 14, para. 30.

⁹⁴*Eur. Court HR, Case of A v. the United Kingdom, Judgment of 23 September 1998, Reports 1998-VI, p. 2699, para. 21.*

⁹⁵Ibid., p. 2699, para. 22.

⁹⁶Ibid., loc. cit.; emphasis added.

⁹⁷Ibid., pp. 2699-2700, para. 23.

⁹⁸Ibid., p. 2700, para. 24.

4.4 Violence against women as crimes against humanity and war crimes

In conclusion, it is important to point out in this context that, according to both article 5(f) and (g) of the Statute of the International Tribunal for the Former Yugoslavia and article 3(f) and (g) of the Statute of the International Tribunal for Rwanda, *torture* and *rape* are considered to constitute *a crime against humanity* when committed against any civilian population in the course of an armed conflict. Moreover, pursuant to article 4 of its Statute, the International Tribunal for Rwanda has the power to prosecute persons committing or ordering to be committed serious violations of article 3 common to the Geneva Conventions of 1949, including the 1977 Protocol Additional thereto. Article 4(e) and (h) specifies that these violations shall include “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”, including threats to commit such acts.

According to article 7 of the 1998 Statute of the International Criminal Court, the concept of a *crime against humanity* covers not only such acts as murder, extermination, enslavement, torture and deportation or forcible transfer of population but also rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization “or any other form of sexual violence of comparable gravity” (art. 7(g)). However, to constitute a “crime against humanity”, these acts must be committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Such acts may also constitute serious *war crimes* in both international and non-international armed conflicts (art. 8(2)(b)(xxii) and (e)(vi) respectively).

For more information on the protection of human rights in times of crisis, see Chapter 16 concerning “The Administration of Justice during States of Emergency”.

Women have the right to freedom from torture and from cruel, inhuman or degrading treatment or punishment at all times, including in times of emergency.

Women deprived of their liberty must be treated with humanity and given special protection against violence and sexual abuse.

Corporal punishment is prohibited by international law, also when imposed on women for reasons of adultery or for having violated specific dress codes.

A woman must not be returned to a country where she runs a serious risk of being subjected to torture or other treatment contrary to international law.

Domestic and community violence against women is contrary to international law. States have a legal duty to take immediate and effective measures to eradicate all forms of gender-based violence in society. This duty implies, inter alia, that States must also provide adequate and effective protection under criminal law to victims of violence by private individuals.

5. Women's Right to Freedom from Slavery, the Slave Trade, Forced and Compulsory Labour, and Trafficking

Although it is beyond the scope of this Manual to examine the notions of slavery, the slave trade, servitude, and forced and compulsory labour, it is important for the legal professions to know that there are international legal provisions outlawing these practices, which, contrary to what many people may think, still occur in many countries. Such practices are also often linked in many ways to trafficking in women and children and forced prostitution. The notions of slavery, the slave trade, forced and compulsory labour, and trafficking, including for purposes of servitude and prostitution, are thus intricately interwoven in practice and difficulties may arise when it comes to applying the relevant legal principles. After reviewing the major legal provisions, this section will give particular attention to the serious and increasingly widespread phenomenon of trafficking, which has become particularly acute in Europe since the collapse of the Soviet Union and the opening up of borders.

5.1 Relevant legal provisions

5.1.1 *Slavery, the slave trade and servitude*

Slavery is prohibited under all general human rights treaties (article 8(1) of the International Covenant on Civil and Political Rights, article 5 of the African Charter on Human and Peoples' Rights, article 6(1) of the American Convention on Human Rights, article 4(1) of the European Convention on Human Rights). *The slave trade* is expressly prohibited under article 8(1) of the Covenant, article 5 of the African Charter and article 6(1) of the American Convention. *Servitude* is outlawed by article 8(2) of the Covenant, article 6(1) of the American Convention and article 4(1) of the European Convention.

These practices are further prohibited under the Slavery Convention, 1926, as amended by the 1953 Protocol, and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956. While the 1926 Convention deals with the prevention and suppression of slavery and the slave trade, the 1956 Convention is interesting in that it also, inter alia, expressly deals with institutions and practices such as *debt bondage*, *serfdom* and *forced marriages for money*. Article 1 requires States parties to take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices:

“(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt of the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of eighteen years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.”

The right to freedom from slavery, the slave trade and servitude must be ensured *at all times* and cannot be derogated from in public emergencies (article 4(2) of the International Covenant, article 27(2) of the American Convention and article 15(2) of the European Convention).

5.1.2 Forced and compulsory labour

Forced and compulsory labour is expressly prohibited by three of the four general human rights treaties, namely by article 8(3) of the International Covenant on Civil and Political Rights, article 6(2) of the American Convention and article 4(2) of the European Convention. Such practices are further outlawed by the ILO Forced Labour Convention, 1930 (No. 29) and the ILO Abolition of Forced Labour Convention, 1957 (No. 105). The three general human rights treaties and the 1930 ILO Convention exclude from the definition of “forced and compulsory labour” such services as are required, for instance, in the course of military service, which form part of normal civil obligations or which can be exacted in cases of emergency or calamity. All these prohibitions must be applied without discrimination to women.

5.1.3 Trafficking

Under article 1 of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the States parties agree to punish any person who, to gratify the passions of another:

“(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

(2) Exploits the prostitution of another person, even with the consent of that person”.

The States parties also agree to punish any person who:

“(1) Keeps or manages, or knowingly finances or takes part in the financing of a brothel;

(2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others”.

These offences are regarded as extraditable offences (arts. 8-9).

Furthermore, States parties are required, under article 6 of the Convention on the Elimination of Discrimination against Women, to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

Another international treaty of potential relevance in this field is the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, which was adopted by the General Assembly on 15 November 2000 and opened for signature on 13 December 2000. This Protocol, like the Convention itself, requires 40 ratifications to enter into force and cannot enter into force before the Convention (art. 17 of the Protocol). As of 15 November 2001, only four States had ratified the Convention (Monaco, Nigeria, Poland and Yugoslavia).

Lastly, article 35 of the Convention on the Rights of the Child stipulates that “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.” A final significant development with regard to trafficking in children, including, in particular, the girl child, is the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which entered into force on 18 January 2002. Although the text of the Optional Protocol does not refer specifically to trafficking, the link between trafficking and the sale of children, child prostitution and child pornography is a direct one; bearing this reality in mind, the drafters of the Protocol hoped that it would prove to be an additional tool in the fight against trafficking and related exploitation of children.⁹⁹ As of 8 February 2002, the Optional Protocol had been ratified by 17 States.

⁹⁹UN doc. E/CN.4/2001/72, *Traffic in women and girls, Report of the Secretary-General*, p. 3, para 8.

5.2 The practice of slavery, forced and compulsory labour, and trafficking in women

Overt or disguised forms of slavery, forced and compulsory labour, and trafficking in women and children are unlawful practices that are a continuing source of concern to the international monitoring bodies.

In analysing legal obligations under article 8 of the International Covenant, the Human Rights Committee emphasized that States parties should inform it of measures taken “to eliminate trafficking of women and children, within the country or across borders, and forced prostitution. They must also provide information on measures taken to protect women and children, including foreign women and children, from slavery, disguised, *inter alia*, as domestic or other kinds of personal service. States parties where women and children are recruited, and from which they are taken, and States parties where they are received should provide information on measures, national or international, which have been taken in order to prevent the violation of women’s and children’s rights.”¹⁰⁰

The Human Rights Committee expressed deep concern about information on trafficking in women to Venezuela, especially from neighbouring countries, and the lack of information from the delegation of the State party on the extent of the problem and action to combat it.¹⁰¹ The Committee also noted that Croatia had “a variety of measures at its disposal in its criminal law to combat the practice of trafficking of women into and through its territory, particularly for purposes of sexual exploitation”; it regretted, however, that, despite widespread reports of the extent and seriousness of the practice, it had not been provided with information on actual steps taken to prosecute the persons involved. The State party should therefore

“take appropriate steps to combat this practice, which constitutes a violation of several Covenant rights, including the right under article 8 to be free from slavery and servitude”.¹⁰²

The Human Rights Committee welcomed the appointment in the Netherlands “of an independent National Rapporteur on Trafficking in Persons endowed with appropriate investigative and research powers”, but it nonetheless remained concerned “at on-going reports of sexual exploitation of significant numbers of foreign women in the State party”, since such exploitation raised issues under articles 3, 8 and 26 of the Covenant; the State party should therefore ensure that the National Rapporteur was “equipped with all means necessary to achieve real and concrete improvement in this area”.¹⁰³ The Committee was even more explicit with regard the situation of trafficking in the Czech Republic, which gave rise to deep concern since the State party was both a country of origin and transit and a recipient country. It recommended that:

¹⁰⁰General Recommendation No. 28 (Article 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 170, para. 12.

¹⁰¹UN doc. GAOR, A/56/40 (vol. I), p. 51, para. 16.

¹⁰²*Ibid.*, p. 67, para. 12.

¹⁰³*Ibid.*, p. 79, para. 10.

“The State party should take resolute measures to combat this practice, which constitutes a violation of several Covenant rights, including article 3 and the right under article 8 to be free from slavery and servitude. The State party should also strengthen programmes aimed at providing assistance to women in difficult circumstances, particularly those coming from other countries who are brought into its territory for the purpose of prostitution. Strong measures should be taken to prevent this form of trafficking and to impose sanctions on those who exploit women in this way. Protection should be extended to women who are the victims of this kind of trafficking so that they may have a place of refuge and an opportunity to give evidence against the person responsible in criminal or civil proceedings. The Committee wishes to be informed of the measures taken and their result.”¹⁰⁴

The Committee on the Elimination of Discrimination against Women has pointed out that poverty and unemployment increase opportunities for trafficking in women.¹⁰⁵ New forms of sexual exploitation have emerged in addition to the established forms of trafficking “such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries, and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse.”¹⁰⁶

The Committee further notes that “poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.”¹⁰⁷

The Committee points out in this regard that “wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.”¹⁰⁸ As women are “particularly vulnerable in times of internal or international armed conflicts”, the Human Rights Committee has also recommended that States parties to the International Covenant on Civil and Political Rights inform it “of all measures taken during these situations to protect women from rape, abduction and other forms of gender-based violence”.¹⁰⁹

¹⁰⁴Ibid., p. 86, para. 13. Trafficking is also a matter of serious concern in the Democratic People's Republic of Korea, p. 104, para. 26.

¹⁰⁵General Recommendation No. 19 (Violence against women), *United Nations Compilation of General Comments*, p. 218, para. 14.

¹⁰⁶Ibid., loc. cit.

¹⁰⁷Ibid., p. 218, para. 15.

¹⁰⁸Ibid., p. 218, para. 16.

¹⁰⁹Ibid., General Comment No. 28 (Article 3 – Equality of rights between men and women), p. 169, para. 8.

The Committee on the Elimination of Discrimination against Women urged Uzbekistan to provide more information and data on the situation of trafficking of women and girls and on progress made in that area; it considered “that comprehensive measures should be developed and introduced in order to address the problem effectively, including prevention and reintegration and the prosecution of those responsible for trafficking”.¹¹⁰ The Committee also expressed concern about non-European women in the Netherlands who have been trafficked, “who fear expulsion to their countries of origin and who might lack the effective protection of their Government on their return”. It urged the Government of the Netherlands “to ensure that trafficked women are provided with full protection in their countries of origin or to grant them asylum or refugee status”.¹¹¹

The Committee on Economic, Social and Cultural rights welcomed the adoption of the 1998 immigration bill in Italy, which grants one-year residence/work permits to women who have been the victims of trafficking and who denounce their exploiters, and the criminalization of trafficking of migrants under the Penal Code. However, the Committee remained concerned at the extent of trafficking of women and children in Italy.¹¹²

Women have the right to freedom from slavery, the slave trade, servitude, and forced and compulsory labour.

Women may not therefore be subjected to any kind of slavery or to similar practices such as prostitution and domestic or other kinds of service that may be disguised slavery or servitude.

Trafficking in women and the girl child is strictly prohibited by international law.

Slavery, the slave trade, servitude, forced and compulsory labour, and trafficking in women and children, including the girl child, are practices that must be penalized in national law, and those responsible for such illegal acts must be rigorously prosecuted and punished by the national authorities.

States have a legal duty to take immediate, appropriate and effective measures to combat these unlawful practices at all levels, including through international cooperation, and to provide adequate help and protection to victims, including foreign nationals.

¹¹⁰UN doc. GAOR, A/56/38, p. 21, para. 179.

¹¹¹Ibid., p. 66, paras. 211-212.

¹¹²UN doc. E/2001/22 (E/C.12/2000/21), p. 34, para. 109, and p. 36, para. 121.

6. The Right to Equality in respect of Marriage

6.1 The right of intending spouses to marry freely and to found a family

The right of men and women of marriageable age to marry and found a family is recognized by article 23(2) of the International Covenant on Civil and Political Rights, article 17(2) of the American Convention on Human Rights (which uses the term “to raise a family” instead of “to found”) and article 12 of the European Convention on European Rights. Article 23(3) of the International Covenant and article 17(3) of the American Convention on Human Rights further stipulate that “no marriage shall be entered into without the free and full consent of the intending spouses”. Although the European text does not expressly refer to the fact that marriage must be freely entered into, this is implied in the term “*right* to marry” (emphasis added), which must also be interpreted in the light of the non-discrimination provision contained in article 14 of the Convention so as to secure equality before the law between women and men in the enjoyment of this right.

Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women sets out the States parties' duties with regard to the elimination of “discrimination against women in all matters relating to marriage and family relations”. They are required to ensure, on a basis of equality of men and women, inter alia, the same right to enter into marriage and the same right freely to choose a spouse and to enter into marriage only with their free and full consent (art. 16(1)(a) and (b)).

Another international treaty of interest in this regard is the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* which was adopted by the United Nations General Assembly in 1962 and entered into force on 9 December 1964. The Convention contains, inter alia, the following legal undertakings:

- ❖ “No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law” (art. 1(1));
- ❖ “States parties ... shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses” (art. 2).

The factors that may affect a woman's capacity to make an informed and uncoerced decision to marry include, as will be seen below, an unduly low minimum age for women. As indicated by the Human Rights Committee with regard to the

interpretation of article 23 of the International Covenant, other factors that may undermine a woman's "free and full consent to marriage" are "the existence of social attitudes which tend to marginalize women victims of rape and put pressure on them to agree to marriage" as well as "laws which allow the rapist to have his criminal responsibility extinguished or mitigated if he marries the victim".¹¹³ The Committee also notes that "the right to choose one's spouse may be restricted by laws and practices that prevent the marriage of a woman of a particular religion to a man who professes no religion or a different religion."¹¹⁴

On the issue of free consent, the Committee on the Elimination of Discrimination against Women stresses that "a woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being."¹¹⁵ However, while most countries reported that national constitutions and laws comply with the Convention on the Elimination of All Forms of Discrimination against Women, "custom, tradition and failure to enforce these laws in reality contravene the Convention". An examination of States parties' reports disclosed that there were countries

- ❖ that permitted forced marriages or remarriages on the basis of custom, religious beliefs or the ethnic origins of particular groups of people;
- ❖ that allowed a woman's marriage to be arranged for payment or preferment; and
- ❖ where poverty forced women to marry foreign nationals for financial security.¹¹⁶

The Committee adds in this context that "a women's right to choose when, if, and whom she will marry must be protected by law" and subject only to "reasonable restrictions based for example on a woman's youth or consanguinity with her partner".¹¹⁷

The Committee on the Elimination of Racial Discrimination expressed particular concern "at section 10(2)(c) of the Immigration Act of the Laws of Tonga, according to which the right to marriage between a Tongan and a non-Tongan is conditioned by the written consent of the Principal Immigration Officer", a requirement that might constitute a breach of article 5(d) of the International Convention on the Elimination of All Forms of Racial Discrimination, which, inter alia, guarantees enjoyment of the right to marriage and choice of spouse, without distinction as to race, colour, or national or ethnic origin.¹¹⁸

¹¹³General Comment No. 28 (Article 23 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 172, para. 24.

¹¹⁴*Ibid.*, loc. cit.

¹¹⁵*Ibid.*, General Recommendation No. 21 (Equality in marriage and family relations), p. 226, para. 16.

¹¹⁶*Ibid.*, p. 226, paras. 15-16.

¹¹⁷*Ibid.*, p. 226, para. 16.

The Committee on Economic, Social and Cultural Rights was “disturbed about the reassertion of traditional attitudes towards women in Kyrgyz society” and noted in this connection with deep concern “the re-emergence of the old tradition of bride kidnapping”. It recommended that the State party continue more actively to implement the law with regard to this phenomenon.¹¹⁹

6.1.1 Polygamous marriages

According to the Human Rights Committee, “equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”¹²⁰ With regard to the situation in Gabon, the Committee reiterated that “polygamy is incompatible with equality of treatment with regard to the right to marry.” The Government must “ensure that there is no discrimination based on customary law in matters such as marriage”; polygamy “must be abolished” and the relevant article of the Civil Code repealed.¹²¹

The Committee on the Elimination of Discrimination against Women has stated that polygamous marriage “contravenes a woman’s right to equality with men, and can have such serious emotional and financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited”; countries which permit polygamous marriage in spite of constitutionally guaranteed equal rights thus violate not only the constitutional rights of women but also article 5(a) of the Convention on the Elimination of All Forms of Discrimination against Women, which requires States parties to modify the social and cultural patterns of conduct of men and women in order to eliminate gender-based discrimination.¹²² The Committee therefore expressed concern regarding the continued legal authorization of polygamy in Egypt and urged the Government to take measures to prevent the practice in accordance with its General Recommendation No. 21.¹²³ It also recommended that Burkina Faso “work towards the elimination of the practice of polygamy” and that the State party “embark on a comprehensive public effort ... to change existing attitudes regarding polygamy, and in particular to educate women on their rights and how to avail themselves of these rights”.¹²⁴

¹¹⁸UN doc. GAOR, A/55/18, p. 38, para. 182.

¹¹⁹UN doc. E/2001/22 /E/C.12/2000/21, p. 64, para. 344, and p. 65, para. 358.

¹²⁰General Comment No. 28 (Article 3 – Equality of rights between men and women), *UN Compilation of General Comments*, pp. 172-173, para. 24.

¹²¹UN doc. GAOR, A/56/40 (vol. I), pp. 42-43, para. 9.

¹²²General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 226, para. 14.

¹²³UN doc. GAOR, A/56/38, p. 37, paras. 354-355.

¹²⁴UN doc. GAOR, A/55/38, p. 28, para. 282.

6.1.2 The marriageable age

Although the minimum age for marriage is one factor that may prevent women from being able to take the decision to marry freely, the international treaties do not specify a minimum age. However, article 16(2) of the Convention on the Elimination of All Forms of Discrimination against Women states that:

“2. The betrothal and marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”

Interpreting article 23 of the International Covenant on Civil and Political Rights, the Human Rights Committee states that the article:

“does not establish a specific marriageable age either for men or for women, but that age should be such as to enable each of the intending spouses to give his or her free and full personal consent in a form and under conditions prescribed by law.”¹²⁵

Such provisions must furthermore “be compatible with the full exercise of the other rights guaranteed by the Covenant” such as the right to freedom of thought, conscience and religion.¹²⁶

The Committee noted with regard to Venezuela that the minimum marriageable age is 14 for girls and 16 for boys and that “such age may be lowered without any limits for girls in case of pregnancy or childbirth,” a matter that raised problems with respect to the fulfilment by the State party of its obligation under article 24, paragraph 1, to protect minors. Moreover, in the Committee’s view, marriage at such an early age does not appear to be compatible with article 23 of the Covenant, “which requires the free and full consent of the intending spouses”.¹²⁷ The Committee also questioned the compatibility with the Covenant of the legislation on the minimum marriageable age in the Syrian Arab Republic, where the permissible age is 17 years for girls and 18 for boys, an age that “can be further reduced by a judge to 15 years for boys and 13 for girls with the father’s consent”.¹²⁸ As this legislation was felt to pose problems of compliance with the Covenant, the State party was asked to amend its legislation to bring it into line with the provisions of articles 3, 23 and 24.¹²⁹ Monaco, where the legal age for marriage is 15 years for girls and 18 years for boys, was also asked “to amend its legislation to ensure that girls and boys are treated equally by making the legal age of marriage 18 years, regardless of sex”.¹³⁰

¹²⁵General Comment No. 19 (Article 23), *United Nations Compilation of General Comments*, p. 138, para. 4.

¹²⁶*Ibid.*, loc. cit.

¹²⁷UN doc. *GAOR*, A/56/40 (vol. I), p. 52, para. 18.

¹²⁸*Ibid.*, p. 74, para. 20.

¹²⁹*Ibid.*, loc. cit.

¹³⁰*Ibid.*, p. 91, para. 12.

As pointed out by the Committee on the Elimination of Discrimination against Women, article 16(2) of the Convention on the Elimination of All Forms of Discrimination against Women, as well as the relevant provisions of the Convention on the Rights of the Child, “preclude States parties from permitting or giving validity to a marriage between persons who have not attained their majority”; in the Committee’s view, “the minimum age for marriage should be 18 years for both men and women.”¹³¹ As men and women “assume important responsibilities” when they marry, “marriage should not be permitted before they have attained full maturity and capacity to act.”¹³² Laws which provide for different ages for marriage for men and women should be abolished.¹³³

The Committee on the Elimination of Discrimination against Women expressed concern about the high number of early marriages of girls in Egypt, especially in rural areas, and recommended “that the Government amend the law on the legal age of marriage to prevent early marriage, in line with its obligations as a State party to the Convention”.¹³⁴ With regard to the Republic of Moldova, it expressed concern “at the differential ages of marriage established in the Family Code for boys and girls and the legal recognition of marriages of girl children”, which was not in conformity with article 16(2) of the Convention. It therefore recommended “that the Government take action to bring legislation on the marriage age for women and men into full conformity with the Convention, taking into consideration ... general recommendation 21”.¹³⁵ Lastly, the Committee urged the Maldives “to introduce minimum age of marriage laws and other programmes to prevent early marriage, in line with the obligations of the Convention”.¹³⁶

6.1.3 Other de jure and de facto impediments to the right to marry freely

The Human Rights Committee expressed concern that marriages in Cambodia were decided by the parents and urged the State party to take steps to ensure respect for laws prohibiting marriage without the full and free consent of the spouses.¹³⁷

It also held that the absence of divorce under Chilean law might amount to a violation of article 23(2) of the Covenant, according to which men and women of marriageable age have the right to marry and found a family. It left married women “permanently subject to discriminatory property laws ... even when a marriage has broken down irretrievably”.¹³⁸

¹³¹General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, pp. 229-230, para. 36.

¹³²*Ibid.*, p. 229, para. 36.

¹³³*Ibid.*, p. 230, para. 38.

¹³⁴UN doc. *GAOR*, A/56/38, p. 36, paras. 352-353.

¹³⁵UN doc. *GAOR*, A/55/38, pp. 60-61, paras. 113-114.

¹³⁶UN doc. *GAOR*, A/56/38, p. 17, para. 136.

¹³⁷UN doc. *GAOR*, A/54/40/ (vol. I), p. 60, para. 309.

¹³⁸*Ibid.*, p. 46, para. 213.

The Committee on the Elimination of Racial Discrimination noted “with approval” when examining the fifteenth and sixteenth periodic reports of Cyprus “that a draft marriage law, allowing marriage between a Greek Orthodox Christian and a Muslim of Turkish origin [had] been approved by the Council of Ministers and laid before the House of Representatives for enactment”.¹³⁹ The prohibition of marriages between persons of different religious faiths would not only constitute a violation of the right to marry freely but also of the right to freedom of religion.

The Committee on the Elimination of Discrimination against Women urged the Democratic Republic of the Congo to enact legislation to prohibit “traditional customs and practices, which are in violation of women’s fundamental rights, such as dowry, the levirate, polygamy [and] forced marriage”.¹⁴⁰

6.1.4 Restrictions on remarriage

The Human Rights Committee urged Venezuela, in order to comply with its obligations under articles 2, 3 and 26 of the International Covenant on Civil and Political Rights, “to amend all laws that still discriminate against women, including those relating to adultery and the ban on marriage for 10 months following the dissolution of a previous marriage”.¹⁴¹ With regard to Japan, the Committee stated that the six-month ban on remarriage by women following the dissolution or annulment of marriage was incompatible with articles 2, 3 and 26 of the Covenant.¹⁴² The Committee on the Elimination of Discrimination against Women stated that the Luxembourg law according to which a widow or divorced women must wait for 300 days before she can remarry appeared “anachronistic”.¹⁴³

In the case of *F. v. Switzerland*, the applicant complained that the three-year prohibition on remarriage imposed on him by the Lausanne District Civil Court was a violation of article 12 of the European Convention on Human Rights. In its judgment, the European Court of Human Rights pointed out that the exercise of the right of a man and a women to marry and found a family guaranteed by article 12 “gives right to personal, social and legal consequences”; it is a right that

“is ‘subject to the national laws of the Contracting States’, but ‘the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired’.”¹⁴⁴

¹³⁹UN doc. GAOR, A/56/18, p. 49, para. 264.

¹⁴⁰UN doc. GAOR, A/55/38, p. 23, paras. 215-216.

¹⁴¹UN doc. GAOR, A/56/49 (vol. I), p. 53, para. 22.

¹⁴²UN doc. GAOR, A/54/40 (vol. I), p. 38, para. 158.

¹⁴³UN doc. GAOR, A/55/38, p. 41, para. 406.

¹⁴⁴*Eur. Court HR, Case of F. v. Switzerland, judgment of 18 December 1987, Series A, No. 128, p. 16, para. 32.*

The Court then pointed out that:

“In all the Council of Europe’s Member States, these ‘limitations’ appear as conditions and are embodied in procedural or substantive rules. The former relate mainly to publicity and the solemnisation of marriage, while the latter relate primarily to capacity, consent and certain impediments.”¹⁴⁵

After lengthy reasoning, in the course of which the Court noted that a waiting period no longer exists in the other Contracting States and recalled that “the Convention must be interpreted in the light of present-day conditions”, it concluded that “the disputed measure, which affected the very essence of the right to marry, was disproportionate to the legitimate aim pursued” and therefore violated article 12 of the Convention.¹⁴⁶

6.1.5 Registration of marriages

Under article 3 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the States parties undertake to have all marriages registered “in an appropriate official register by the competent authority”. According to article 16(2) of the Convention on the Elimination of All Forms of Discrimination against Women, States parties have a legal duty to take “all necessary action ...to make the registration of marriages in an official registry compulsory”. There are no comparable provisions in the other human rights treaties.

The Committee on the Elimination of Discrimination against Women has stated with regard to article 16(2) that States parties “should also require the registration of all marriages whether contracted civilly or according to custom or religious law. The State can thereby ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and the protection of the rights of children.”¹⁴⁷ The Committee expressed concern “that India has not yet established a comprehensive and compulsory system of registration of births and marriages”; “inability to prove those important events by documentation prevents effective implementation of laws that protect girls from sexual exploitation and trafficking, child labour and forced or early marriage.”¹⁴⁸

On this issue the Human Rights Committee has merely accepted, under article 23 of the International Covenant on Civil and Political Rights, that “for a State to require that a marriage, which is celebrated in accordance with religious rights, be conducted, affirmed or registered also under civil law is not incompatible with the Covenant.”¹⁴⁹

¹⁴⁵Ibid., loc. cit.

¹⁴⁶Ibid., p. 16, para. 33, and p. 19, para. 40. In the course of its reasoning the Court recognized “that stability of marriage is a legitimate aim which is in the public interest”, but it doubted “whether the particular means used were appropriate for achieving that aim”, p. 17, para. 36.

¹⁴⁷General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 230, para. 39.

¹⁴⁸UN doc. GAOR, A/55/38, p. 10, para. 62.

¹⁴⁹General Comment No. 19 (Article 23), *United Nations Compilation of General Comments*, p. 138, para. 4.

6.1.6 Meaning of the right to found a family

As seen above, the right to found a family is guaranteed by article 23(2) of the International Covenant on Civil and Political Rights and article 17(2) of the American Convention on Human Rights. Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination against Women requires States parties to ensure, “on a basis of equality of men and women”, “the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights”.

According to the Human Rights Committee, article 23(2) of the International Covenant “implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.”¹⁵⁰ In the Committee’s view, the possibility to live together “implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons”.¹⁵¹

The Committee on the Elimination of Discrimination against Women states that the reasons why “women are entitled to decide on the number and spacing of their children” under article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination against Women are that “the responsibilities that [they] have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women. The number and spacing of their children have a similar impact on women’s lives and also affect their physical and mental health, as well as that of their children.”¹⁵² The Committee further expresses the view that “decisions to have children or not, while preferably made in consultation with spouse or partner, must not nevertheless be limited by spouse, parent, partner or Government,” for example through forced pregnancies, abortions or sterilization.¹⁵³

With regard to *compulsory family planning*, the Human Rights Committee expressed concern about reports of forced sterilization in Peru, “particularly of indigenous women in rural areas and women from the most vulnerable social sectors”. It followed that the State party “must take the necessary measures to ensure that

¹⁵⁰Ibid., p. 138, para. 5.

¹⁵¹Ibid., loc. cit.

¹⁵²General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 227, para. 21.

¹⁵³Ibid., p. 227, para. 22.

persons who undergo surgical contraception are fully informed and give their consent freely”.¹⁵⁴ On similar allegations concerning the mountain ethnic minority women in Viet Nam and their rejection by the State party, the Committee on the Elimination of Racial Discrimination simply stated that it would welcome information “on the impact of its population-planning policies on the enjoyment of reproductive rights by persons belonging to such minorities”.¹⁵⁵ The latter Committee has made it clear that “racial discrimination does not always affect women and men equally or in the same way”. It mentions in this connection “the coerced sterilization of indigenous women” as a form of racial discrimination that “may be directed towards women specifically because of their gender”. The Committee will therefore endeavour in its work “to take into account gender factors or issues which may be interlinked with racial discrimination”.¹⁵⁶

Women have the right to enter into marriage with their full and free consent on a basis of equality with men. Forced marriages are prohibited by international law and must be outlawed at the national level. The same applies to dowry and other similar traditions.

Traditions, customs and religious beliefs cannot therefore be allowed to justify forced marriages under international law.

Similarly, polygamy is prohibited under international law since it violates the principle of equality between women and men.

If set too low, the legal marriageable age may violate the principle of free consent; the legal age for marriage should preferably be 18 years for both men and women.

The non-existence of divorce under national law violates the right to marry and found a family. Temporary bans on remarriage are contrary to international law.

A record of all marriages, whether civil or religious, should be kept in an official registry. Such registration is, inter alia, indispensable in order to prevent forced marriages, bigamy and polygamy.

The right to found a family means, inter alia, that women are entitled to decide on the number and spacing of their children, preferably in consultation with their partner. Compulsory family planning such as forced sterilization is prohibited under international law.

¹⁵⁴UN doc. GAOR, A/56/40 (vol. I), p. 48, para. 21.

¹⁵⁵UN doc. GAOR, A/56/18, p. 69, para. 417.

¹⁵⁶General Recommendation No. XXV (Gender-related dimensions of racial discrimination), *United Nations Compilation of General Comments*, p. 194, paras. 1-3.

6.2 Equality of rights in terms of nationality laws

The *Convention on the Nationality of Married Women* was adopted by the United Nations General Assembly in 1957 and entered into force on 11 August 1958. States parties agree under this Convention:

- ❖ “that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife”(art. 1);
- ❖ “that neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national” (art. 2);
- ❖ “that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization procedures; the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy” (art. 3(1)).

On the question of equal rights with respect to nationality, article 9 of the Convention on the Elimination of All Forms of Discrimination against Women stipulates that:

- “1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.”

Although article 23 of the International Covenant on Civil and Political Rights does not explicitly refer to the right of equality in terms of nationality laws, the Committee has stated that “no sex-based discrimination should occur in respect of the acquisition or loss of nationality by reason of marriage.”¹⁵⁷

Article 23(1) of the Covenant entitles the family to “protection by society and the State” and it follows from articles 2(1), 3 and 26 of the Covenant that “such protection must be equal, that is to say not discriminatory, for example on the basis of sex”.¹⁵⁸ Where legal restrictions on access to Mauritius were imposed on foreign husbands of Mauritian women but not on foreign spouses of Mauritian men, the Human Rights Committee concluded that the legislation was discriminatory with respect to Mauritian women and could not be justified by security requirements; there was consequently a violation of articles 2(1), 3 and 26 of the Covenant in conjunction with article 23 thereof in so far as the three married co-authors were concerned.¹⁵⁹ The impugned legislation implied that only the wives of Mauritian men would have the right

¹⁵⁷Ibid., General Comment No. 19 (art. 23), p. 138, para. 7.

¹⁵⁸Communication No. 35/1978, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius* (Views adopted on 9 April 1981), in UN doc. CCPR/C/OP/1, *Selected Decisions under the Optional Protocol (Second to sixteenth sessions)*, p. 71, para. 9.2 (b) 2 (ii) 2.

¹⁵⁹Ibid., p. 71, paras. 9.2 (b) 2 (ii) 3 and 4.

of free access to Mauritius and enjoy immunity from deportation, while foreign husbands had to apply to the Minister of the Interior for a residence permit and, in case of refusal, would have no possibility to seek redress before a court of law.¹⁶⁰ This case therefore also violated articles 2(1) and 3 of the Covenant in conjunction with article 17(1), which *inter alia* guarantees the right to a family. The Human Rights Committee noted that the law “made an adverse distinction based on sex” which affected the alleged victims in their enjoyment of one of their rights; as no “sufficient justification” for this difference had been given, the aforementioned provision had been violated.¹⁶¹

As pointed out by the Committee on the Elimination of Discrimination against Women, nationality is “critical to full participation in society”, since “without status as nationals or citizens, women are deprived of the right to vote and to stand for public office and may be denied access to public benefits and a choice of residence.”¹⁶² In its view, “nationality should be capable of change by an adult women and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality.”¹⁶³

The Committee recommended to Guinea “that female and male spouses who marry foreigners be treated equally in regulations governing nationality” and urged the Government to ensure that the concept of *jus sanguinis* is applied “to ensure that children of mixed parentage born outside the country can acquire nationality through their Guinean mother”.¹⁶⁴ It was also concerned that “Jordanian nationality law prevents a Jordanian woman from passing on her nationality to her children if her husband is not Jordanian”, a situation that it characterized as “anachronistic”.¹⁶⁵

The same Committee was also concerned that “Iraq’s nationality law, which is based on the principle that the members of a family should all have the same nationality and that none should have dual nationality or lose their nationality, does not grant women an independent right to acquire, change or retain their nationality or to pass it on to their children.” It therefore recommended that the Government withdraw its reservations to articles 2(f) and (g) as well as articles 9 and 16 of the Convention on the Elimination of All Forms of Discrimination against Women so as to ensure full implementation thereof.¹⁶⁶

¹⁶⁰Ibid., p. 69, para. 7.2.

¹⁶¹Ibid., p. 70, para. 9.2 (b) 2 (i) 8.

¹⁶²General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 223, para. 6.

¹⁶³Ibid., loc. cit.

¹⁶⁴UN doc. GAOR, A/56/38, p. 58, para. 125; see also regarding Singapore, p. 54, para. 75.

¹⁶⁵UN doc. GAOR, A/55/38, p. 19, para. 172. The Committee on Economic, Social and Cultural Rights expressed concern with regard to the same law; see UN doc. E/2001/22 (E/C.12/2000/21), p. 50, para. 234.

¹⁶⁶UN doc. GAOR, A/55/38, p. 68, paras. 187-188.

The Human Rights Committee, concerned at the discriminatory legal status of women as regards the transmission of Monegasque nationality, recommended that Monaco “adopt legislation giving men and women the same right to transmit nationality to children”. The problem raised concerns under articles 3 and 26 of the Covenant.¹⁶⁷

The Committee on the Elimination of Racial Discrimination expressed concern “at the nationality law, which prevents an Egyptian mother married to a foreigner from passing on her nationality to her children”.¹⁶⁸ The same Committee expressed satisfaction at the amendment of the 1967 Citizenship Law in Cyprus, “which eradicates discrimination in marriage to foreigners”. As a result of the amendment, the right of an alien spouse to acquire the citizenship of the Cypriot spouse is recognized for both spouses, as is “the equal right of both spouses to transmit citizenship to their children”.¹⁶⁹ It also welcomed the 1998 amendment to Icelandic legislation, which addressed “the unequal rights of men and women with regard to the naturalization of their children, and the elimination of the requirement to adopt an Icelandic patronym as a condition for naturalization”.¹⁷⁰

For more examples of gender discrimination, see Chapter 13 of this Manual.

6.3 The equal right to a name

Under article 16(1)(g) of the Convention on the Elimination of All Forms of Discrimination against Women, State parties are legally required to ensure, “on a basis of equality of men and women”, “the same personal rights as husband and wife, including the right to choose a family name”. According to the Committee on the Elimination of Discrimination against Women, this provision means that “each partner should have the right to choose his or her name, thereby preserving individuality and identity in the community and distinguishing that person from other members of society. When by law or custom a woman is obliged to change her name on marriage or its dissolution, she is denied these rights.”¹⁷¹

The Human Rights Committee has stated, with respect to article 23 of the International Covenant on Civil and Political Rights, that “the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name should be safeguarded”¹⁷² and that “States parties should

¹⁶⁷UN doc. *GAOR*, A/56/40 (vol. I), p. 90, para. 10.

¹⁶⁸UN doc. *GAOR*, A/56/18, p. 52, para. 288. The Committee on Economic, Social and Cultural Rights expressed concern with regard to the same law (UN doc. E/2001/22 (E/C.12/2000/21), p. 40, para. 159), as did the Committee on the Elimination of Discrimination against Women (UN doc. *GAOR*, A/56/38, p. 35, para. 330).

¹⁶⁹UN doc. *GAOR*, A/56/18, p. 49, para. 263.

¹⁷⁰*Ibid.*, p. 33, para. 150.

¹⁷¹General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 228, para. 24.

¹⁷²*Ibid.*, General Comment No. 19 (Article 23), p. 138, para. 7.

ensure that no sex-based discrimination occurs in respect of ... the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name.”¹⁷³ States Parties must also ensure “the capacity to transmit to children the parents’ nationality” on a non-discriminatory basis.¹⁷⁴

The Committee on the Elimination of Discrimination against Women expressed concern “that Jamaica’s passport law provides that a married women may keep her maiden name on her passport only if she insists or for professional reasons and that, in those cases, a note would be entered in her passport with the name of her husband and the fact of her marriage”. The Committee called on the Government to bring its passport law into line with article 16(1)(g) of the Convention on the Elimination of All Forms of Discrimination against Women.¹⁷⁵ The Committee believes that the Netherlands new Law on Names violates the same provision, particularly inasmuch as it grants the father the ultimate decision in giving a child a name when the parents cannot agree. The Committee therefore asked the Government to make the law consistent with the Convention.¹⁷⁶

Under international law, women and men have equal rights in terms of nationality laws. This means that female and male spouses who marry foreigners must be treated equally and have equal rights to transmit their nationality to their children.

Under international law, women and men have the same right to choose a family name.

6.4 Equal rights and responsibilities of spouses as to marriage, during marriage and at its dissolution

6.4.1 Relevant legal provisions

States parties are required, under article 23(4) of the International Covenant on Civil and Political Rights, to take appropriate steps “to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution”. Article 17(4) of the American Convention on Human Rights stipulates in this regard that the “States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution.” Article 5 of Protocol No. 7 to the European Convention on Human Rights states that “spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations

¹⁷³Ibid., General Comment No. 26 (Article 3 – Equality of rights between men and women), p. 173, para. 25.

¹⁷⁴Ibid., loc. cit.

¹⁷⁵UN doc. GAOR, A/56/38, p. 24, paras. 213-214.

¹⁷⁶Ibid., p. 67, paras. 223-224.

with their children, as to marriage, during marriage and in the event of its dissolution.” All three treaties accept that special provision should be made for children in the event of dissolution of the marriage. Under the more detailed provisions of article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, States parties are required to ensure, “on a basis of equality of men and women”,

- ❖ “The same rights and responsibilities during marriage and at its dissolution”(art. 16(1)(c));
- ❖ “The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount” (art. 16(1)(d));
- ❖ “The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount (art. 16(1)(f)); and
- ❖ “The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration” (art. 16(1)(h)).

6.4.2 General understanding of the principle of equal rights and responsibilities

The Human Rights Committee states, with regard to article 23(4) of the International Covenant, that “during marriage, the spouses should have equal rights and responsibilities in the family. This equality extends to all matters arising from their relationship, such as choice of residence, running of the household, education of the children and administration of assets. Such equality continues to be applicable to arrangements regarding legal separation or dissolution of the marriage.”¹⁷⁷ According to the Committee, “any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited, bearing in mind the paramount interest of the children in this connection.”¹⁷⁸

These views were expanded by the Committee in its General Comment No. 28, where it emphasized that, in order to fulfil their obligations under article 23(4), “States parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the custody and care of children, the children’s religious and moral education ... and the ownership or administration of property, whether common property or property in the sole ownership of either spouse.” States parties should further ensure that no gender-based discrimination occurs in respect of residence rights. In short, “equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family.”¹⁷⁹

¹⁷⁷ General Comment No. 19 (art. 23), *United Nations Compilation of General Comments*, p. 138, para. 8.

¹⁷⁸ *Ibid.*, p. 138, para. 9.

¹⁷⁹ *Ibid.*, General Comment No. 28 (Article 3 – Equality of rights between men and women), p. 173, para. 25.

In explaining its understanding of article 16(1)(c) of the Convention on the Elimination of All Forms of Discrimination against Women, the Committee notes that, in providing for the rights and responsibilities of married partners, many countries rely on the application of common law principles, religious or customary law, rather than complying with the principles contained in the Convention. In the Committee's view, these variations in law and practice have wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage by making the husband the head of the household and primary decision-maker in contravention of the Convention.¹⁸⁰

To the extent possible, the various components of the equal rights and responsibilities of spouses will be given particular attention in the following sub-sections.

6.4.3 Equal right to decision-making

The Human Rights Committee expressed concern about articles 182 and 196 of the Civil Code of Monaco, which respectively state that the “husband is the head of the family” and give him the right to choose the couple's place of residence. The State party was asked by the Committee to repeal those provisions and to ensure de facto equality between men and women.¹⁸¹

While recognizing the importance of the family as the basic social unit, the Committee on the Elimination of Discrimination against Women expressed concern, with regard to Singapore, “that the concept of Asian values regarding the family, including that of the husband having the legal status of head of household, might be interpreted so as to perpetuate stereotyped gender roles in the family and reinforce discrimination against women”.¹⁸²

6.4.4 Equal parental rights and responsibilities

With regard to the shared parental rights and responsibilities defined in article 16(1)(d) and (f) of the Convention on the Elimination of All Forms of Discrimination against Women, the Committee states that they should be “enforced at law and as appropriate through legal concepts of guardianship, wardship, trusteeship and adoption. States parties should ensure that by their laws both parents, regardless of their marital status and whether they live with their children or not, share equal rights and responsibilities for their children.”¹⁸³ It furthermore states that, although most States recognize the shared responsibility of parents for care, protection and maintenance of children, in practice some of them do not observe this principle, particularly when the parents are not married. As a result, “the children of such unions

¹⁸⁰Ibid., General Recommendation No. 21 (Equality in marriage and family relations), p. 226, para. 17.

¹⁸¹UN doc. GAOR, A/56/40 (vol. I), p. 90, para. 9.

¹⁸²UN doc. GAOR, A/56/38, p. 54, para. 79.

¹⁸³General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 227, para. 20.

do not always enjoy the same status as those born in wedlock and, where the mothers are divorced or living apart, many fathers fail to share the responsibility of care, protection and maintenance of their children.”¹⁸⁴

The Human Rights Committee expressed concern about the discriminatory nature of article 301 of the Civil Code of Monaco, “which vests the father with the parental authority over the children”, and recommended that the State party repeal this provision.¹⁸⁵

6.4.5 Equal rights to marital property

Given that article 23(4) of the International Covenant requires States parties, according to the Human Rights Committee, to ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the ownership or administration of property, whether common property or property in the sole ownership of either spouse, “States parties should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property, where necessary.”¹⁸⁶ Women naturally also have the equal right to represent matrimonial property before the courts. On this issue, see the case of *Ato del Avellanal* considered in section 10 below and in Chapter 13.

The Committee on the Elimination of Discrimination against Women points out that the equal rights of spouses with regard to property under article 16(1)(h) of the Convention on the Elimination of All Forms of Discrimination against Women overlap with and complement those in article 15(2) of the Convention “in which an obligation is placed on States to give women equal rights to enter into and conclude contracts and to administer property” (see further section 7 below).¹⁸⁷ As to marital property, the Committee notes that “there are countries that do not acknowledge that right of women to own an equal share of the property with the husband during a marriage or de facto relationship and when that marriage or relationship ends. Many countries recognize that right, but the practical ability of women to exercise it may be limited by legal precedent or custom.”¹⁸⁸

The Committee also notes that “even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man. In many States, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or de facto relationship is sold or

¹⁸⁴Ibid., p. 227, para. 19.

¹⁸⁵UN doc. GAOR, A/56/40 (vol. I), p. 90, para. 9.

¹⁸⁶General Comment No. 28 (Article 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 173, para. 25.

¹⁸⁷Ibid., General Recommendation No. 21 (Equality in marriage and family relations), p. 228, para. 25.

¹⁸⁸Ibid., p. 228, para. 30.

otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it".¹⁸⁹

The Committee on the Elimination of Discrimination against Women points out also that "in some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. Financial and non-financial contributions should be accorded the same weight."¹⁹⁰

The Committee further notes that "in many countries, property accumulated during a de facto relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the women receives a significantly lower share than her partner. Property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged."¹⁹¹

Lastly, the Committee noted with concern that Egyptian women "who seek divorce by unilateral termination of their marriage contract under Law No. 1 of 2000 (khul) must in all cases forego their rights to financial provision, including the dower". It recommended that the Government consider a revision of the law in order to eliminate this financial discrimination against women.¹⁹²

6.4.6 The equal right to a profession and an occupation

States parties are required, under article 16(1)(g) of the Convention on the Elimination of All Forms of Discrimination against Women, to ensure, "on a basis of equality of men and women", "the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation". As stated by the Committee on the Elimination of Discrimination against Women, "a stable family is one which is based on principles of equity, justice and individual fulfilment for each member. Each partner must therefore have the right to choose a profession or employment that is best suited to his or her abilities, qualifications and aspirations, as provided in article 11(a) and (c) of the Convention."¹⁹³

6.4.7 Women living in de facto unions

With regard to women living in de facto unions, the Human Rights Committee states that "in giving effect to recognition of the family in the context of article 23 [of the International Covenant], it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children, and to ensure the equal treatment of women in these

¹⁸⁹Ibid., pp. 228-229, para. 31.

¹⁹⁰Ibid., p. 229, para. 32.

¹⁹¹Ibid., p. 229, para. 33.

¹⁹²UN doc. GAOR, A/56/38, p. 35, paras. 328-329.

¹⁹³General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 228, para. 24.

contexts.”¹⁹⁴ On the same subject, the Committee on the Elimination of Discrimination against Women holds that “the form and concept of the family can vary from State to State, and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people,” as required by article 2 of the Convention on the Elimination of All Forms of Discrimination against Women.¹⁹⁵ Women in de facto unions “should have their equality of status with men both in family life and in the sharing of income and assets protected by law. Such women should share equal rights and responsibilities with men for the care and raising of dependent children or family members.”¹⁹⁶

6.4.8 Equality with respect to divorce

In explaining the meaning of article 23(4) of the International Covenant on Civil and Political Rights, the Human Rights Committee notes that States parties have a duty to ensure “equality in regard to the dissolution of marriage, *which excludes the possibility of repudiation*. The grounds for divorce and annulment should be the same for men and women, as well as decisions with regard to property distribution, alimony and the custody of children. Determination of the need to maintain contact between children and the non-custodial parent should be based on equal considerations.”¹⁹⁷

6.4.9 The equal right of succession between spouses

According to the Human Rights Committee, “women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses” (on the right of succession in general, see below sub-section 7.2).¹⁹⁸

The Committee on the Elimination of Discrimination against Women points out that “there are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband’s or father’s property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased’s property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.”¹⁹⁹

¹⁹⁴Ibid., General Comment No. 28 (Article 3 – Equality of rights between men and women), p. 173, para. 27.

¹⁹⁵Ibid., General Recommendation No. 21 (Equality in marriage and family relations), p. 226, para. 13.

¹⁹⁶Ibid., p. 227, para. 18.

¹⁹⁷Ibid., General Comment No. 28 (Article 3 – Equality of rights between men and women), p. 173, para. 26; emphasis added.

¹⁹⁸Ibid.

¹⁹⁹Ibid., General Recommendation No. 21 (Equality in marriage and family relations), p. 229, para. 35.

The Committee on Economic, Social and Cultural Rights expressed concern that there are still “persisting patterns of discrimination against women” in Moroccan legislation, “particularly in family and personal status law, as well as inheritance law”.²⁰⁰

Women and men have equal rights as to marriage, during marriage and at its dissolution. In other words, they have the same rights and responsibilities with regard to all matters arising from their relationship, such as residence, economy, assets and children.

Married women have the same right as their spouse to choose and exercise a profession and occupation suited to their abilities.

International law accepts various forms of family life including unmarried couples. Women living in de facto unions should have the same rights as men with regard to both family life and sharing of property and income. These rights should be protected by law.

Under international law women and men have equal rights with regard to divorce. Repudiation is prohibited by international law.

Women have an equal right of succession when the marriage is dissolved by the death of the spouse.

7. The Equal Right to Legal Capacity in Civil Matters

7.1 Equal rights to administer property and conclude contracts

As noted at the beginning of this chapter, women have a right to legal personality on equal terms with men. Of course, this legal personality not only covers family affairs but extends to civil matters in general. Under the International Covenant on Civil and Political Rights, this is implicit in article 16, which guarantees the right to legal personality. Article 15(2) and (3) of the Convention on the Elimination of All forms of Discrimination against Women stipulates as follows:

“2 States parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

²⁰⁰UN doc. E/2001/22 (E/C.12/2000/21), p. 84, para. 527.

3. States parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.”

On the interpretation of these provisions, the Committee on the Elimination of Discrimination against Women states that “when a women cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband’s or a male relative’s concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner and precludes her from the legal management of her own business or from entering into any other form of contract. Such restrictions seriously limit the woman’s ability to provide for herself and her dependants.”²⁰¹

The Committee urged Jordan to revoke a law that prohibits women from concluding contracts in their own name, since such a prohibition is inconsistent with the legal status of women under the Jordanian Constitution and the Convention on the Elimination of All Forms of Discrimination against Women.²⁰² In the case of the Democratic Republic of Congo, the Committee expressed concern “about de jure and de facto discrimination against women with regard to the right to work, particularly the requirement of the husband’s authorization of a wife’s paid employment and reduction of pay during maternity leave”. Such discriminatory laws should be amended to be consistent with article 11 of the Convention on the Elimination of All Forms of Discrimination against Women.²⁰³ With regard to the situation in Burkina Faso, the same Committee was concerned that “despite the law on agrarian and land reform, which establishes equality between men and woman with regard to land, prejudices and customary rights are once again hindering the implementation of this law.” It therefore recommended that the State party “encourage the services concerned to take into account the rights of women to property and to provide them with the necessary credit”.²⁰⁴

On the question of legal autonomy, the Human Rights Committee states that the right of everyone under article 16 of the International Covenant on Civil and Political Rights “to be recognized everywhere as a person before the law is particularly pertinent for women, who often see it curtailed by reason of sex or marital status”; in its view, “this right implies that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground.”²⁰⁵ The Committee was therefore gravely concerned that both common and customary law in Lesotho permitted discrimination against women by treating them as minors. It noted with concern “that under customary law, inheritance and property rights of women are severely restricted and

²⁰¹General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 224, para. 7.

²⁰²UN doc. GAOR, A/55/38, p. 19, paras. 172-173.

²⁰³Ibid., p. 24, paras. 225-226.

²⁰⁴Ibid., p. 28, paras. 277-278.

²⁰⁵General Comment No. 28 (art. 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 171, para. 19.

that under customary law, as well as under common law, women may not enter into contracts, open bank accounts, obtain loans or apply for passports without the permission of their husbands". The Committee therefore urged the State party "to take measures to repeal or amend these discriminatory laws and eradicate these discriminatory practices", which violate articles 3 and 26 of the Covenant.²⁰⁶

The Committee on Economic, Social and Cultural Rights was "deeply concerned that the Government of Cameroon [had] not yet embarked on the necessary law reform to repeal laws which maintain the unequal legal status of women, particularly in aspects of the Civil Code and the Commercial Code relating to, *inter alia*, the right to own property and the laws regarding credit and bankruptcy, which restrict women's access to means of production". These Codes are, in the Committee's view, "in flagrant violation of the non-discrimination and equal treatment provisions of the Covenant [on Economic, Social and Cultural Rights] and are inconsistent with the recently amended Constitution of Cameroon which upholds the equal rights of all citizens." The Committee therefore recommended that the State party repeal all provisions of the Civil and Commercial Codes which discriminate against women.²⁰⁷

7.2 The equal right to succession in general

It follows from the right to equality before the law that women must have *equal rights of inheritance* with men. As noted above in connection with article 16(1)(h) of the Convention on the Elimination of All Forms of Discrimination against Women, as interpreted in the light of article 15(1), "any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself and to live in dignity as an independent person."²⁰⁸ "All of these rights", including the right to inherit equal shares, "should be guaranteed regardless of a women's marital status."²⁰⁹

The Committee on the Elimination of Discrimination against Women expressed concern that in India "the practice of debt bondage and the denial of inheritance rights in land result in gross exploitation of women's labour and their impoverishment." It called on the Government "to review laws on inheritance urgently and to ensure that rural women obtain access to land and credit".²¹⁰ The Committee was also concerned "that failure to register marriages may ... prejudice the inheritance of women".²¹¹

²⁰⁶UN doc. GAOR, A/54/40 (vol. I), p. 52, para. 253.

²⁰⁷UN doc. E/2000/22 (E/C.12/1999/11), p. 58, para. 327, and p. 60, para. 346.

²⁰⁸General Recommendation No. 21 (Equality in marriage and family relations), *United Nations Compilation of General Comments*, p. 228, para. 28.

²⁰⁹*Ibid.*, p. 228, para. 29.

²¹⁰UN doc. GAOR, A/55/38, p. 12, paras. 82-84.

²¹¹*Ibid.*, p. 10, para. 62.

The Human Rights Committee stated that Gabon “must review its legislation and practice in order to ensure that women have the same rights as men, including rights of ownership and inheritance,” and that “there is no discrimination based on customary law in matters such as marriage, divorce and inheritance”.²¹² It also expressed concern about the persistent inequality between women and men “in a number of areas, such as inheritance” in the Libyan Arab Jamahiriya and recommended that the State party “intensify its efforts to guarantee full equal enjoyment by men and women of all their human rights”.²¹³

The Committee on Economic, Social and Cultural Rights expressed concern that, under the laws on inheritance in Tunisia, “females are entitled to receive only half of the inheritance of males.” It strongly recommended “that all men, women and children of both sexes should be enabled to enjoy the right to inherit on a basis of equality”.²¹⁴

Women have the right to equal legal capacity with men in civil matters.

This means, for instance, that women must be ensured equal rights to own and administer property, and to conclude contracts and obtain credit, and that they must be allowed to work without their husband's or other relative's permission.

The right to equal legal autonomy also implies that women have a right to inherit on a basis of full equality with men.

Customs and traditions are not allowed to prejudice the effective exercise of these rights.

8. The Right to Equal Participation in Public Affairs, including Elections

8.1 Relevant legal provisions

Article 25 of the International Convention on Civil and Political Rights stipulates that “every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

²¹²UN doc. GAOR, A/56/40 (vol. I), pp. 42-43, para. 9.

²¹³UN doc. GAOR, A/54/40 (vol. I), pp. 35, para. 137.

²¹⁴UN doc. E/2000/22 (E/C.12/1999/11), pp. 37-38, para. 165, and p. 39, para. 173.

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.”

Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women reads as follows:

“States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
- (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.”

Article 8 of the same treaty reads:

“States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.”

Another universal treaty of interest in this connection is the *Convention on the Political Rights of Women*, which was adopted by the United Nations General Assembly in 1953 and entered into force on 7 July 1954. It is a short treaty setting forth the following rights, which must be ensured “on equal terms with men, without any discrimination”:

- ❖ the right to vote in all elections (art. I);
- ❖ the right to be eligible for election to all publicly elected bodies, established by national law (art. II); and
- ❖ the right to hold public office and to exercise all public functions (art. III).

At the regional level, article 23 of the American Convention on Human Rights guarantees the right to equal participation in public affairs and the right to vote and to be elected in “genuine periodic elections”. The right to vote and to be elected is not expressly guaranteed by article 13 of the African Charter on Human and Peoples’ Rights, but it does recognize the right to participate freely in the government of one’s

country “either directly or through freely chosen representatives in accordance with the provisions of the law”. Article 13 of the Charter also provides for the right of equal access to the public service of one’s country. Under article 3 of Protocol No. 1 to the European Convention on Human Rights, “the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” Article 14 of the Convention requires the exercise of this right to be ensured without discrimination between men and women.

Clearly, therefore, women’s right to equal participation in public affairs, including the right to vote and to be elected, is firmly rooted in international human rights law. This important right cannot, however, be discussed in detail in this context, which will be limited to a brief description of its main features.²¹⁵

8.2 The interpretation of article 25 of the International Covenant on Civil and Political Rights

As pointed out by the Human Rights Committee, “article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant” and it must be guaranteed without discrimination based on sex.²¹⁶ Women must therefore enjoy, inter alia, the following rights on equal terms with men:

- ❖ the right to exercise political power, in particular legislative, executive and administrative powers. This right covers all levels of administration – local, regional, national and international – and can be exercised, for instance, through membership of a legislative body or by holding executive office;²¹⁷
- ❖ the right to exert influence through public debate and dialogue with their representatives or through their capacity to organize themselves. “This participation is supported by ensuring freedom of expression, assembly and association;”²¹⁸
- ❖ the right to vote or to run for election. “Genuine periodic elections ... are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them;”²¹⁹
- ❖ the right to freedom of expression, assembly and association, which are “essential conditions for the effective exercise of the right to vote and must be fully protected”;²²⁰

²¹⁵For more details on the interpretation of article 25 of the International Covenant, see General Comment No. 25 (Article 25), *United Nations Compilation of General Comments*, pp. 157-162. On articles 7-8 of the Convention on the Elimination of All Forms of Discrimination Against Women, see General Recommendation No. 23 (Political and public life), pp. 233-244.

²¹⁶*Ibid.*, General Comment No. 25 (Article 25), p. 157, paras. 1 and 3.

²¹⁷*Ibid.*, pp. 157-158, paras. 5-6.

²¹⁸*Ibid.*, p. 158, para. 8.

²¹⁹*Ibid.*, p. 158, para. 9.

²²⁰*Ibid.*, p. 159, para. 12.

- ❖ “the right ... to have access on general terms of equality to public service positions. To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable.”²²¹

On the basis of its long experience, however, the Human Rights Committee has found that “the right to participate in the conduct of public affairs is not fully implemented everywhere on an equal basis. States parties must ensure that the law guarantees to women the rights contained in article 25 on equal terms with men and take effective and positive measures to promote and ensure women’s participation in the conduct of public affairs and in public office, including appropriate affirmative action. Effective measures taken by States parties to ensure that all persons entitled to vote are able to exercise that right should not be discriminatory on the grounds of sex.”²²²

While recognizing that there had been some progress in achieving equality for women in political and public life in Croatia, the Human Rights Committee remained concerned “that the representation of women in Parliament and in senior official positions, including the judiciary, still [remained] low”. The State party was therefore urged to make every effort to improve the representation of women in the public sector, if necessary through appropriate positive measures, in order to give effect to its obligations under articles 3 and 26 of the International Covenant.²²³ A similar recommendation was made to the Czech Republic in view of the low participation of women in political life, as well as their inadequate representation in higher levels of administration in the country.²²⁴

8.3 The interpretation of articles 7 and 8 of the Convention on the Elimination of All Forms of Discrimination against Women

The Committee on the Elimination of Discrimination against Women has expressed its views on how to interpret articles 7 and 8 of the Convention on the Elimination of All Forms of Discrimination against Women in its General Recommendation No. 23 on “political and public life”. With regard to the obligation of States parties under article 7 to take all appropriate measures to eliminate discrimination against women in political and public life, the Committee states that this obligation:

“extends to all areas of public and political life and is not limited to those areas specified in subparagraphs (a), (b) and (c). The political and public life of a country is a broad concept. It refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers. The term covers all aspects of public administration and the formulation and implementation of policy at the international, national, regional and local levels. The concept also includes many aspects

²²¹Ibid., p. 161, para. 23.

²²²Ibid., General Comment No. 28 (Article 3 – Equality of rights between men and women), pp. 173-174, para. 29.

²²³UN doc. *GAOR*, A/56/40 (vol. I), p. 69, para. 21.

²²⁴Ibid., p. 86, para. 12. See similar concern regarding Romania, in UN doc., *GAOR*, A/54/40 (vol. I), p. 69, para. 366.

of civil society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political life."²²⁵

The Committee further states that:

“to be effective, this equality must be achieved within the framework of a political system in which each citizen enjoys the right to vote and be elected at genuine periodic elections held on the basis of universal suffrage by secret ballot, in such a way as to guarantee the free expression of the will of the electorate, as provided for under international human rights instruments, such as ... article 25 of the International Covenant on Civil and Political Rights.”²²⁶

The right to vote and to be elected “on the basis of equality with men” must be enjoyed both *de jure* and *de facto*. In the Committee's experience, however, women in many nations “continue to experience difficulties in exercising this right” owing to factors such as women's double burden of work, financial constraints, “traditions and social and cultural stereotypes”, male influence on or control of women's votes (practices that “should be prevented”) and restrictions on women's freedom of movement.²²⁷

With regard to the right to participate in the formulation of government policy, as guaranteed by article 7(b), States parties have a duty:

- ❖ “to ensure that women have the right to participate fully in and be represented in public policy formulation in all sectors and at all levels”;
- ❖ “where it is within their control, both to appoint women to senior decision-making roles and, as a matter of course, to consult and incorporate the advice of groups which are broadly representative of women's views and interests”;
- ❖ “to ensure that barriers to women's full participation in the formulation of government policy are identified and overcome”.²²⁸

With regard to the right to hold public office and to perform all public functions, which is also guaranteed by article 7(b) of the Convention, “the examination of the reports of States parties demonstrates”, according to the Committee, “that women are excluded from top-ranking positions in cabinets, the civil service and in public administration, in the judiciary and in justice systems”.²²⁹ In some cases, the law also “excludes women from exercising royal powers, from serving as judges in religious or traditional tribunals vested with jurisdictions on behalf of the State or from full participation in the military. These provisions discriminate against women ... and contravene the principles of the Convention.”²³⁰

²²⁵General Recommendation No. 23 (Political and public life), *United Nations Compilation of General Comments*, p. 234, para. 5.

²²⁶*Ibid.*, p. 234, para. 6.

²²⁷*Ibid.*, p. 237, paras. 18-20.

²²⁸*Ibid.*, p. 238, paras. 25-27.

²²⁹*Ibid.*, p. 239, para. 30.

²³⁰*Ibid.*, p. 239, para. 31.

With respect to article 8 of the Convention, “Governments are obliged to ensure the presence of women at all levels and in all areas of international affairs [such as] in economic and military matters, in both multilateral and bilateral diplomacy, and in official delegations to international and regional conferences”. In the Committee’s experience, “it is evident that women are grossly under-represented in the diplomatic and foreign services of most Governments, and particularly at the highest ranks” and that many permanent missions to international organizations have no women among their diplomats and few at senior levels.²³¹ Yet “States parties are under an obligation to take all appropriate measures, including the enactment of appropriate legislation,” to comply with articles 7 and 8 of the Convention.²³²

With regard to the situation in India, the Committee expressed concern about “the low participation of qualified women in the administration and the judiciary, including family courts and *lok adalats* or conciliation tribunals”.²³³ With respect to the Maldives, it was concerned “that the reservation to article 7(a) on political participation supports the retention of legislative provisions that exclude women from the office of President and Vice-President of the Country”.²³⁴

Women have a right to equal participation with men in the conduct of public affairs of their country and they have the right to do so either directly themselves or through freely chosen representatives.

Women have a right to vote and to be elected themselves on an equal footing with men in all elections and referenda.

Women have an equal right with men to hold public office and to perform governmental functions at all levels.

Women have a right to equal participation in the formulation and implementation of government policy.

Women have an equal right to participate in public debate, either alone or through a variety of organizations, a right that presupposes the effective enjoyment also of the freedoms of expression, assembly and association.

States must ensure that women have an equal opportunity with men to represent their government at the international level.

The right to equal participation in a country’s public and political life is a cornerstone of a democratic society based on respect for the freely expressed will of the people concerned.

²³¹Ibid., p. 240, paras. 35-37.

²³²Ibid., p. 241, paras. 41-42.

²³³UN doc. GAOR, A/55/38, p. 12, para. 80.

²³⁴UN doc. GAOR, A/56/38, p. 17, para. 130.

9. Women's Right to Equal Enjoyment of Other Human Rights

Women's right to equal enjoyment of human rights is not, of course, limited to the rights dealt with in some detail above *but covers the entire spectrum of internationally guaranteed human rights and fundamental freedoms*. This means that all rights, whether civil and political, or economic, social and cultural, must be ensured to women on an equal footing with men. As explained in Chapter 14 below, these rights are all intrinsically linked and interdependent, and therefore depend on each other for their full implementation. *It follows logically that women's rights cannot be fully guaranteed, and women's potential as a positive element in the construction of a secure, peaceful and prosperous world cannot be adequately ensured without a holistic approach both to the rights and freedoms that they are entitled to enjoy, and to the role they have a legitimate interest in fulfilling, at the local, regional, national and international levels.*

In addition to the rights already dealt with, some further rights are listed below, the equal enjoyment of which is of particular importance to women. The list is not, however, exhaustive. It does not, for instance, include women's right to equal enjoyment of economic, social and cultural rights protected by international human rights law such as the right to equality in the field of employment with equal pay for equal work and the right of equal access to health, which is of fundamental importance to the development of the girl child. For more information about women's enjoyment of economic, social and cultural rights, see the relevant recommendations of the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women, and the work carried out by the International Labour Organization.

This section will therefore confine itself to equal enjoyment of freedom of movement and residence, the right to privacy, freedom of thought, conscience, belief, religion, opinion, expression, association and assembly, and the right to education.

9.1 The right to freedom of movement and residence

The equal right to freedom of movement and residence is guaranteed by article 12 of the International Covenant on Civil and Political Rights, article 15(4) of the Convention on the Elimination of All Forms of Discrimination against Women, article 12 of the African Charter on Human and Peoples' Rights, article 22 of the American Convention on Human Rights and article 2 of Protocol No. 4 to the European Convention on Human Rights. The exercise of this right can in principle be restricted on certain grounds such as those described in article 12(3) of the International Covenant, article 22(3) of the American Convention and article 2(3) of Protocol No. 4 to the European Convention.

According to the Human Rights Committee, State parties must ensure “that the rights guaranteed in article 12 are protected not only from public but also from private interference. In the case of women, this obligation to protect is particularly pertinent. For example, it is incompatible with article 12, paragraph 1, that the right of a woman to move freely and to choose her residence be made subject, by law or practice, to the decision of another person, including a relative.”²³⁵ This applies to both married women and adult daughters, who need no consent from their spouse or parents, or from anybody else, in order to travel freely or to have a passport or any other travel document issued in their name. Any such legal or de facto requirement would be incompatible with article 12(3) of the Covenant.²³⁶ In examining States parties’ reports, “the Committee has on several occasions found that measures preventing women from moving freely or from leaving the country by requiring them to have the consent or the escort of a male person constitute a violation of article 12.”²³⁷ More specifically, it expressed concern, for instance, at the inequality between men and women in terms of freedom of movement in the Libyan Arab Jamahiriya and asked the Government to intensify its efforts to ensure full equality in this and other areas.²³⁸

The Committee on the Elimination of Discrimination against Women noted with concern “that Jordanian law prohibits women ... from travelling alone and from choosing their place of residence,” limitations which, in its view, are inconsistent with the legal status of women under both the Jordanian Constitution and the Convention on the Elimination of All Forms of Discrimination against Women.²³⁹

Women have the right to freedom of movement and residence on an equal basis with men.

No one has the right to prohibit an adult woman from travelling or choosing her residence.

No custom or tradition can justify a limitation of this right.

9.2 The right to privacy

The right to respect for one’s private life is protected by article 17 of the International Covenant on the Civil and Political Rights, article 11(2) of the American Convention on Human Rights, and article 8 of the European Convention on Human Rights.

²³⁵General Comment No. 27 (Article 12 – Freedom of movement), *United Nations Compilation of General Comments*, p. 164, para. 6.

²³⁶*Ibid.*, General Comment No. 28 (Article 3 – Equality of rights between men and women), pp. 170-171, para. 16.

²³⁷*Ibid.*, General Comment No. 27 (Article 12 – Freedom of movement), p. 166, para. 18.

²³⁸UN doc. GAOR, A/54/40 (vol. I), p. 35, para. 137.

²³⁹UN doc. GAOR, A/55/38, p. 19, para. 172.

An example of gender-based interference with a women's right to respect for her private life is "where the sexual life of a women is taken into consideration in deciding the extent of her legal rights and protection, including protection against rape. Another area where States may fail to respect women's privacy relates to their reproductive functions, for example, where there is a requirement for the husband's authorization to make a decision in regard to sterilization; where general requirements are imposed for the sterilization of women, such as having a certain number of children or being of a certain age, or where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone abortion."²⁴⁰

As shown in sub-section 4.3.3 above, a woman's right to respect for her private life requires States, *inter alia*, to take practical and effective measures such as providing for the possibility of bringing criminal proceedings against perpetrators of sexual assault.

Women have the right to enjoy respect for their private life on the same basis as men. This right must be effectively guaranteed.

A woman's reproductive life forms part of her private sphere, over which she has the ultimate right to decide.

9.3 Freedom of thought, conscience, belief, religion, opinion, expression, association and assembly

The freedoms of thought, conscience, belief, religion, opinion, expression, association and assembly are the cornerstone of a democratic society. These freedoms are guaranteed by articles 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, articles 8-11 of the African Charter on Human and Peoples' Rights, articles 12, 13, 15 and 16 of the American Convention on Human Rights, and articles 9-11 of the European Convention on Human Rights.

According to the Human Rights Committee States parties to the International Covenant must take measures to ensure that freedom of thought, conscience and religion, and the freedom to adopt the religion or belief of one's choice, including the freedom to change religion or belief and to express one's religion or belief, are "guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination". These freedoms, which are protected by article 18 of the Covenant, "must not be subject to restrictions other than those authorized by the Covenant and must not be constrained by, *inter alia*, rules requiring permission from third parties, or by interference from fathers, husbands, brothers or others. Article 18 may not be relied upon to justify discrimination against women by reference to the freedom of thought, conscience and religion".²⁴¹

²⁴⁰General Comment No. 28 (Article 3 – Equality of right between men and women), *United Nations Compilation of General Comments*, p. 171, para. 20.

²⁴¹*Ibid.*, p. 172, para. 21.

As shown in section 8 above, freedom of expression, assembly and association is of fundamental importance for enabling women to take an active part in public life on equal terms with men. These freedoms must therefore be effectively ensured for women and men alike. Restrictions on their exercise must not discriminate against women.

For information on the substantive interpretation of freedom of thought, conscience, religion, opinion, expression, association and assembly, see Chapter 12 of this Manual.

Women have the right to exercise freedom of thought, conscience, belief, religion, opinion, expression, association and assembly on the same basis of equality as men. No one has the right to interfere with a woman's free exercise of these freedoms.

Restrictions on the exercise of these freedoms must respect the conditions laid down in international human rights law. Such restrictions must not be discriminatory.

9.4 The right to education

The right to education is guaranteed by article 13 of the International Covenant on Economic, Social and Cultural Rights, article 10 of the Convention on the Elimination of All Forms of Discrimination against Women, article 17 of the African Charter on Human and Peoples' Rights, and article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Under these treaties, the right to education must be guaranteed without discrimination based on sex. Furthermore, the 1960 UNESCO Convention against Discrimination in Education, which entered into force on 22 May 1962, aims at the elimination of discrimination in general, including gender-based discrimination in the field of education.

The Committee on Economic, Social and Cultural Rights noted with concern “that despite the achievements of Egypt in the field of education, inequality of access to education between boys and girls, high drop-out rates for boys and high illiteracy rates among adults, particularly women, persist”. It urged the Government to undertake measures to address the economic, social and cultural factors that are the root cause of these problems.²⁴² The Committee also expressed concern regarding the situation in Kyrgyzstan, where children were dropping out of school to provide for their families; the situation of girls was particularly alarming as “their access to education [was] being curtailed by a revival of the tradition of early marriage, and a decrease in the prestige of having a formal education.”²⁴³

²⁴²UN doc. E/2001/22 (E/C.12/2000/21), p. 41, para. 166, and p. 43, para. 182.

²⁴³Ibid., p. 64, para. 351.

The Committee on the Elimination of Racial Discrimination expressed concern at the fact that “children born to Egyptian mothers and foreign fathers are faced with discrimination in the field of education.”²⁴⁴

The Human Rights Committee expressed concern at the situation in Zambia, where, “despite some advances, [women] continue to be *de jure* and *de facto* the object of discrimination, particularly as regards education.” It therefore recommended that the State party review its law so as to ensure “full legal and *de facto* equality for women in all aspects of social and economic relationships”.²⁴⁵

The Committee on the Elimination of Discrimination against Women expressed concern about “the restricted admission of women to certain courses in higher education” in Myanmar, which contravenes article 10(b) and (c) of the Convention on the Elimination of All Forms of Discrimination against Women. It urged the Government “to modify the policies on restricted admissions, noting that the women themselves should be entitled to decide which subjects they wish to study and professions they wish to pursue”.²⁴⁶ Despite the efforts of the Cameroon Government in the area of education, the Committee remained concerned “at the low rate of female literacy, the high female dropout rate, and the low rate of female enrolment in basic education”. It encouraged the Government “to intensify its efforts to promote female access to basic and secondary education and to develop programmes specifically designed to reduce female illiteracy”.²⁴⁷ The Committee also expressed concern at the high prevalence of illiteracy among women in Burundi and the low level of schooling of girls, especially in rural areas. It noted that “education is a key to the empowerment of women, and low levels of education of women remain one of the most serious impediments to national development.”²⁴⁸ The Committee therefore urged the Government “to continue its efforts to improve the access of girls to all levels of education and to prevent their dropping out of school”.²⁴⁹

Girls and women have the right to equal access with boys and men to education, be it at the primary, secondary or higher levels of education.

Under international human rights law, women have the right to choose their subjects of study and the professions they want to pursue. There must be no gender-based restrictions on access to higher education.

Education is essential to ensure women's effective enjoyment of other human rights and to help them play a constructive role in the development of their country.

²⁴⁴UN doc. GAOR, A/56/18, p. 52, para. 288.

²⁴⁵UN doc. GAOR, A/51/40, p. 40, para. 195, and p. 41, para. 207.

²⁴⁶UN doc. GAOR, A/55/38, p. 15, paras. 125-126.

²⁴⁷Ibid., p. 56, paras. 57-58.

²⁴⁸UN doc. GAOR, A/56/38, p. 10, para. 57.

²⁴⁹Ibid., p. 10, para. 58.

10. Women's Right to an Effective Remedy, including the Right of Access to the Courts and Due Process of Law

The legal duty to provide effective remedies for persons whose rights and freedoms are violated is contained in article 2(3) of the International Covenant on Civil and Political Rights, article 7(a) of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights and article 13 of the European Convention on Human Rights. Article 2(b) and (c) of the Convention on the Elimination of All Forms of Discrimination against Women contains rules about the legal duties of States parties "to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women" and "to establish legal protection of the rights of women on an equal basis with men".

Article 14 of the International Covenant, article 8 of the American Convention and article 6 of the European Convention also contain due process guarantees which must be ensured to everyone without discrimination on any ground such as sex (cf. articles 2(1), 3 and 14(1) of the Covenant, article 1 of the American Convention and article 14 of the European Convention). As will be seen below, these provisions also guarantee access to the courts or, in other words, access to justice.²⁵⁰

Although the question of availability of domestic remedies will be dealt with in some depth in Chapter 15 of this Manual concerning "Protection and Redress for Victims of Human Rights Violations", it should be mentioned in this context that women may in many instances be in a particularly disadvantageous position to vindicate their rights, since they may not, for instance, have access to the courts or be able to benefit from due process guarantees. The Human Rights Committee has therefore asked the States parties to the International Covenant to provide information in their reports on the following points:

- ❖ "whether there are legal provisions preventing women from direct and autonomous access to the courts";
- ❖ "whether women may give evidence as witnesses on the same terms as men";
- ❖ "whether measures are taken to ensure equal access to legal aid, in particular in family matters", and
- ❖ "whether certain categories of women are denied the enjoyment of the presumption of innocence under article 14, paragraph 2, and on the measures which have been taken to put an end to this situation".²⁵¹

The case of *Ato del Avellanal v. Peru* illustrates the dilemma that can face women who do not have equal access to justice. The case concerned a Peruvian women who owned two apartment buildings in Lima and who, by final decision of the Supreme

²⁵⁰On article 14 of the Covenant, see Human Rights Committee General Comment No. 28 (Article 3 – Equality of rights between men and women), *United Nations Compilation of General Comments*, p. 171, para. 18.

²⁵¹*Ibid.*, loc. cit.

Court, was not allowed to sue the tenants in order to collect overdue rents, since, under article 168 of the Peruvian Civil Code, when a woman is married, only her husband is entitled to represent the matrimonial property before the courts.²⁵² According to the Human Rights Committee, this violated the following provisions of the International Covenant on Civil and Political Rights:

- ❖ Article 14(1), which guarantees that all persons shall be equal before the courts and tribunals, since “the wife was not equal to her husband for purposes of suing in Court”;
- ❖ Article 3, which requires States parties to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant, and article 26, which states that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”; the Committee found that the application of article 168 of the Peruvian Civil Code to the author “resulted in denying her equality before the courts and constituted discrimination on the ground of sex”.²⁵³

Another important case illustrating women's right of access to the courts is that of *Airey v. Ireland*, which was considered by the European Court of Human Rights. In this case, Ms. Airey claimed a violation of, inter alia, article 6(1) of the European Convention of Human Rights, “since the prohibitive cost of litigation prevented her from bringing proceedings before the High Court for the purpose of petitioning for judicial separation” from her husband who was an alcoholic, frequently threatened her and sometimes also subjected her to physical violence. Her husband had even once been convicted of assaulting her.²⁵⁴ Legal aid was not available at the time in Ireland either for the purpose of seeking a judicial separation or for any other civil matters.²⁵⁵

The Court held that, since judicial separation was a remedy provided for by Irish law, it should be available to anyone who satisfied the conditions prescribed thereby.²⁵⁶ The Court responded as follows to the Government's contention that the applicant did in fact enjoy access to the High Court since she was “free to go before that court without the assistance of a lawyer”:

“The Court does not regard this possibility, of itself, as conclusive of the matter. The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective ... This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial ... It must therefore be ascertained whether Mrs. Airey's appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily”.²⁵⁷

²⁵²Communication No. 202/1986, *G. Ato del Avellanal v. Peru* (Views adopted on 28 October 1988), in UN doc. GAOR, A/44/40, p. 196, paras. 1 and 2.1.

²⁵³*Ibid.*, pp. 198-199, paras. 10.1-10.2.

²⁵⁴*Eur. Court HR, Case of Airey v. Ireland, judgment of 9 October 1979, Series A, No. 32*, p. 12, para. 20, and p. 6, para. 8.

²⁵⁵*Ibid.*, p. 7, para. 11.

²⁵⁶*Ibid.*, p. 12, para. 23.

²⁵⁷*Ibid.*, pp. 12-13, para. 24.

The Court considered it “most improbable that a person in Mrs. Airey’s position [could] effectively present his or her own case”. It therefore concluded that the possibility to appear in person before the High Court did not provide the applicant with an effective right of access to the courts, and that, hence, it did not constitute a domestic remedy for the purpose of article 26 of the European Convention.²⁵⁸ However, this conclusion did not mean that the State would have to provide free legal aid for every dispute relating to a “civil right” but that article 6(1) “may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigations, or by reason of the complexity of the procedure or of the case”.²⁵⁹ In the *Airey* case the Court found that article 6(1) of the Convention had been violated since the applicant “did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation”.²⁶⁰

With regard to the availability of remedies, the Committee on the Elimination of Discrimination against Women called upon the Government of Belarus “to create adequate remedies for women to obtain easy redress from direct and indirect discrimination, especially in the area of employment,” and “to improve women’s access to such remedies, including access to courts, by facilitating legal aid to women and embarking on legal literacy campaigns”.²⁶¹ The Committee recommended that the Government of Cameroon “provide access to legal remedies” to women who are victims of violence.²⁶² It requested the Government of Uzbekistan “to pass a law against violence, especially against domestic violence, including marital rape, as soon as possible and to ensure that violence against women and girls constitutes a crime punishable under criminal law and that women and girls victims of violence have immediate means of redress and protection”.²⁶³ It also expressed concern with regard to Jamaica, where “there are no constitutional remedies available to women”, although the right to equality of all citizens is guaranteed by the Jamaican Constitution.²⁶⁴

Under international human rights law women have the right of access to justice, and the right to due process of law, on equal terms with men.

This means, in particular, that women must have access to effective domestic remedies, including effective access to the courts, for the purpose of vindicating their rights. This applies to all alleged violations of their human rights but is particularly important in cases of alleged violence to their person.

²⁵⁸Ibid., pp. 12-13, para. 24.

²⁵⁹Ibid., pp. 15-16, para. 26.

²⁶⁰Ibid., p. 16, para. 28.

²⁶¹UN doc. GAOR, A/55/38, p. 37, para. 360.

²⁶²Ibid., p. 55, para. 50.

²⁶³UN doc. GAOR, A/56/38, p. 21, para. 177.

²⁶⁴Ibid., p. 24, para. 211.

To ensure the effective exercise of the right of access to the courts/ access to justice, States may have a legal obligation to provide legal aid.

The due process guarantees laid down in international human rights law are equally valid for women and men. This implies, inter alia, that women's evidence must be given and assessed on the same terms as that of men, and that all women must be allowed to benefit from the presumption of innocence.

11. The Role of Judges, Prosecutors and Lawyers in Ensuring Protection of the Rights of Women

The role of judges, prosecutors and lawyers in the protection of human rights in general is at all times of fundamental importance, but the role that the legal professions play, or should play, in protecting the rights of women and the girl child is of special significance in a social and cultural environment in which women may have nowhere else to go to seek protection and relief from violations of their basic human rights, including gender-based discrimination.

Judges, prosecutors and lawyers have a special duty at all times to be alert to any sign of violence against women, whether State-sponsored, institutional, State-tolerated, community violence or violence in the private sphere. The legal protection of women must be scrupulously applied in the face of religious, cultural or other local customs that may resist the view that a woman's life is of equal value to that of a man.

The crucial role of judges, prosecutors and lawyers extends, of course, beyond the context of violence against women. It covers the whole spectrum of human rights as outlined in this chapter, including, for instance, the many aspects of equality pertaining to marriage, divorce, the care of children, participation in public life and education. Moreover, it covers a long list of economic, social and cultural rights, which, for reasons of space, have not been dealt with in this context.

It is, however, particularly important that the legal professions, in considering allegations of violations of the human rights of women, including gender-based discrimination, adopt a holistic approach to individual rights, because, as shown in this chapter, the interdependence of the rights guaranteed by international human rights law emerges with particular clarity from any analysis of the rights of women.

12. Concluding Remarks

This chapter has shown that human rights are also women's rights, that women have the right to full legal recognition under international human rights law and that they must be treated on an equal footing with men. However, the precarious situation in which many of the world's women live and which makes the enjoyment of many of their human rights illusory, gives rise to a very special responsibility for both national legal professions and international monitoring bodies. If human rights are to become a reality in the future for more than a minority of the world's women, a concerted effort will have to be made at all levels to ensure that they are genuinely able to exercise their rights without fear of being beaten, killed or, at best, socially rejected.

.....Chapter 12
**SOME OTHER KEY RIGHTS:
FREEDOM OF THOUGHT,
CONSCIENCE, RELIGION,
OPINION, EXPRESSION,
ASSOCIATION AND
ASSEMBLY.....**

Learning Objectives

- *To familiarize the participants with some other key rights, namely freedom of thought, conscience, religion, opinion, expression, association and assembly, and their importance in a society that is respectful of human rights in general*
- *To illustrate how these freedoms, as well as the limitations attached to the exercise of most of them, are interpreted by the international monitoring bodies*
- *To explain the role of judges, prosecutors and lawyers in safeguarding the freedoms dealt with in this chapter*

Questions

- *How are the following freedoms protected in the country in which you work:*
 - *freedom of thought, conscience, and religion,*
 - *freedom of opinion and expression, and*
 - *freedom of association and assembly?*
- *Are there any particular concerns with regard to the effective implementation of these freedoms in the country in which you work?*
- *Are there any groups in the country in which you work that might be particularly vulnerable to violations of one or more of these freedoms?*
- *If so, who are they and how may their freedoms be violated?*

Questions (cont.d)

- *What judicial or administrative remedies exist in the country in which you work for persons who consider themselves to be victims of violations of these freedoms?*
- *What role is played by the following freedoms in building, preserving and/or strengthening a democratic society/ a society respectful of human rights:*
 - *freedom of thought, conscience, and religion,*
 - *freedom of opinion and expression, and*
 - *freedom of association and assembly?*
- *With regard to freedoms whose exercise may be limited: in your view, how can a balance be struck between an individual's right to exercise those freedoms and a society's general interest in protecting, for instance, national security, public order, safety, health, morals or the rights and freedoms of others?*
- *What can you as judges, prosecutors or lawyers do to protect every person's right to freedom of thought, conscience, religion, opinion, expression, association and assembly?*

Relevant Legal Instruments

Universal Instruments

- International Covenant on Civil and Political Rights, 1966
 - International Covenant on Economic, Social and Cultural Rights, 1966
 - International Convention on the Elimination of All Forms of Racial Discrimination, 1965
 - Convention on the Elimination of All Forms of Discrimination against Women, 1979
 - Convention on the Rights of the Child, 1989
 - ILO Freedom of Association and Protection of the Right to Organise Convention, 1948
 - ILO Right to Organise and Collective Bargaining Convention, 1949
- *****
- Universal Declaration of Human Rights, 1948
 - United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 1999

Relevant Legal Instruments (cont.d)

Regional instruments

- African Charter on Human and Peoples' Rights, 1981
 - African Charter on the Rights and Welfare of the Child, 1990
 - American Convention on Human Rights, 1969
 - Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994
 - European Convention on Human Rights, 1950
 - European Social Charter, 1961, and European Social Charter, 1996 (revised)
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1. Introduction

This chapter will deal with a number of fundamental freedoms which constitute some of the pillars of a democratic society that is respectful of human rights. Owing to space constraints, however, only the most important aspects of these freedoms will be highlighted.

The Manual has hitherto emphasized the importance of a number of rights such as the right not to be subjected to arbitrary detention, the right to a fair trial and the right to freedom from torture and other forms of ill-treatment. As a result, many of the chapters have also focused on protection of the human person in the course of law enforcement procedures.

This chapter, on the other hand, is concerned with rights or freedoms that are exercised at all levels of society and in a wide variety of settings and situations, for example in a person's religious or philosophical activities, educational undertakings or in the spoken or written word. However, in many situations where there are problems with the effective protection of human rights during law enforcement procedures, there is often a corresponding lack of tolerance for a person's religious beliefs or his or her political or other convictions expressed at public gatherings, in books or in the mass media. To move towards full and comprehensive protection of the rights and freedoms of the individual, States should therefore take appropriate action to advance the cause of human rights in all relevant dimensions of society.

The chapter will deal first with freedom of thought, conscience and religion, secondly with freedom of opinion and expression, and thirdly with freedom of association and assembly.

Lastly, the role of the legal professions in protecting freedom of thought, conscience, religion, opinion, expression, association and assembly will be emphasized, and the chapter will close with some concluding remarks.

2. The Right to Freedom of Thought, Conscience and Religion

2.1 Relevant legal provisions

This sub-section contains the text of the most important legal provisions pertaining to freedom of thought, conscience and religion:

Article 18 of the Universal Declaration of Human Rights:

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

Article 18 of the International Covenant on Civil and Political Rights:

“1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”

Article 8 of the African Charter on Human and Peoples’ Rights:

“Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.”

Article 12 of the American Convention on Human Rights:

“1. Everyone has the right to freedom of conscience and of religion. This includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious or moral education of their children or wards that is in accord with their own convictions."

Article 9 of the European Convention on Human Rights:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

The right to freedom of religion is further guaranteed by:

- ❖ Article 5(d)(vii) of the International Convention on the Elimination of All Forms of Racial Discrimination;
- ❖ Article 14 of the Convention on the Rights of the Child;
- ❖ Article 9 of the African Charter on the Rights and Welfare of the Child; and
- ❖ Article 4(i) of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.

Moreover, as will be further shown in Chapter 13, international human rights law prohibits discrimination on the ground of religion (see, inter alia, articles 1(3), 13 and 55(c) of the Charter of the United Nations, article 2 of the Universal Declaration, articles 2(1), 4(1), 24(1) and 26 of the International Covenant on Civil and Political Rights; article 2 of the African Charter on Human and Peoples' Rights, articles 1(1) and 27(1) of the American Convention on Human Rights and article 14 of the European Convention on Human Rights).

2.2 General meaning of the right to freedom of thought, conscience and religion

2.2.1 Article 18 of the International Covenant on Civil and Political Rights

As pointed out by the Human Rights Committee, the right to freedom of thought, conscience and religion guaranteed by article 18(1) of the International Covenant "is far-reaching and profound; it encompasses freedom of thought on all

matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.” Furthermore, “the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.”¹ The Committee points out that “the fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency,”² an issue that will be further dealt with in Chapter 16.

It is noteworthy that article 18 “*does not permit any limitations whatsoever* on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally...”³ On the other hand, as regards *the right to freedom of conscience*, the Human Rights Committee held in the case of *Westerman*, that it does not as such imply the right to refuse all obligations imposed by law, nor does it provide immunity from criminal liability in respect of every such refusal.⁴

The Committee also importantly underlines that, on the basis of articles 18(2) and 17 of the Covenant, “no one can be compelled to reveal his thoughts or adherence to a religion or belief.”⁵ In other words, every man or woman has the right to keep his or her religion or belief an exclusively private matter in all situations.

The Human Rights Committee further states that “article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices or practices analogous to those of traditional religions. The Committee therefore views with concern

any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.”⁶

The Human Rights Committee further observes

“that the freedom to ‘have or to adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert.”⁷

¹See General Comment No. 22 (Article 18) in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations adopted by Human Rights Bodies*, p. 144, para. 1 (hereinafter referred to as *United Nations Compilation of General Comments*).

²*Ibid.*, loc. cit.

³*Ibid.*, p. 144, para. 3; emphasis added.

⁴Communication No. 682/1996, *P. Westerman v. the Netherlands* (Views adopted on 3 November 1999), in UN doc. GAOR, A/55/40 (vol. II), p. 46, para. 9.3.

⁵*United Nations Compilation of General Comments*, p. 144, para. 3.

⁶*Ibid.*, p. 144, para. 2.

⁷*Ibid.*, p. 145, para. 5.

The Committee adds that “policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 [i.e. the right to participate in government] and other provisions of the Covenant, are similarly inconsistent with article 18(2). The same protection is enjoyed by holders of all beliefs of a non-religious nature.”⁸

2.2.2 Article 8 of the African Charter on Human and Peoples’ Rights

Article 8 of the African Charter on Human and Peoples’ Rights is brief. It merely stipulates that “freedom of conscience, the profession and free practice of religion shall be guaranteed” and that “no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.” It is noteworthy that this provision is silent on the question of freedom of thought and also on the freedom to adopt or change a religion or belief according to one’s own convictions.

In a case against Zaire, the African Commission on Human and Peoples’ Rights held that “the harassment of the Jehovah’s Witnesses and religious leaders, including assassinations, destruction of religious structures and death threats” constituted a violation of article 8 of the Charter, since the Government had “presented no evidence that the practice of their religion in any way [threatened] law and order”.⁹

2.2.3 Article 12 of the American Convention on Human Rights

The right to freedom of conscience and religion as protected by article 12 of the American Convention on Human Rights is in many ways similar to the freedoms guaranteed by article 18 of the International Covenant. However, in the Convention freedom of thought is not linked to these freedoms but to the right to freedom of expression set forth in article 13.

The right to freedom of conscience and religion under article 12 of the American Convention also includes “freedom to maintain or to change one’s religion or beliefs”, a freedom that is strengthened by article 12(2) of the Convention, according to which “no one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.” It follows, *a fortiori*, that no one may be subject to “coercion” – the term used in article 18(2) of the Covenant – for purposes of either preventing a person from, or obliging a person to, maintain or change his or her religion or beliefs. In other words, a person’s religion or beliefs must at all times be fully voluntary.

Freedom of conscience and religion as protected by article 12 of the American Convention is included in the list of non-derogable rights in article 27(2) and must therefore be guaranteed also “in time of war, public danger, or other emergency that threatens the independence or security” of the State party concerned (art. 27(1) of the Convention).

⁸Ibid., loc. cit.

⁹ACHPR *World Organisation against Torture and Others v. Zaire*, Communications Nos. 25/89, 47/90, 56/91, 100/93, decision adopted during the 19th session, March 1996, para. 71 of the text as published at: http://www.up.ac.za/cht/ahrdb/acomm_decisions.html

Article 12 of the American Convention was considered in the case of *Olmedo Bustos et Al. v. Chile* – also called *The Last Temptation of Christ* case – concerning the annulment by the Chilean courts of an administrative decision taken by the Cinematographic Classification Council approving the exhibition of the film *The Last Temptation of Christ* for an audience of a minimum of 18 years of age. The applicants submitted, inter alia, that their **freedom of conscience** had been violated because of the censorship of the film, which implied that a group of people with a specific religion decided what other people could see.¹⁰ In its judgment the Inter-American Court of Human Rights pointed out that “the right to freedom of conscience and religion allows everyone to maintain, change, profess and disseminate his religion or beliefs,” adding that this right is one of the foundations of democratic society, which, in its religious dimension, “constitutes a far-reaching element in the protection of the convictions of those who profess a religion and in their way of life”.¹¹ However, in this case there was no evidence, according to the Court, to prove that any of the freedoms embodied in this article had been violated; “the prohibition of the exhibition of the film ‘The Last Temptation of Christ’ did not impair or deprive anyone of their right to maintain, change, profess or disseminate their religion or beliefs with total freedom.”¹² As will be seen below, however, the prohibition did violate the right to freedom of thought and expression set forth in article 13 of the Convention.

2.2.4 Article 9 of the European Convention on Human Rights

Article 9(1) of the European Convention on Human Rights guarantees “the right to freedom of thought, conscience and religion; this right includes the freedom to change [one’s] religion or belief.” In terms very similar to those used in article 18(1) of the Covenant, article 9(1) of the European Convention also protects the freedom of every person, “either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance”.

In the case of *Kokkinakis v. Greece*, the European Court of Human Rights held that “freedom of thought, conscience and religion” as enshrined in article 9

“is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”¹³

Yet, as made clear by the same Court in the case of *Kalaç v. Turkey*, article 9

“does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account.”¹⁴

¹⁰I-A Court HR, *The Case of Olmedo Bustos et Al. v. Chile*, judgment of 5 February 2001, Series C, No. 73. The version used in this context is the unedited text found on the Court’s web site: www.corteidh.or.cr/seriecing/C, para. 45.

¹¹Ibid., para. 79.

¹²Ibid., loc. cit.

¹³Eur. Court HR, *Case of Kokkinakis v. Greece*, judgment of 25 May 1993, Series A, No. 260-A, p. 17, para. 31.

¹⁴Eur. Court HR, *Case of Kalaç v. Turkey*, judgment of 1 July 1997, Reports 1997-IV, p. 1199 at p. 1209, para.27.

This case arose out of a complaint brought by Mr. Kalaç, a judge advocate in the Turkish army, who was compelled to retire for having “adopted unlawful fundamentalist opinions”; he was considered to be at least a de facto member of the Muslim Süleyman sect.¹⁵ According to the Government, his compulsory retirement “was intended to remove from the military legal service a person who had manifested his lack of loyalty to the foundation of the Turkish nation, namely secularism, which it was the task of the armed forces to guarantee”.¹⁶ The applicant argued, on the other hand, that he had been unaware of the existence of the Süleyman sect and that domestic law gave no indication as to the meaning of the expression “unlawful fundamental opinions”, given as grounds for his compulsory retirement.¹⁷

The European Court concluded, however, that there had been no violation of article 9 in this case. It held, in particular, that

“In choosing to pursue a military career Mr Kalaç was accepting of his own accord a system of military discipline that by its very nature implied the possibility of placing on certain of the rights and freedoms of members of the armed forces limitations incapable of being imposed on civilians ... States adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.”¹⁸

The Court noted that it was not contested “that the applicant, within the limits imposed by the requirements of military life, was able to fulfil the obligations which constitute the normal forms through which a Muslim practises his religion”. He was, in particular, permitted to pray five times a day and to perform his other religious duties, such as keeping the fast of Ramadan and attending Friday prayers at the mosque.¹⁹ Lastly, the Supreme Military Council’s order was not based on the applicant’s “religious opinions and beliefs or the way he performed his religious duties but on his conduct and attitude”, which, according to the Turkish authorities, “breached military discipline and infringed the principle of secularism”.²⁰ There had not therefore been any breach of article 9 in this case. It should be pointed out that, since the Court concluded that the applicant’s compulsory retirement did not constitute an interference with his right to freedom of religion, it was not necessary to deal with the case under article 9(2) of the Convention.

The right to freedom of thought, conscience and religion is far-reaching and covers all matters relating to one’s personal convictions. It protects not only religious people but also, for instance, atheists, agnostics, sceptics and the indifferent.

¹⁵Ibid., p. 1203, para. 8, and p. 1208, para. 25.

¹⁶Ibid., p. 1208, para. 25.

¹⁷Ibid., p. 1208, para. 24.

¹⁸Ibid., p. 1209, para. 28.

¹⁹Ibid., p. 1209, para. 29.

²⁰Ibid., p. 1209, para. 30.

The right to freedom of thought, conscience and religion also implies that every person has the unconditional right to have and adopt a religion of his or her choice. This freedom includes the right to change one's religion. Every person has the right not to be coerced or otherwise compelled to maintain, adopt or change a religion.

The right to freedom of thought, conscience and religion, including the freedom to have, adopt or change religion according to one's choice, are protected unconditionally, although freedom of conscience does not imply a right to refuse all obligations imposed by law.

No limitations may be imposed on the freedom to adopt or change a religion of one's choice.

Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, freedom of thought, conscience and religion cannot be derogated from in any circumstances.

Freedom of thought, conscience and religion is a cornerstone of a democratic society/ a society respectful of human rights.

2.3 The right to manifest one's religion or belief

Article 18(1) of the International Covenant guarantees the freedom to manifest one's religion or belief "either individually or in community with others and in public or private" and the freedom to do so "in worship, observance, practice and teaching". As noted by the Human Rights Committee, it is thus a freedom that "encompasses a broad range of acts. The concept of *worship* extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The *observance and practice* of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the *practice and teaching* of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."²¹

The Committee expressed concern, for instance, regarding provisions in the Freedom of Conscience and Religion Organizations Act in Uzbekistan "that require religious organizations and associations to be registered to be entitled to manifest their religion and beliefs" and article 240 of the Uzbek Penal Code, "which penalizes the failure of leaders of religious organizations to register their statutes". The Committee strongly recommended that these provisions be abolished since they were not in conformity with article 18(1) and (3) of the Covenant. It further recommended that

²¹ *United Nations Compilation of General Comments*, p. 144, para. 4; emphasis added.

criminal procedures initiated on the basis of these provisions should be discontinued and convicted persons pardoned and compensated.²²

As noted above, article 8 of the African Charter on Human and Peoples' Rights is the most laconic of the provisions considered in this chapter since it merely guarantees "the profession and free practice of religion", adding that "no one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

According to article 12(1) of the American Convention on Human Rights, the right to freedom of conscience and religion includes "freedom to profess or disseminate one's religion or beliefs either individually or together with others, in public or in private".

Under article 9(1) of the European Convention on Human Rights, the right to freedom of religion includes "freedom, either alone or in community with others and in public or private, to manifest [one's] religion or belief, in worship, teaching, practice and observance". In the case of *Kokkinakis v. Greece*, the European Court held that, "while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest (one's) religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions".²³ It added that, according to article 9 of the European Convention,

"freedom to manifest one's religion is not only exercisable in community with others, 'in public' and within the circle of those whose faith one shares, but can also be asserted 'alone' and 'in private'; furthermore, it includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change (one's) religion or belief, enshrined in Article 9, would be likely to remain a dead letter.'"²⁴

The case of *Cha'are Shalom ve Tsedek v. France* raised the issue of permits to perform ritual slaughters in France. The applicant association complained that articles 9 and 14 of the European Convention had been violated by the refusal of the French authorities to grant it "the approval necessary for it to authorise its own ritual slaughterers to perform ritual slaughter, in accordance with religious prescriptions of its members," and by their granting such approval to the Joint Rabbinical Committee (ACIP) alone.²⁵ The applicant association submitted that the conditions for ritual

²²UN doc. GAOR, A/56/40 (vol. I), pp. 63-64, para. 24.

²³*Eur. Court HR, Case of Kokkinakis v. Greece, judgment of 25 May 1993, Series A, No. 260-A, p. 17, para. 31.*

²⁴*Ibid.*, loc. cit.

²⁵*Eur. Court HR, Case of Cha'are Shalom Ve Tsedek v. France, judgment of 27 June 2000; the text used is the unedited text found on the Court's website: <http://hudoc.echr.coe.int>, para. 58.*

slaughter as performed by the slaughterers authorized by ACIP “no longer satisfied the very strict requirements of the Jewish religion” so that ultra-orthodox Jews could not obtain perfectly pure or *glatt* meat.²⁶ In their view, the refusal to approve it for purposes of slaughter could not be justified under article 9(2) of the Convention and was a disproportionate and discriminatory measure contrary to article 14 thereof.²⁷

Referring to the text of article 9(1), the Court noted that it was not contested “that ritual slaughter, as indeed its name indicates, constitutes a rite or ‘rite’ (the word in the French text of the Convention corresponding to ‘observance’ in the English), whose purpose is to provide Jews with meat from animals slaughtered in accordance with religious prescriptions, which is an essential aspect of practice of the Jewish religion”.²⁸

The question next arose whether the refusal to authorize the applicant association to approve its own ritual slaughterers constituted an interference with their freedoms under article 9(1) of the Convention. In the opinion of the Court, “there would be interference with the freedom to manifest one’s religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable.” However, this was not the case, since it was not contested that the applicant association could easily obtain supplies of *glatt* meat from Belgium. It was further apparent from the material before the Court that a number of butchers’ shops operating under the control of ACIP made meat certified *glatt*.²⁹ Although the applicant association did not trust the ritual slaughters authorized by ACIP, the Court took the view that

“the right to freedom of religion guaranteed by Article 9 of the Convention cannot extend to the right to take part in person in the performance of ritual slaughter and the subsequent certification process, given that ... the applicant association and its members are not in practice deprived of the possibility of obtaining and eating meat considered by them to be more compatible with religious prescriptions.”³⁰

As it had not been established that Jews belonging to the applicant association could not obtain *glatt* meat, or that the applicant could not supply them with it by reaching an agreement with the ACIP, in order to be able to engage in ritual slaughter under cover of the approval granted to the ACIP, the Court concluded “that the refusal of approval complained of did not constitute an interference with the applicant association’s right to freedom to manifest its religion”.³¹ It was not necessary therefore for the Court to rule on the compatibility of the restriction challenged by the applicant under article 9(2) of the Convention. The Court observed, nevertheless, that, even on the assumption that the impugned measure “could be considered an interference with the right to freedom to manifest one’s religion,” it was prescribed by law and pursued a

²⁶Ibid., para. 60.

²⁷Ibid., para. 61.

²⁸Ibid., para. 73.

²⁹Ibid., paras. 80-81.

³⁰Ibid., para. 82.

³¹Ibid., para. 83.

legitimate aim, namely, “the protection of public health and public order, in so far as organisation by the State of the exercise of worship is conducive to religious harmony and tolerance”. Having regard to the margin of appreciation left to the Contracting States, particularly with regard to establishment of the delicate relations between the State and religions, it could not be considered excessive or disproportionate and the measure was not, therefore, in breach of article 9(2).³²

As to the question of alleged discrimination, the Court concluded that there had been no violation of article 9 in conjunction with article 14 of the Convention. It noted in particular that the difference of treatment which resulted from the measure complained of “was limited in scope”. In so far as there was a difference of treatment, it pursued a legitimate aim, and there was a reasonable relationship of proportionality between the means employed and the aim sought to be realized. The difference of treatment therefore “had an objective and reasonable justification within the meaning of the Court’s consistent case-law”.³³

2.3.1 Limitations on the right to manifest one’s religion or belief

Among the freedoms guaranteed by article 18 of the International Covenant, only the freedom to manifest one’s religion or beliefs may be restricted. According to article 18(3), this freedom “may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”. The Human Rights Committee emphasizes that this provision “is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.”³⁴ The Committee importantly adds that limitations on the right to manifest one’s religion or beliefs “must not be applied in a manner that would vitiate the rights guaranteed in article 18”.³⁵ Lastly, the limitations must not, of course, “be imposed for discriminatory purposes or applied in a discriminatory manner”.³⁶

In resorting to limitations on the right to manifest one’s religion or beliefs, States parties must therefore ensure that they

- ❖ comply with the principle of legality (“prescribed by law”);
- ❖ are imposed exclusively for one or more of the objectives enumerated in article 18(3);
- ❖ are necessary to achieve the objective concerned (principle of proportionality); and, lastly,
- ❖ are not discriminatory but applied in an objective and reasonable manner.

³²Ibid., para. 84.

³³Ibid., paras. 87-88. The Court, sitting as a Grand Chamber, was not unanimous in this case. By 12 votes to 5 it concluded that there was no violation of article 9 of the Convention, while the vote on article 9 in conjunction with article 14 was 12 to 7.

³⁴United Nations *Compilation of General Comments*, p. 145, para. 8.

³⁵Ibid., loc. cit.

³⁶Ibid.

With regard to the concept of *morals* as a possible justification for limitations on the freedom to manifest one's religion or beliefs, the Committee states that it derives from many social, philosophical and religious traditions and that, consequently, "limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition."³⁷

It further states that "persons already subject to certain legitimate restraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint."³⁸

In the *Sing Bhinder v. Canada* case, the author, who was a Sikh, complained of a violation of article 18 of the Covenant as a consequence of the termination of his labour contract following his refusal to wear safety headgear during his work. The Committee examined this issue under both article 18 and article 26 of the Covenant and concluded that, if the requirement to wear a hard hat were regarded as raising an issue under article 18, it was a limitation justified by reference to the grounds laid down in article 18(3). On the other hand, if it was considered as a de facto discrimination against persons of the Sikh religion under article 26, "the legislation requiring that workers in the federal employment be protected from injury and electric shock by the wearing of hard hats is to be regarded as reasonable and directed towards objective purposes that are compatible with the Covenant."³⁹

The grounds for allowing limitations on the freedom to manifest one's religion or beliefs contained in article 12(3) of the American Convention on Human Rights are similar to those found in article 18(3) of the International Covenant. Limitations may thus be imposed provided that they are "prescribed by law" and "are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others". The measures resorted to must, in other words, be proportionate to the legitimate aim pursued.

According to article 9(2) of the European Convention on Human Rights, "freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." The grounds enumerated cover in substance those found in the other two treaties. There is thus an important convergence on the major issue of limitations on the freedom to manifest one's religion or beliefs. However, article 9(2) of the European Convention adds the condition that limitations for the reasons invoked must be necessary "in a democratic society". The necessity test must therefore be made in the light of the needs of a society based on a democratic constitutional order.

³⁷Ibid.

³⁸Ibid., pp. 145-146, para. 8.

³⁹Communication No. 208/1986, *K. Sing Bhinder v. Canada* (Views adopted on 9 November 1989), in UN doc. G.AOR, A/45/40 (vol. II), p. 54, para. 6.2.

Article 9 was examined by the European Court of Human Rights in the case of *Kokkinakis v. Greece* concerning a Jehovah's Witness convicted of proselytism in Greece, where, by virtue of Law No, 1363/1938, as amended by Law No. 1672/1939, proselytism was made a crime during the dictatorship of Metaxas (1936-1940).⁴⁰ The applicant was sentenced by the Lasithi Criminal Court to four months' imprisonment, convertible into a pecuniary penalty, and to a fine of 10,000 drachmas. On appeal, the Crete Court of Appeal reduced the prison sentence to three months' imprisonment converted into a pecuniary penalty.⁴¹ The applicant and his wife had been arrested at the home of a woman who was married to the cantor at a local Orthodox church. The applicant mainly complained that this conviction was an unlawful restriction of the exercise of his right to freedom of religion.⁴²

The European Court considered that Mr. Kokkinakis' conviction amounted to an interference with his right to manifest his religion or belief, which would be contrary to article 9 unless it was: (1) "prescribed by law"; (2) directed at one or more of the legitimate aims in paragraph 2; and (3) "necessary in a democratic society" for achieving them.⁴³ These various questions were dealt with as follows by the Court:

Was the interference "prescribed by law"? In reply to the applicant's argument that the Greek legislation did not describe the "objective substance" of the offence of proselytism,⁴⁴ the Court noted that

"the wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague ... Criminal-law provisions on proselytism fall within this category. The interpretation and application of such enactments depends on practice."⁴⁵

In the case before it there was, however, "a body of settled national case-law ... which had been published and was accessible", thereby supplementing the terms of the 1936 Law and enabling the applicant "to regulate his conduct in the matter"; it followed that the measure complained of was "prescribed by law" within the meaning of article 9(2) of the European Convention.⁴⁶

Was the measure imposed for a legitimate aim? The Court concluded that, having regard to the circumstances of the case and the actual terms of the relevant court decisions, "the impugned measure was in pursuit of a legitimate aim under Article 9 § 2, namely the protection of the rights and freedoms of others, relied on by the Government"; the Government had in fact submitted "that a democratic State had to ensure the peaceful enjoyment of the personal freedoms of all those living on its territory" and that article 9(2) "would in practice be rendered wholly nugatory" unless

⁴⁰ Eur. Court HR, *Case of Kokkinakis v. Greece*, judgment of 25 May 1993, Series A, No. 260-A, p. 12, para. 16.

⁴¹ Ibid., pp. 8-10, paras. 9-10.

⁴² Ibid., p. 16, para. 28.

⁴³ Ibid., p. 18, para. 36.

⁴⁴ Ibid., p. 19, para. 38.

⁴⁵ Ibid., p. 19, para. 40.

⁴⁶ Ibid., pp. 19-20, paras. 40-41.

the State were “vigilant to protect a person’s religious beliefs and dignity from attempts to influence them by immoral and deceitful means”.⁴⁷

Was the prohibition “necessary in a democratic society”? This is the crucial test that numerous cases have failed to pass under various articles of the European Convention on Human Rights. The test of what is “necessary in a democratic society” is the ultimate safeguard against interference with the enjoyment of a person’s fundamental freedoms that cannot possibly be considered necessary in a society that is pluralistic and tolerant.

Although the Contracting States have “a certain margin of appreciation ... in assessing the existence and extent of the necessity of an interference, ... this margin is subject to European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court.” The task of the European Court in the *Kokkinakis v. Greece* case was therefore “to determine whether the measures taken at national level were justified in principle and proportionate”.⁴⁸

As to the meaning of proselytism, the Court held that, first of all:

“a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism, which a report drawn up in 1956 under the auspices of the World Council of Churches describes as an essential mission and responsibility of every Christian and every Church. The latter represents a corruption or deformation of it. It may, according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others.”⁴⁹

An examination of section 4 of Law No. 1363/1938 showed, however, that the criteria adopted by the Greek legislature were reconcilable with the foregoing if and insofar as they were “designed only to punish improper proselytism, which the Court [did] not have to define in the abstract in the present case”.⁵⁰ The Court noted, on the other hand, “that in their reasoning the Greek courts established the applicant’s liability by merely reproducing the wording of article 4 and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means”. Indeed, “none of the facts they set out warranted that finding”.⁵¹ It followed that it had not been shown “that the applicant’s conviction was justified in the circumstances of the case by a pressing social need” and the contested measure did not therefore appear “to have been proportionate to the legitimate aim pursued or, consequently, ‘necessary in a

⁴⁷Ibid., p. 20, paras. 44 and 42.

⁴⁸Ibid., p. 21, para. 47.

⁴⁹Ibid., p. 21, para. 48.

⁵⁰Ibid., loc. cit. According to article 4(2) of Law No. 1363/1938 as amended, “proselytism” meant, “in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (*eterodoxos*), with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety”, p. 12, para. 16.

⁵¹Ibid., p. 21, para. 49.

democratic society ... for the protection of the rights and freedoms of others”’. There had, in other words, been a violation of article 9 in the case.⁵²

A violation of article 9 of the European Convention was also found in the case of *Serif v. Greece*, which – against a complex historical background – concerned the right of Muslims to organize elections for the post of Mufti in Rodopi. That right was overturned on 24 December 1990 by the Government through a legislative decree that was retroactively validated when the Greek Parliament passed Law No. 1920 on 4 February 1991. Requests had been made to the Government for the organization of elections to fill the post of Mufti in Rodopi following the death of the previous Mufti. In the absence of a reply, elections were held at the mosques after prayers on 28 December 1990. The applicant was elected Mufti and, together with other Muslims, challenged before the Supreme Court the Government’s decision to appoint another person to that position.⁵³ On 12 December 1994, the Salonika Criminal Court found the applicant guilty under articles 175 and 176 of the Criminal Code “for having usurped the functions of a minister of a ‘known religion’ and for having publicly worn the dress of such a minister without having the right to do so”.⁵⁴ The applicant was given a commutable sentence of eight months’ imprisonment, which was reduced to six months on appeal, the Court of Appeal having upheld the conviction. The sentence was commuted to a fine.⁵⁵

Before the European Court, the applicant complained that his conviction amounted to unjustified interference with his right to be free to exercise his religion together with all those who turned to him for spiritual guidance.⁵⁶

The Court concluded in the first place that the applicant’s conviction amounted to “an *interference* with his right under Article 9 § 1 of the Convention, ‘in community with others and in public ... to manifest his religion ... in worship [and] teaching’”; this followed from the facts on which the conviction was based, according to which the applicant had issued a message about the religious significance of a feast, delivered a speech at a religious gathering, worn the dress of a religious leader and so forth.⁵⁷ The Court did not, however, consider it necessary to deal with the question whether the interference was “*prescribed by law*”, since it was in any event contrary to article 9 on other grounds.

The Court next accepted that the interference *pursued a legitimate aim* under article 9(2) of the Convention, namely protection of “public order”, since “the applicant was not the only person claiming to be the religious leader of the local Muslim community”, the authorities having appointed another person. The Government had argued that the interference served a legitimate purpose because by protecting the authority of the lawful mufti “the domestic courts sought to preserve order in the particular religious community and in society at large.”⁵⁸

⁵²Ibid., pp. 21-22, paras. 49-50.

⁵³*Eur. Court HR, Case of Serif v. Greece, judgment of 14 December 1999, Reports 1999-IX, p. 79, paras. 9-12.*

⁵⁴Ibid., pp. 79-80, paras. 13, 15 and 16; the quote is from para. 13.

⁵⁵Ibid., p. 80, paras. 16-17.

⁵⁶Ibid., p. 84, para. 36.

⁵⁷Ibid., p. 85, para. 39; emphasis added.

⁵⁸Ibid., p. 86, paras. 43 and 45.

Lastly, in considering whether *the interference was necessary in a democratic society*, the Court recalled its ruling in the *Kokkinakis* case, according to which “freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’”, pluralism being “indissociable” from such a society.⁵⁹ It was true, nevertheless, that

“in a democratic society it may be necessary to place restrictions on freedom of religion to reconcile the interests of the various religious groups ... However, any such restriction must correspond to a ‘pressing social need’ and must be ‘proportionate to the legitimate aim pursued’.”⁶⁰

Yet in the Court’s view, “punishing a person for merely acting as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society.”⁶¹ The Court was “not oblivious of the fact that in Rodopi there existed, in addition to the applicant, an officially appointed mufti” and that the Government had argued “that the applicant’s conviction was necessary in a democratic society because his actions undermined the system put in place by the State for the organisation of the religious life of the Muslim community in the region”. The Court recalled, however, that there was “no indication that the applicant attempted at any time to exercise the judicial and administrative functions for which the legislation on the muftis and other ministers of ‘known religions’ makes provisions”. It did not consider that “in democratic societies, the State needs to take measures to ensure that religious communities remain or are brought under a unified leadership”.⁶²

It only remained for the Court to consider the Government’s argument “that, in the particular circumstances of the case, the authorities had to intervene in order to avoid the creation of tension among the Muslims in Rodopi and between the Muslims and the Christians of the area as well as Greece and Turkey”. To this the Court gave the following important reply:

“Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.”⁶³

The Court noted that, “apart from a general reference to the creation of tension, the Government did not make any allusion to disturbances among the Muslims in Rodopi that had actually been or could have been caused by the existence of two religious leaders.” It considered, moreover, that nothing had been adduced “that could warrant qualifying the risk of tension between the Muslims and Christians or between Greece and Turkey as anything more than a very remote possibility”.⁶⁴

⁵⁹Ibid., p. 87, para. 49.

⁶⁰Ibid., loc. cit.

⁶¹Ibid., p. 88, para. 51.

⁶²Ibid., p. 88, para. 52.

⁶³Ibid., p. 88, para. 53.

⁶⁴Ibid., loc. cit.

In the light of all these considerations, the Court concluded that it had not been shown that the applicant's conviction "was justified in the circumstances of the case by 'a pressing social need'". As a result, the interference with his right, in community with others and in public, to manifest his religion in worship and teaching was not "necessary in a democratic society ... for the protection of public order" under Article 9 § 2 of the Convention.⁶⁵ It followed that article 9 had been violated.

The third case relating to article 9 of the European Convention on Human Rights is that of *Buscarini and Others v. San Marino* concerning the obligation imposed on the applicants to take an oath containing a reference to the Holy Gospels on pain of forfeiting their parliamentary seats in the Republic of San Marino. In their view, it had been shown that in the Republic "at the material time the exercise of a fundamental political right, such as holding parliamentary office, was subject to publicly professing a particular faith" in breach of article 9 of the Convention.⁶⁶ For its part the Government maintained "that the wording of the oath in question was not religious but, rather, historical and social in significance and based on tradition". It did not, therefore, amount to a limitation of the applicants' freedom of religion.⁶⁷

Reiterating its fundamental ruling in the *Kokkinakis* case on freedom of thought, conscience and religion, the Court added that this freedom "entails, *inter alia*, freedom to hold or not to hold religious beliefs and to practice or not to practice a religion". The obligation for the applicants to take the oath on the Gospels "did indeed constitute a limitation" within the meaning of article 9(2) of the Convention, "since it required them to swear allegiance to a particular religion on pain of forfeiting their parliamentary seats".⁶⁸ The question thus arose whether such interference could be justified as being prescribed by law and necessary in a democratic society for one or more of the legitimate aims set out in article 9(2).

The Court concluded that the measure was "*prescribed by law*", since it was based on section 55 of the Elections Act of 1958, which referred to the Decree of 27 June 1909 laying down the wording of the oath to be sworn by members of the Parliament.⁶⁹ Without determining in this case whether there were any *legitimate aims* justifying the interference within the meaning of article 9(2) of the Convention, the Court concluded that it was not in doubt that, in general, the law of San Marino guarantees freedom of conscience and religion. In the instant case, however, "requiring the applicants to take oath on the Gospels was tantamount to requiring two elected representatives of the people to swear allegiance to a particular religion," a requirement that was not compatible with article 9 of the Convention, which had therefore been violated.⁷⁰ In other words, the interference was not necessary in a democratic society.

⁶⁵Ibid., p. 88, para. 54.

⁶⁶*Eur. Court HR, Case of Buscarini and Others v. San Marino, judgment of 18 February 1999, Reports 1999-I, p. 612, paras. 12-13, and p. 615, para. 30 (quotation).*

⁶⁷Ibid., p. 616, para. 32.

⁶⁸Ibid., p. 616, para. 34.

⁶⁹Ibid., p. 616, para. 35.

⁷⁰Ibid., p. 617, para. 39.

2.3.2 Prohibitions on the freedom to manifest one's religion or belief

Article 18 of the International Covenant must be read in conjunction with article 20, according to which the following acts “shall be prohibited by law”:

- ❖ any “propaganda for war” (art. 20(1)), and
- ❖ any “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” (art. 20(2)).⁷¹

It follows that the manifestation of religion or beliefs must *not at any time* be used as a tool for the encouragement of war or for advocacy of hatred. The Human Rights Committee confirms that no derogation made pursuant to article 4(1) of the Covenant “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”.⁷² The fact that States parties are legally bound to outlaw war propaganda and religious incitement to discrimination, hostility and violence implies that they also have a legal duty to ensure that this prohibition is respected in practice.

Every person has the right to manifest his or her religion either in private or in public and either individually or in community with others.

The manifestation of one's religion or beliefs may cover such activities as worship, observance, practice, teaching, evangelization and rites.

The right to manifest one's religion may be subjected to limitations, provided that such limitations are

- *prescribed by law*
- *imposed in order to protect a legitimate aim, namely public safety, (public) order, health, morals or the rights and freedoms of others, and*
- *necessary in order to protect the legitimate objective.*

At the European level, the notion of a democratic society plays a pivotal role in determining the necessity of measures limiting a person's right to manifest his or her religion or beliefs.

2.4 Freedom of religion and public school instruction

According to the Human Rights Committee, “the liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions” under article 18(4) of the Covenant “is related to the guarantees of the freedom to teach a religion or belief stated in article 18.1”. This means, inter alia, that article 18(4) of the Covenant “permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and

⁷¹United Nations Compilation of General Comments, p. 145, para. 7.

⁷²General Comment No. 29 (72) (Derogations from provisions of the Covenant during a state of emergency), in UN doc. GAOR, A/56/40 (vol. I), p. 206, para. 13(e).

objective way”, but that “public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.”⁷³

In the case of *Hartikainen v. Finland*, the author complained of a violation of article 18(4) of the Covenant as a consequence of the requirement in Finnish legislation that instruction in the history of religions and ethics should be given instead of religious instruction to students whose parents or legal guardians objected to religious instruction. The author, who was a teacher and also a member of the Union of Free Thinkers in Finland, wanted such alternative classes to be neutral and non-compulsory. Disagreeing with the author, the Committee concluded that such alternative instruction in the history of religions and ethics was not in itself incompatible with article 18(4) of the Covenant if “given in a neutral and objective way”, respecting “the convictions of parents and guardians who do not believe in any religion”. In any event, the impugned legislation expressly permitted parents and guardians who did not wish their children to be given either religious instruction or instruction in the history of religions and ethics to obtain exemption therefrom by arranging for them to receive comparable instruction outside school.⁷⁴

Article 12(4) of the American Convention guarantees the right of parents and guardians, as the case may be, to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Although article 9 of the European Convention contains no similar guarantee, the second sentence of article 2 of Protocol No. 1 to the Convention states that:

“In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

According to the European Court of Human Rights, this sentence, which is an adjunct to the fundamental right to education guaranteed by the first sentence of the article,⁷⁵

“is binding upon the Contracting States in the exercise of each and every function – it speaks of ‘any functions’ – that they undertake in the sphere of education and teaching, including that consisting of the organisation and financing of public education”.⁷⁶

⁷³United Nations *Compilation of General Comments*, p. 145, para. 6.

⁷⁴Communication No. R.9/40, *E. Hartikainen v. Finland* (Views adopted on 9 April 1981), in UN doc. *GAOR*, A/36/40, p. 152, para. 10.4.

⁷⁵*Eur. Court HR, Case of Kjeldsen, Busk Madsen and Pedersen, judgment of 7 December 1976, Series A, No. 23*, p. 26, para. 52.

⁷⁶*Ibid.*, p. 24, para. 50.

The provision “aims in short at safeguarding the possibility of pluralism in education, which possibility is essential for the preservation of the ‘democratic society’ as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.”⁷⁷ Article 2 of Protocol No. 1 thus “enjoins the State to respect parents’ convictions, be they religious or philosophical, throughout the entire State education programme” and it does not therefore “permit a distinction to be drawn between religious instruction and other subjects”.⁷⁸

However, the second sentence of article 2 of the Protocol

“does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable.”⁷⁹

The same provision

“implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious or philosophical convictions. That is the limit that must not be exceeded.”⁸⁰

In the case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, the applicants objected to the integrated and compulsory sex education in Danish primary schools and alleged that this violated their rights under, inter alia, article 2 of Protocol No. 1 to the Convention. However, after examining the Danish legislation, the Court concluded that the provision had not been violated. In its opinion, the legislation did not entail “overstepping the bounds of what a democratic State may regard as the public interest” and it “in no way [amounted] to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour”.⁸¹ The Court added, however, that, in order to avoid abuses in its application by a given school or teacher “the competent authorities have a duty to take the utmost care to see to it that parents’ religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism.”⁸²

⁷⁷Ibid., p. 25, para. 50.

⁷⁸Ibid., p. 25, para. 51.

⁷⁹Ibid., p. 26, para. 53.

⁸⁰Ibid., loc. cit.

⁸¹Ibid., p. 27, para. 54.

⁸²Ibid., p. 28, para. 54.

In the case of *Campbell and Cosans*, on the other hand, the Court concluded that there had been a violation of the second sentence of article 2 of Protocol No. 1 as a consequence of the existence of corporal punishment as a disciplinary measure in the schools attended by the applicants' children, such punishment being contrary to their philosophical convictions.⁸³

Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, parents or legal guardians have the right to ensure that the religious and moral education of their children is conveyed in accordance with their own convictions.

It is, however, compatible with the International Covenant to impart public school instruction in subjects such as the general history of religions and ethics provided that this is done in a neutral and objective manner.

Under the European Convention on Human Rights, the Contracting States are legally bound to ensure that in each and every function that they undertake in the field of education and teaching, the religious or philosophical convictions of parents or legal guardians are respected.

This means that States have to take care to impart information or knowledge in an objective, critical and pluralistic way and that they are forbidden to pursue an aim of indoctrination.

2.5 State religion and religious minorities

The recognition of a religion as a so-called State religion or a religion that is simply an official or traditional religion or a religion professed by a majority of the State's population can easily imply that other religions are discriminated against. However, as noted by the Human Rights Committee, this situation "shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers".⁸⁴ It would, for instance, be contrary to the non-discrimination provision in article 26 of the Covenant to adopt "measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths".⁸⁵

The Committee points out in this connection that article 20(2) of the Covenant provides "important safeguards against infringements of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups".⁸⁶

⁸³ Eur. Court HR, *Case of Campbell and Cosans*, judgment of 25 February 1982, Series A, No. 48, pp. 14-18, paras. 32-38.

⁸⁴ United Nations *Compilation of General Comments*, p. 146, para. 9.

⁸⁵ *Ibid.*, loc. cit.

⁸⁶ *Ibid.*

Lastly, the Committee stresses that “if a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.”⁸⁷

The Human Rights Committee has emphasized that States parties to the International Covenant on Civil and Political Rights have a legal duty to ensure that there is no discrimination against adherents of different religions or non-believers.

2.6 Conscientious objection on religious grounds

Although the right to conscientious objection is not expressly guaranteed by the International Covenant, the Human Rights Committee “believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service.”⁸⁸

These views have been confirmed in several cases brought under the Optional Protocol to the Covenant, such as that of *Westerman v. the Netherlands*, in which the author complained, inter alia, of a violation of article 18 as a consequence of his being sentenced to nine months’ imprisonment for refusing to wear a military uniform as ordered by a military officer. Prior to entering military service, the author had in vain tried to be recognized as a conscientious objector on the basis that the army was “contrary to the destination of (wo)man”.⁸⁹

The issue to be decided by the Committee was whether the imposition of sanctions on the author “to enforce the performance of military duty was ... an infringement of his right to freedom of conscience”. The Committee pointed out that the responsible authorities “evaluated the facts and arguments advanced by the author in support of his claim for exemption as a conscientious objector in the light of its legal provisions in regard to conscientious objection and that these legal provisions [were] compatible with the provisions of article 18”. It further observed that the author had “failed to satisfy” the State authorities “that he had an ‘insurmountable objection of conscience to military service ... because of the use of violent means’”. On this basis, the Committee concluded that there was “nothing in the circumstances of the case which [required it] to substitute its own evaluation of this issue for that of the national authorities”.⁹⁰ It followed that article 18 had not been violated.

⁸⁷Ibid., para. 10.

⁸⁸Ibid., para. 11.

⁸⁹Communication No. 682/1996, *Westerman v. the Netherlands* (Views adopted on 3 November 1999), in UN doc. GAOR, A/55/40 (vol. II), pp. 41-43, paras. 2.1-2.7 and p. 46, para. 9.4.

⁹⁰Ibid., p. 47, para. 9.5.

The question of conscientious objection may, however, also be examined under articles 8 and 26 of the Covenant. Under article 8(3)(c)(ii), the term “forced and compulsory labour” shall not include “any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors”. The Committee has, however, consistently found a violation of article 26 of the Covenant where the national alternative service is *disproportionately longer* than the military service. This was the situation, for instance, in the case of *R. Maille v. France*. French law required conscientious objectors to complete 24 months of alternative service instead of 12 months of military service. In this case the Committee concluded that article 26 of the Covenant had been violated “since the author was discriminated against on the basis of his conviction of conscience”, the Government having failed to submit any reasons to show that the differentiation was based on “reasonable and objective criteria” that would justify the longer period of service.⁹¹

With regard to conscientious objection, the Committee further considers that the exemption of only one group of conscientious objectors, such as the Jehovah’s Witnesses, and the inapplicability of exemption for all others cannot be considered reasonable, since “no differentiation shall be made among conscientious objectors on the basis of the nature of their particular beliefs.”⁹² Yet where the author had not shown “that his convictions as a pacifist [were] incompatible with the system of substitute service ... or that the privileged treatment accorded to Jehovah’s Witnesses adversely affected his rights as a conscientious objector against military service”, the Committee found that he had not been a victim of a violation of article 26 of the Covenant.⁹³

The Human Rights Committee has accepted that the right to conscientious objection can be derived from article 18 of the International Covenant on Civil and Political Rights. This right is not unconditional and the Committee may be reluctant to re-examine decisions taken by the national authorities in this regard. However, when the right to conscientious objection is recognized in national law, there must be no discrimination between the persons concerned on the basis of their particular beliefs.

Alternative/ substitute service must not be disproportionately longer than ordinary military service. Any distinction in this regard must be based on reasonable and objective criteria.

⁹¹Ibid., Communication No. 689/1996, *R. Maille v. France* (Views adopted on 10 July 2000), p. 72, para. 10.4.

⁹²Communication No. 402/1990, *H. Brinkhof v. the Netherlands* (Views adopted on 27 July 1993) in UN doc. GAOR, A/48/40 (vol. II), p. 129, para. 9.3.

⁹³Ibid., loc. cit.

3. The Right to Freedom of Opinion and Expression

3.1 Relevant legal provisions

The main legal provisions dealt with in this subsection are:

Article 19 of the Universal Declaration of Human Rights:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Article 19 of the International Covenant on Civil and Political Rights:

- “1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights and reputation of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

Article 9 of the African Charter on Human and Peoples’ Rights:

- “1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.”

Article 13 of the American Convention on Human Rights:

- “1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

- a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinion.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offences punishable by law.”

Article 10 of the European Convention on Human Rights:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The right to freedom of expression is also guaranteed by article 5(d)(viii) of the International Convention on the Elimination of All Forms of Racial Discrimination and article 13 of the Convention on the Rights of the Child.

As the substance of freedom of expression is intrinsically linked to limitations on its exercise, these two issues will be dealt with jointly in the light of the extensive jurisprudence and legal comments of the international monitoring bodies.

3.2. Article 19 of the International Covenant on Civil and Political Rights

The right “to hold opinions without interference” guaranteed by article 19(1) “is a right to which the Covenant permits no exception or restriction”.⁹⁴ This is logical since it is impossible to control what goes on in a person’s mind.

The right to freedom of expression, as guaranteed by article 19(2), is multi-dimensional and wide-ranging, and includes “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [one’s] choice”. In its 1983 General Comment on this article, the Human Rights Committee notes that it is not sufficient for States parties to claim in their periodic reports that freedom of expression is guaranteed by the Constitution; “in order to know the precise regime of freedom of expression in law and in practice, the Committee needs in addition pertinent information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right.”⁹⁵

The restrictions permitted by article 19(3) of the Covenant “shall only be such as are provided by law and are necessary ... for respect of the rights or reputations of others” or “for the protection of national security or of public order (*ordre public*), or of public health or morals”. *In other words, to be lawful, restrictions on freedom of expression must comply with the principles of legality and proportionality and be imposed for one or more of the legitimate purposes enumerated in article 19(3).* The Committee has further emphasized that the right to freedom of expression “is of paramount importance in any democratic society, and any restrictions to the exercise thereof must meet a strict test of justification”.⁹⁶

Freedom of expression may, however, also be limited on the basis of article 20 of the Covenant, according to which “propaganda for war” and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

The scope of article 19 in various contexts will be further illustrated by a selection of communications brought under the Optional Protocol and of recommendations made by the Committee in connection with the consideration of the periodic reports of States parties.

Article 19(1) of the International Covenant on Civil and Political Rights guarantees the right to hold opinions without interference. This right may not be subjected to any exception or restriction.

⁹⁴General Comment No. 10 (Article 19) of the Human Rights Committee, in UN doc. *United Nations Compilation of General Comments*, p. 119, para. 1.

⁹⁵*Ibid.*, p. 120, para. 3.

⁹⁶Communication No. 628/1995, *T. Hoon Park v. the Republic of Korea* (Views adopted on 20 October 1998) in UN doc. *G.AOR*, A/54/40 (vol. II), p. 91, para. 10.3.

As a point of departure, the right to freedom of expression in article 19(2) of the Covenant may be described as all-encompassing in that it includes the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, whether in oral, written or printed form or through any other media of one's choice. Art is a form of expression protected by article 19(2).

Freedom of expression may be limited only on the basis of articles 19(3) and 20 of the Covenant.

3.2.1 Choice of language in court

In the case of *Cadoret and Le Biban v. France*, the authors claimed that their freedom of expression had been violated since they were not allowed to use the Breton language in French courts; the Committee observed that the fact that the authors had not been able to speak the language of their choice raised no issues under article 19(2). The complaint was therefore declared inadmissible.⁹⁷ In Australia, the same finding was made with regard to the provision of sign language in court for deaf people.⁹⁸ It should be recalled, however, that a person who does not understand the language used in court has the right to free assistance of an interpreter (see Chapter 7, subsection 3.9).

Freedom of information, as guaranteed by article 19 of the International Covenant on Civil and Political Rights, does not include a right to speak the language of one's choice in court proceedings.

3.2.2 Advertising

In the case of *Ballantyne, Davidson and McIntyre v. Canada*, the authors, who were living in Quebec, complained of a violation of, inter alia, article 19 of the Covenant because they were “forbidden to use English for purposes of advertising, e.g. on commercial signs outside the business premises, or in the name of the firm”.⁹⁹ The Human Rights Committee did not share the Canadian Government’s view that commercial activities are not covered by article 19. It held that article 19(2)

“must be interpreted as encompassing every form of subjective ideas and opinions capable of transmission to others, which are compatible with article 20 of the Covenant, of news and information, of commercial expression and advertising, or works of art, etc.; it should not be confined to means of political, cultural or artistic expression. In the Committee’s opinion, the commercial element in an expression taking the form of outdoor advertising cannot have the effect of removing this expression

⁹⁷ Communications Nos. 221/1987 and 323/1988, *Y. Cadoret and H. Le Biban v. France* (Views adopted on 11 April 1991) in UN doc. GAOR, A/46/40, p. 224, para. 5.2.

⁹⁸ See *Gradiage v. Grace Bros. Pty. Ltd.* (1988), *Federal Law Reports*, vol. 92, p. 414.

⁹⁹ Communications Nos. 359/1989 and 385/1989, *J. Ballantyne and E. Davidson, and G. McIntyre v. Canada* (Views adopted on 31 March 1993), in UN doc. GAOR, A/48/40 (vol. II), p. 91, para. 1.

from the scope of protected freedom. The Committee does not agree either that any of the above forms of expression can be subjected to varying degrees of limitation, with the result that some forms of expression may suffer broader restrictions than others.”¹⁰⁰

As the right to freedom of expression set forth in article 19(2) had thus been limited, the Committee had to decide whether the restrictions could be justified under article 19(3) of the Covenant. While the relevant measures were “indeed provided for by law”, namely section 58 of the Charter of the French Language as amended by section 1 of Bill No. 178, the question arose whether they were necessary to ensure respect for the rights of others, namely “the rights of the francophone minority within Canada”. The Committee believed that it was “not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English”, since such protection could be achieved in other ways not precluding “the freedom of expression, in a language of their choice, of those engaged in such fields as trade”. The law could, for instance, have required that advertising be in both French and English. The Committee added that “a State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one’s choice.”¹⁰¹ It followed that article 19(2) had been violated.¹⁰²

Freedom of expression, as guaranteed by article 19(2) of the International Covenant on Civil and Political Rights, is not limited to means of political, cultural and artistic expression but covers every form of subjective idea and opinion that is capable of transmission to others, such as commercial advertising.

Outside the public sphere, individuals have the right to choose the language in which they wish to express themselves. In public life, however, a State may choose one or more official languages.

3.2.3 Defamation and dissemination of false information

The Human Rights Committee observed that a provision in the Croatian Penal Code allowing proceedings for slander could, in certain circumstances, lead to restrictions that go beyond those permissible under article 19(3). However, given the absence of specific information by the author in the case of *D. Paraga v. Croatia* and the dismissal of the charges against him, the Committee was unable to conclude that the institution of proceedings against the author, by itself, amounted to a violation of article 19. The proceedings had been instituted because he had referred to the Croatian President as a “dictator”.¹⁰³

¹⁰⁰Ibid., pp. 102-103, para. 11.3.

¹⁰¹Ibid., p. 103, para. 11.4.

¹⁰²Ibid., loc. cit.

¹⁰³Communication No. 727/1996, *D. Paraga v. Croatia* (Views adopted on 4 April 2001), in UN doc. GAOR, A/56/40 (vol. II), p. 66, para. 9.6.

When considering the initial report of Croatia, the Committee also pointed out that, although the right to freedom of expression was constitutionally guaranteed, “the variety of provisions in the Criminal Code dealing with offences against honour and reputation, covering areas of defamation, slander, insult and so forth [were] uncertain in their scope, particularly with respect to speech and expression directed against the authorities.” It therefore urged the State party to work towards developing “a comprehensive and balanced code in this area” setting out clearly and precisely the restrictions on freedom of speech and expression and ensuring that such restrictions did not exceed those permissible under article 19(3) of the Covenant.¹⁰⁴ The Committee also took note of the existence of the crime of disrespect of authority (*desacato*), in the Dominican Republic, which it deemed contrary to article 19 of the Covenant. The State party was asked to take steps to abolish that crime.¹⁰⁵

The Committee expressed concern in the case of Iraq about “severe restrictions on the right to express opposition to or criticism of the Government or its policies” and about the fact that “the law imposes life imprisonment for insulting the President of the Republic, and in certain cases death.” The Committee also noted that the law “imposes severe punishments for vaguely defined crimes which are open to wide interpretations by the authorities, such as writings detrimental to the President”. In its view, “such restrictions on freedom of expression, which effectively prevent the discussion of ideas or the operation of political parties in opposition to the ruling Ba’ath party, constitute a violation of articles 6 and 19 of the Covenant and impede the implementation of articles 21 and 22 of the Covenant, which protect the rights to freedom of peaceful assembly and association.”. It observed that the penal laws and decrees imposing restrictions on the freedoms of expression, peaceful assembly and association should be amended so as to comply with the relevant provisions of the Covenant.¹⁰⁶

The Committee expressed concern about a number of aspects of freedom of expression in Slovakia such as article 98 of the Penal Code which makes it an offence to disseminate false information abroad which harms the interest of the State. In the Committee’s view, “this terminology ... is so broadly phrased as to lack any certainty and carries the risk of restricting freedom of expression beyond the limits allowable under [article 19(3)]”. The Committee also expressed concern about “lawsuits for defamation resulting from expressing criticism of the Government” which posed a problem under article 19.¹⁰⁷

States parties to the International Covenant on Civil and Political Rights must ensure that laws on defamation and dissemination of false information comply with the principle of legal certainty; in other words, such laws must be sufficiently detailed to allow persons to adopt a form of conduct that does not violate them.

¹⁰⁴UN doc. GAOR, A/56/40 (vol. I), p. 68, para. 17.

¹⁰⁵Ibid., p. 58, para. 22.

¹⁰⁶UN doc. GAOR, A/53/40 (vol. I), p. 21, para. 105.

¹⁰⁷UN doc. GAOR, A/52/40 (vol. I), p. 61, para. 383.

Legislative provisions which limit freedom of expression by, for instance, generally penalizing “disrespect for authority” and criticism of governing bodies and ruling parties, are not consistent with article 19 of the Covenant.

The effective protection of freedom of expression is also indispensable for implementation of the rights of freedom of peaceful assembly and association set forth in articles 21 and 22 of the Covenant.

3.2.4 Denial of crimes against humanity and advocacy of hatred

The permissibility of denying crimes against humanity was raised in the case of *Faurisson v. France*, which concerned the author’s conviction by French courts on the basis of the so-called “Gayssot Act”, which amended the 1881 Freedom of the Press Act to make it an offence “to contest the existence of the category of crimes against humanity as defined in the London Charter of 8 August 1945”. In an interview the author had “reiterated his personal conviction that there were no homicidal gas chambers for the extermination of Jews in Nazi concentration camps”.¹⁰⁸

This restriction on the author’s freedom of expression, as guaranteed by article 19(2), had to be examined in the light of article 19(3), according to which, as seen above, any restriction must cumulatively meet the following three conditions: (1) be prescribed by law, (2) be imposed for one of the legitimate purposes enumerated therein and (3) be necessary for one or more of those purposes. The Committee accepted in the first place that *the principle of legality* had been respected in that the restriction was prescribed by the Gayssot Act, on the basis of which the author was convicted for “having violated the rights and reputation of others”.¹⁰⁹ It next agreed that the restriction was imposed for a *legitimate purpose*, namely to ensure respect for the rights or reputation of others under article 19(3)(a) of the Covenant. It pointed out in this regard that “the rights for the protection of which restrictions on the freedom of expression are permitted [by article 19(3)] may relate to the interests of other persons or to those of the community as a whole.” As the statements made by the author, “read in their full context, were of a nature as to raise or strengthen anti-Semitic feelings, the restriction served the respect of the Jewish community to live free from fear of an atmosphere of anti-Semitism”.¹¹⁰

The final question to be decided was, however, *whether the restriction was necessary for this legitimate purpose*. In the absence of any argument undermining the validity of the Government’s submission that “the Gayssot Act was intended to serve the struggle against racism and anti-Semitism” and the statement by a former Minister of Justice characterizing “the denial of the existence of the Holocaust as the principle vehicle for anti-Semitism”, the Committee was satisfied that the restriction of

¹⁰⁸Communication No. 550/1993, *R. Faurisson v. France* (Views adopted on 8 November 1996), in UN doc. GAOR, A/52/40 (vol. II), p. 85, paras. 2.3 and 2.5.

¹⁰⁹*Ibid.*, pp. 95-96, para. 9.5.

¹¹⁰*Ibid.*, p. 96, para. 9.6.

Mr. Faurisson's freedom of expression was necessary within the meaning of article 19(3) of the Covenant.¹¹¹

In a case concerning the freedom of expression of teachers, the *Ross v. Canada* case, the Committee likewise concluded that article 19 had not been violated. The question that had to be decided was whether the author's right to freedom of expression had been restricted contrary to article 19 of the Covenant by virtue of the decision of the Human Rights Board of Inquiry, upheld by the Supreme Court of Canada, as a result of which the author was placed on leave without pay for a week and subsequently transferred to a non-teaching position.¹¹² It appears from the assessment of the Board of Inquiry that statements made by the author in his various books and pamphlets, which were published outside the framework of his teaching activities, denigrated the faith and beliefs of Jews.¹¹³

Disagreeing with the State party, the Committee was of the view that "the loss of a teaching position was a significant detriment, even if no or only insignificant pecuniary damage was suffered" and the removal of the author from his teaching position was therefore a restriction of his freedom of expression that needed to be justified under article 19(3).¹¹⁴ The Committee then accepted that the measure was *provided for by law*, namely the New Brunswick Human Rights Act as subsequently interpreted by the Supreme Court. On the question whether it also pursued a *legitimate purpose*, the Committee confirmed its *Faurisson* ruling that the terms "rights or reputation of others [in article 19(3)] may relate to other persons or to a community as a whole". It added that:

"restrictions may be permitted on statements which are of a nature as to raise or strengthen anti-Semitic feeling, in order to uphold the Jewish communities' right to be protected from religious hatred. Such restrictions also derive support from the principles reflected in article 20(2) of the Covenant. The Committee notes that both the Board of Inquiry and the Supreme Court found that the author's statements were discriminatory against persons of the Jewish faith and ancestry and that they denigrated the faith and beliefs of Jews and called upon true Christians to not merely question the validity of Jewish beliefs and teachings but to hold those of the Jewish faith and ancestry in contempt as undermining freedom, democracy and Christian beliefs and values. In view of the findings as to the nature and effect of the author's public statements, the Committee concludes that the restrictions imposed on him were for the purpose of protecting the 'rights and reputations' of persons of Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance."¹¹⁵

¹¹¹Ibid., p. 96, para. 9.7.

¹¹²Communication No. 736/1997, *M. Ross v. Canada* (Views adopted on 18 October 2000), in UN doc. *G.AOR*, A/56/40 (vol. II), pp. 72-75, paras. 4.1-4.6, and p. 83, para. 11.1.

¹¹³Ibid., p. 73, para. 4.2.

¹¹⁴Ibid., p. 83, para. 11.1.

¹¹⁵Ibid., p. 84, paras. 11.3-11.5.

Lastly, with regard to the question of the *necessity* of the restriction, the Committee stated that “the exercise of the right to freedom of expression carries with it special duties and responsibilities. These special duties and responsibilities are of particular relevance within the school system, especially with regard to the teaching of young students.” The influence exerted by schoolteachers may thus “justify restraints in order to ensure that legitimacy is not given by the school system to the expression of views which are discriminatory”.¹¹⁶ The Committee took note of the fact

“that the Supreme Court found that it was reasonable to anticipate that there was a casual link between the expressions of the author and the ‘poisoned school environment’ experienced by Jewish children in the School district. In that context, the removal of the author from a teaching position can be considered a restriction necessary to protect the right and freedom of Jewish children to have a school system free from bias, prejudice and intolerance.”¹¹⁷

The Committee noted, furthermore, that “the author was appointed to a non-teaching position after only minimal period on leave without pay and that the restriction thus did not go any further than that which was necessary to achieve its protective functions.” It followed that there had been no violation of article 19.¹¹⁸

The exercise of freedom of expression carries with it special duties and responsibilities.

The denial of crimes against humanity and incitement to discrimination may in certain circumstances justify restrictions on the exercise of freedom of expression for the protection of the rights and freedoms of others. The terms “rights or reputation of others” in article 19(3)(a) of the International Covenant may in this regard relate either to other persons or to a community as a whole.

It is particularly important for States parties to ensure that the public education of young children is free from bias, prejudice and intolerance.

3.2.5 Threats to national security and public order

As will be shown by the cases cited in this subsection, it is not sufficient for a State party simply to invoke one of the legitimate purposes enumerated in article 19(3) in order to justify restrictions on the exercise of freedom of expression. ***It must also show, by providing specific and reliable details, that in the case in point the restriction was indeed “prescribed by law” and necessary for a specific legitimate purpose.***

¹¹⁶Ibid., p. 84, para. 11.6.

¹¹⁷Ibid., pp. 84-85, para. 11.6.

¹¹⁸Ibid., p. 85, para. 11.6.

The notion of national security was at the core of the *K-T Kim v. the Republic of Korea* case, which concerned the author's conviction under article 7(1) and (5) of the National Security Law of the Republic of Korea. The Criminal District Court of Seoul sentenced the author to three years' imprisonment and one year of suspension of eligibility, a sentence that was reduced to two years' imprisonment on appeal. His crime was that he had, together with other members of the National Coalition for Democratic Movement, prepared documents criticizing the Government and its foreign allies and appealing for national reunification.¹¹⁹ Article 7(1) and (5) of the National Security Law stipulate that "any person who assists an anti-State organization by praising or encouraging the activities of this organization, shall be punished" and that "any person who produces or distributes documents, drawings or any other material(s) to the benefit of an anti-State organization, shall be punished."¹²⁰

The Committee had thus to determine whether the author's conviction, which constituted a restriction of his freedom of expression, was justified under article 19(3) of the Covenant. As it was *prescribed by law*, namely the National Security Law, it had to be decided whether it was *necessary* for one of the *legitimate purposes* specified in article 19(3). The Committee observed in this regard that there was a need for "careful scrutiny" because of "the broad and unspecific terms in which the offence under the National Security Law [was] formulated".¹²¹

The Committee noted that the author had been convicted "for having read out and distributed printed materials which were seen as coinciding with the policy statements of the DPRK (North Korea), with which country the State party was in a state of war". The Supreme Court had held "that the mere knowledge that the activity could be of benefit to North Korea was sufficient to establish guilt". Even so, the Committee had to consider "whether the author's political speech and his distribution of political documents were of a nature to attract the restriction allowed by article 19(3) namely the protection of national security". It stated in this regard that:

"It is plain that North Korean policies were well known within the territory of the State party and it is not clear how the (undefined) 'benefit' that might arise for the DPRK from the publication of views similar to their own created a risk to national security, nor is it clear what was the nature and extent of any such risk. There is no indication that the courts, at any level, addressed those questions or considered whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being *necessary*."¹²²

As the State party had failed both to specify the precise nature of the threat allegedly posed by the author's exercise of freedom of expression and to provide "specific justifications" as to why it was necessary for national security to prosecute him for the exercise of this freedom, the Committee concluded that the restriction was not

¹¹⁹Communication No. 574/1994, *K-T Kim v. the Republic of Korea* (Views adopted on 3 November 1998), in UN doc. *GAOR*, A/54/40 (vol. II), p. 2, paras. 2.1-2.2.

¹²⁰*Ibid.*, p. 2, para. 2.3.

¹²¹*Ibid.*, p. 9, para. 12.3.

¹²²*Ibid.*, p. 10, para. 12.4.

compatible with the requirements of article 19(3) of the Covenant. Article 19 had therefore been violated.¹²³

In the case of *T. Hoon Park v. the Republic of Korea*, the author complained of his conviction under article 7(1) and (3) of the National Security Law, which was “based on his membership and participation in the activities of the Young Koreans United (YKU), during his study at the University of Illinois” in the United States during the years 1983-1989. According to the author, this organization was American and composed of young Koreans with the aim of discussing “issues of peace and unification between North and South Korea”.¹²⁴ It appeared from the court judgments “that the conviction and sentence were based on the fact that the author had, by participating in certain peaceful demonstrations and other gatherings in the United States, expressed his support or sympathy to certain political slogans and positions”.¹²⁵

In examining this case under article 19(3) of the Covenant, the Committee emphasized that

“the right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification.”¹²⁶

To justify the restriction on the exercise of the author’s freedom of expression, the Government had maintained that it was necessary in order to protect “national security” but had in this regard only referred to “the general situation in the country and the threat posed by ‘North Korean communists’”. Again, the Committee considered that the State party had “failed to specify the precise nature of the threat” and it concluded that none of the arguments advanced by the State party sufficed to justify the restriction of the author’s freedom of expression under article 19(3) of the Covenant. Lastly, there was nothing in either the judicial decisions or the submissions of the State party to show that the author’s conviction was necessary for the protection of one of the legitimate purposes set forth in article 19. His conviction “for acts of expression” had therefore to be regarded as a violation of the article.¹²⁷

In the case of *V. Laptsevich v. Belarus*, the author complained that his right to freedom of expression and opinion had been violated by the sanctions imposed on him following the confiscation of a leaflet concerning the anniversary of the proclamation of independence of Belarus. He was fined 390,000 roubles under the Code of Administrative Offences “for disseminating leaflets not bearing the required publication data”. The author insisted, however, that the leaflets did contain the data concerned “precisely in order to make it clear that the Press Act did not apply to his publication”.¹²⁸ Although it was “implied” in the submissions of the State party “that the sanctions were necessary to protect national security”, there was nothing in the

¹²³Ibid., p. 10, paras. 12.5.

¹²⁴Communication No. 628/1995, *T. Hoon Park v. the Republic of Korea* (Views adopted on 20 October 1998, in UN doc. GAOR, A/54/40 (vol. II), p. 86, para. 2.2.

¹²⁵Ibid., p. 87, para. 2.4.

¹²⁶Ibid., p. 91, para. 10.3.

¹²⁷Ibid., loc. cit.

¹²⁸Communication No. 780/1997, *V. Laptsevich v. Belarus* (Views adopted on 20 March 2000), in UN doc. GAOR, A/55/40 (vol. II), pp. 178-180, paras. 2 and 4.

material before the Committee to suggest “that either the reactions of the police or the findings of the courts were based on anything other than the absence of necessary publication data”. Hence the sole issue to be decided by the Committee was “whether or not the sanctions imposed on the author for not including the details required by the Press Act [could] be deemed necessary for the protection of public order (*ordre public*) or for respect of the rights or reputation of others”.¹²⁹

The Committee noted that the State party had made no attempt “to address the author’s specific case and explain the reasons for the requirement that, prior to publishing and disseminating a leaflet with a print run of 200, he was to register his publication with the administrative authorities to obtain index and registration numbers”. Furthermore, the State party had “failed to explain why this requirement was necessary for one of the legitimate purposes set out in [article 19(3)] and why the breach of the requirements necessitated not only pecuniary sanctions, but also the confiscation of the leaflets still in the author’s possession”.¹³⁰ In the absence of any explanation justifying the registration requirement and the measures taken, the Committee concluded that these could not be deemed necessary “for the protection of public order (*ordre public*) or for respect of the rights or reputations [*sic*] of others”. There had consequently been a violation of article 19(2) of the Covenant.¹³¹

*According to the Human Rights Committee, freedom of expression is of paramount importance in any democratic society and restrictions on the exercise of this freedom must therefore meet a strict test of justification. When invoking one or more of the legitimate purposes listed in article 19(3) of the International Covenant on Civil and Political Rights in order to justify restrictions on the exercise of freedom of expression, States parties must consequently provide sufficient specific and reliable details to substantiate their arguments. General references to notions such as national security and public order (*ordre public*) are insufficient and will not be accepted by the Human Rights Committee as a justification for restrictions on the exercise of freedom of expression.*

3.2.6 Freedom of the press

The case of *R. Gauthier v. Canada* concerned the publisher of *National Capital News* in Canada, who, when applying for membership in the Parliamentary Press Gallery, was only provided with a temporary pass which granted him limited privileges, a fact that he considered to be a violation of article 19 of the Covenant.¹³² The State party had actually “restricted the right to enjoy the publicly funded media facilities of Parliament, including the right to take notes when observing meetings of Parliament, to those media representatives who [were] members of a private organization, the

¹²⁹Ibid., p. 181, para. 8.4.

¹³⁰Ibid., pp. 181-182, para. 8.

¹³¹Ibid., p. 182, para. 8.

¹³²Communication No. 633/1995, *R. Gauthier v. Canada* (Views adopted on 7 April 1999), in UN doc, *GAOR*, A/54/40 (vol. II), pp. 93-94, paras. 1-2.2.

Canadian Press Gallery”. The author had been denied full membership of the Press Gallery and had only occasionally held temporary membership which gave him access to some but not all facilities of the organisation. When he did not have temporary membership, he was denied access to the media facilities and could not take notes of Parliamentary proceedings.¹³³ The Committee thus had to decide whether the author’s restricted access to the parliamentary press facilities amounted to a violation of his right under article 19 “to seek, receive and impart information”. In this connection it referred in the first place

“to the right to take part in the conduct of public affairs, as laid down in article 25 of the Covenant, and in particular to General Comment No. 25 (57) which reads in part: ‘In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.’ ... Read together with article 19, this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members. The Committee recognizes, however, that such access should not interfere with or obstruct the carrying out of the functions of elected bodies, and that a State party is thus entitled to limit access. However, any restrictions imposed by the State party must be compatible with the provisions of the Covenant.”¹³⁴

The Committee next accepted that the author’s exclusion constituted a restriction of his right under article 19(2) to have *access to information*, and it thereby also rejected the State party’s argument that “the author [did] not suffer any significant disadvantage because of technological advances which make information about Parliamentary proceedings readily available to the public”.¹³⁵

After accepting that the restriction was “arguably, imposed by law” in that it followed from the law of parliamentary privilege, the Committee also agreed “that the protection of Parliamentary procedure can be seen as a legitimate goal of public order” and that “an accreditation system can thus be a justified means of achieving this goal”. On the other hand, the Committee did not agree with the Government’s suggestion that this was “a matter exclusively for the State to determine” and it adopted the following Views on the issue:

“The relevant criteria for the accreditation scheme should be specific, fair and reasonable, and their application should be transparent. In the instant case, the State party has allowed a private organization to control access to the Parliamentary press facilities, without intervention. The scheme does not ensure that there will be no arbitrary exclusion from access to the Parliamentary media facilities. In the circumstances, the Committee is of the opinion that the accreditation system has not been shown to be a necessary and proportionate restriction of rights within the meaning of

¹³³Ibid., p. 104, para. 13.5.

¹³⁴Ibid., p. 104, paras. 13.3-13.4; footnote omitted.

¹³⁵Ibid., pp. 104-105, para. 13.5.

article 19, paragraph 3, of the Covenant, in order to ensure the effective operation of Parliament and the safety of its members. The denial of access to the author to the press facilities of Parliament for not being a member of the Canadian Press Gallery Association constitutes therefore a violation of Article 19(2) of the Covenant.”¹³⁶

The Committee noted “with regret” with regard to Gabon “that the powers vested in the National Council of Communication to monitor programmes and impose penalties on organs of the press are an obstacle to the exercise of freedom of the press”. The Committee also deplored “the harassment of journalists” and invited the State party “to bring its legislation into line with article 19 by doing away with censorship and penalties against organs of the press and ensuring that journalists may safely exercise their functions”.¹³⁷ The Committee also expressed concern at the “growing number of complaints of systematic harassment and death threats against journalists intended to undermine freedom of expression” in Peru and requested the State party “to take the necessary measures to put an end to direct and indirect restrictions on freedom of expression, to investigate all complaints which have been filed and to bring the persons responsible to justice”.¹³⁸ It also deplored “the methods used by Peru to take control of communications media away from persons critical of the Government, including stripping one of them of his nationality” and requested the State party “to eliminate these situations, which affect freedom of expression ... and to make effective remedies available to those concerned”.¹³⁹

The Committee expressed concern about various provisions of the Press Law in the Democratic People’s Republic of Korea and their frequent invocation, which was difficult to reconcile with the provisions of article 19 of the Covenant. It was in particular concerned “that the notion of ‘threat to the State security’ may be used in such ways as to restrict freedom of expression”, that the permanent presence in the country of foreign media representatives was confined to journalists from three countries, and that foreign newspapers and publications were “not readily available to the public at large”. Lastly, the Committee observed that “DPRK journalists may not travel abroad freely”. It followed that the State party “should specify the reasons that have led to the prohibition of certain publications, and to refrain from measures that restrict the availability of foreign newspapers to the public”. The State party was further requested “to relax restrictions on the travel abroad by DPRK journalists, and to avoid any use of the notion of ‘threat to the State security’ that would repress freedom of expression contrary to article 19”.¹⁴⁰

The Committee emphasized “its deep concern about the numerous and serious infringements of the right to freedom of expression” in Belarus. “In particular, the fact that most publishing, distribution and broadcasting facilities are State owned, and that editors-in-chief of State-supported newspapers are State employees,

¹³⁶Ibid., p. 104, para. 13.5 at p. 105 and p. 105, para. 13.6.

¹³⁷UN doc. *G.AOR, A/56/40* (vol. I), p. 44, para. 19.

¹³⁸Ibid., pp. 47-48, para. 16.

¹³⁹Ibid., p. 48, para. 17.

¹⁴⁰Ibid., p. 103, para. 23.

effectively exposes the media to strong political pressure and undermines its independence.” The many restrictions imposed on the media, in particular the vaguely defined offences, were incompatible with article 19(3). Furthermore, the Committee expressed concern “about reports of harassment and intimidation of local and foreign journalists by authorities and the denial of access to public broadcasting facilities by political opponents to the Government”. It urged the State party “to take all necessary measures, legislative as well as administrative, in order to remove these restrictions on freedom of expression, which are incompatible with its obligations under article 19 ... as a matter of priority”.¹⁴¹

The Committee expressed concern that the mass media in Zimbabwe, “as well as many other forms of expression, including artistic expression, are subject to censorship and are largely controlled by the Government”. It recommended that the relevant law “be brought into strict compliance with article 19(3) of the Covenant”.¹⁴² Lastly, it was concerned about interference by the Government of Slovakia “in the direction of its State-owned television”, which “carries a danger of violating article 19”.¹⁴³

The right to freedom of expression, including freedom of the press, as guaranteed by article 19 of the International Covenant on Civil and Political Rights, may have to be interpreted also in the light of other provisions of the Covenant, such as article 25 concerning the right to take part in the conduct of public affairs. The effective exercise of that right presupposes the free flow of information and ideas between citizens on public and political issues, including a free press and other media which are able to comment on public issues without censorship or restraint.

*The right of journalists to have **access to information** in accordance with article 19(2) of the Covenant implies, inter alia, that criteria for accreditation schemes must be specific, fair and reasonable, and that, for instance, there must be no arbitrary exclusion from access to parliamentary debates.*

The right to freedom of the press means that harassment of journalists is strictly prohibited under article 19 of the Covenant. Freedom of the press presupposes that journalists must be able to exercise their functions safely and to travel freely.

Censorship and penalties against organs of the press constitute obstacles to the effective exercise of freedom of the press. Article 19(3) does not allow the use of vaguely defined offences for the imposition of restrictions on the mass media in order to silence criticism of the government.

¹⁴¹UN doc. GAOR, A/53/40 (vol. I), pp. 28-29, para. 153.

¹⁴²Ibid., p. 37, para. 224.

¹⁴³UN doc. GAOR, A/52/40 (vol. I), p. 61, para. 383.

3.2.7 Human rights defenders

The right to freedom of expression of human rights defenders is essential because if they are not allowed to express themselves freely, both orally and in written or printed form, the very notion of effective human rights protection becomes illusory. When considering the second periodic report of the Syrian Arab Republic, the Committee stated that it remained concerned “that the activities of human rights defenders and of journalists who speak out for human rights remain subject to severe restrictions”. Referring to a specific case where a person was sentenced to 10 years’ imprisonment “for his non-violent expression of opinions critical of the authorities”, the Committee observed that “such restrictions are incompatible with freedom of expression and opinion” as guaranteed by article 19. The State party should therefore “protect human rights defenders and journalists against any restriction on their activities and ensure that journalists can exercise their profession without fear of being brought before the courts and prosecuted for having criticized government policy”.¹⁴⁴

It is noteworthy in this context that the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by General Assembly resolution 53/144 of 9 December 1998, is specially designed to protect human rights defenders and guarantees to every person the right, among others (1) “to communicate with non-governmental or intergovernmental organizations”; (2) “to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms”; and (3) “as provided for in human rights and other applicable international instruments, [the right] freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms” (arts. 5 and 6).

The right to freedom of expression must be effectively guaranteed to all those who defend human rights and fundamental freedoms although their activities may imply criticism of government policies. The exercise of their freedom of expression must be restricted on no grounds other than those contained in the applicable international treaties.

3.3 Article 9 of the African Charter on Human and Peoples’ Rights

Article 9 of the African Charter on Human and Peoples’ Rights guarantees to every individual “the right to receive information” as well as “the right to express and disseminate his opinions within the law”. It is noteworthy that the terms “within the law” are not conditioned by any other criteria such as an enumeration of legitimate purposes or the concept of necessity.

¹⁴⁴UN doc. GAOR A/56/40 (vol. I), p. 75, para. 23.

3.3.1 Freedom of the press

The case of *Media Rights Agenda v. Nigeria* concerned the trial and conviction of Mr. Malaolu, the editor of an independent Nigerian newspaper; Mr. Malaolu was found guilty by a Special Military Tribunal of the charge of concealment of treason and sentenced to life imprisonment. It was alleged before the African Commission on Human and Peoples' Rights that article 9 of the Charter had been violated, since Mr. Malaolu had simply been punished for news stories published in his newspaper relating to an alleged coup d'état involving certain people. The Government argued, on the other hand, that Mr. Malaolu had been tried with a number of other people, including journalists, accused of involvement in the coup and that it was not, therefore, a case of victimization of the profession of journalist.¹⁴⁵ The Commission took the view, however, that it was only Mr. Malaolu's publication that had led to his arrest, trial and conviction and concluded that article 9 had been violated.¹⁴⁶

Freedom of the press was again at issue in the case of the *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria* which concerned, inter alia, the seizure of thousands of copies of magazines following protests by journalists and others against the annulment of elections. *The News* magazine was closed by a military Decree in June 1993. Prior to the closure, copies of the magazine had been seized by security agents and some of its editors were sought by the police. Thousands of copies of the weekly news magazine *Tempo* had likewise allegedly been confiscated. The Government justified these actions by referring to the "chaotic" situation reigning in the country after the elections were annulled.¹⁴⁷ The Commission disagreed, and recalled the general principle according to which States should not limit the exercise of rights by overriding constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards. In its view, Governments "should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counterproductive."¹⁴⁸ The Commission concluded that, given that Nigeria had all the traditional provisions for libel suits available to deal with violations of domestic law, the Government proscription of a specific publication was of particular concern; "laws made to apply to specifically one individual or legal entity [raised] the acute danger of discrimination and lack of equal treatment before the law as guaranteed by Article 2" of the Charter. The proscription of *The News* and the seizure of 50,000 copies of *Tempo* and *The News* therefore violated article 9 of the Charter.¹⁴⁹

¹⁴⁵ACHPR, *Media Rights Agenda (on behalf of Mr. N. Malaolu) v. Nigeria*, No. 224/98, decision adopted during the 28th session, 23 October – 6 November 2000, paras. 67-68 of the text as published at: <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>

¹⁴⁶Ibid., para. 69.

¹⁴⁷AHCP, *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, Communication No. 102/93, decision adopted on 31 October 1998, paras. 6, 7 and 57 of the text as published at the following web site: <http://www1.umn.edu/humanrts/africa/comcases/102-93.html>

¹⁴⁸Ibid., paras. 57-58.

¹⁴⁹Ibid., para. 59.

The African Commission considers, however, that “payment of a registration fee and a pre-registration deposit for payment of penalty or damages is not in itself contrary to the right to the freedom of expression.” “However, the amount of the registration fee should not be more than necessary to ensure administrative expenses of the registration, and the pre-registration fee should not exceed the amount necessary to secure against penalties or damages against the owner, printer or publisher of the newspaper. Excessively high fees are essentially a restriction on the publication of news media.” In the case before the Commission, on the other hand, the fees concerned were high but “not so clearly excessive” as to constitute a “serious restriction”.¹⁵⁰

The Commission was, however, more concerned about “the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information” protected by article 9(1) of the Charter. There had thus been a breach of that article.¹⁵¹

With regard to the proscription of a newspaper in the same case, the Commission recalled that, according to article 9(2) of the African Charter, “every individual shall have the right to ... disseminate his opinions within the law”. In its view, “this does not mean that national law can set aside the right to express and disseminate one’s opinions; this would make the protection of the right to express one’s opinions ineffective.” Moreover, “international human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.”¹⁵² Furthermore, as the Charter does not contain a derogation clause, “limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.”¹⁵³

Indeed, “the only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27.2”, according to which “the rights and freedoms shall be exercised with due regard to the rights of others, collective security, morality and common interest.” “The reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained.” In particular, “a limitation may never have as a consequence that the right itself becomes illusory.”¹⁵⁴

Considering that, in this case, the Government had provided no evidence that the proscription of the newspaper *The News* could be justified on the grounds enumerated in article 27(2), and given the availability of libel laws in Nigeria, the

¹⁵⁰ ACHPR, *Media Rights Agenda and Others v. Nigeria*, Communications Nos. 105/93, 128/94, 130/94 and 152/96, decision adopted on 31 October 1998, paras. 55-56 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/>. The registration fee was N100,000 and the deposit for any penalty or damages awarded against the newspaper etc. amounted to N250,000, para. 6.

¹⁵¹ *Ibid.*, para. 57.

¹⁵² *Ibid.*, paras. 63 and 66.

¹⁵³ *Ibid.*, para. 67.

¹⁵⁴ *Ibid.*, paras. 68-70.

proscription of a particular publication was “disproportionate and uncalled for” and constituted a violation of article 9(2) of the Charter.¹⁵⁵

3.3.2 Freedom to express opinions

Where persons have been detained simply for belonging to opposition parties or trade unions, the African Commission has concluded that such “blanket restrictions” on the right to freedom of expression violate article 9(2) of the Charter. In this connection, the Commission recalled the principle that, if necessary to restrict human rights, such restrictions “should be as minimal as possible” and should not “undermine fundamental rights guaranteed under international law”.¹⁵⁶ Similarly, where an alleged leader of a student union in Kenya was arrested and detained for several months because of his views and ultimately had to leave his country, the Commission considered the treatment to be a violation of article 9 of the Charter. If a person’s views are contrary to domestic law, the affected individual or Government should rather seek redress in a court of law.¹⁵⁷ Lastly, in the case brought on behalf of the writer Ken Saro-Wiwa Jr. and the Civil Liberties Organisation, the Commission emphasized the close relationship between the freedoms of expression, association and assembly guaranteed by articles 9 to 11 of the Charter and concluded that the Government had implicitly violated article 9(2) when violating articles 10(1) and 11. It had been alleged that the reason for the trial of the victims and ultimate death sentences against them was the peaceful expression of their views. During a rally, the victims had in fact been disseminating, through the organization Movement for the Survival of the Ogoni Peoples, information and opinions on the rights of the people living in an oil-producing part of the country. The Commission noted that the allegations had not been contradicted by the Government.¹⁵⁸

3.3.3 Human rights defenders

The case of *Huri-Laws v. Nigeria* concerned the harassment and persecution of members of a human rights organization in Nigeria. According to the complainant, the Civil Liberties Organisation was a human rights organization whose employees worked together to secure respect for human rights through organized programmes aimed at informing people of their rights. The Commission concluded that “the persecution of its employees and raids of its offices in an attempt to undermine its ability to function in this regard” amounted to a violation of both the right to freedom of expression and the right to freedom of association as guaranteed by articles 9 and 10 of the Charter.¹⁵⁹

¹⁵⁵Ibid., para. 71. It is unclear how this communication relates to Communication No.102/92 (see foot note 155 *et seq.*), since they both deal partly with the proscription of the same newspaper.

¹⁵⁶*Amnesty International and Others v. Sudan*, Communications Nos. 48/90, 50/91, 52/91 and 89/93, decision adopted on unknown date, para. 77-80 of the text of the decision as published at the following web site: <http://www1.umn.edu/humanrts/africa/comcases/>

¹⁵⁷*John D. Ouko v. Kenya*, Communication No. 232/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, paras. 27-28 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/232-99.html>

¹⁵⁸*International Pen and Others (on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation) v. Nigeria*, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998, para. 110 of the text of the decision as published at the following web site: <http://www1.umn.edu/humanrts/africa/comcases/>

¹⁵⁹*Huri-Laws (on behalf of Civil Liberties Organisation) v. Nigeria*, Communication No. 225/98, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, para. 47 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/225-98.html>

The right to freedom of expression, as guaranteed by article 9 of the African Charter on Human and Peoples' Rights, also protects freedom of the press.

The payment of a reasonable fee for the registration of a newspaper is not, however, contrary to article 9, unless excessive. On the other hand, the registration of newspapers may not be used as a way of endangering the right of the public to receive information, as guaranteed by article 9(1) of the Charter. It is for Governments to prove that the limitations imposed on the exercise of a right can be justified under article 27(2) of the Charter.

Domestic law cannot nullify the right to freedom of expression and the right to disseminate one's opinions because international human rights standards prevail over national law.

Under the African Charter, limitations on the exercise of rights must never drain the rights of their substance and can only be imposed for the legitimate reasons described in article 27(2) of the Charter. Limitations must also be strictly proportionate to the legitimate advantage that they are aimed at securing.

The freedom to express one's opinion implies the right to do so peacefully in public, without fear of arrest, prosecution and harassment.

Under the African Charter, human rights defenders have a right to freedom of expression in working for an improved understanding of peoples' rights and freedoms.

3.4 Article 13 of the American Convention on Human Rights

The definition of the right to freedom of expression in article 13(1) of the American Convention on Human Rights is very similar to that in article 19(2) of the International Covenant although it also includes a reference to “freedom of thought”. The right thus includes “freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice”.

The limitation provision in article 13(2) of the American Convention is particularly important in that it states, *expressis verbis*, that the exercise of the right provided for in article 13(1), “shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights and reputation of others; or (b) the protection of national security, public order, or public health or morals”. The grounds that may justify limitations on the exercise of freedom of expression are thus identical to those found in article 19(3) of the International Covenant. An exception to the prohibition on prior censorship is contained in article 13(4) inasmuch as “public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence”.

According to the Inter-American Court, apart from the said exception provided for in article 13(4), “*prior censorship is always incompatible with the full enjoyment of the rights listed in Article 13 ... even if the alleged purpose of such prior censorship is to prevent abuses of freedom of expression*”. It follows that, “in this area any preventive measure inevitably amounts to an infringement of the freedom guaranteed by the Convention.”¹⁶⁰ A case in point is that of *Olmedo Bustos et Al. v. Chile* concerning the prohibition by Chilean courts of the exhibition of the film *The Last Temptation of Christ*. The Inter-American Court concluded that this case of prior censorship constituted a violation of the right to freedom of thought and expression as embodied in article 13 of the American Convention on Human Rights.¹⁶¹

While abuses of the right to freedom of expression can thus be controlled only “through the subsequent imposition of sanctions on those who are guilty of the abuses”, the imposition of such liability must, according to the Court, comply with all of the following requirements in order to be valid:

- ❖ “the existence of previously established grounds for liability”;
- ❖ “the express and precise definition of these grounds by law”;
- ❖ “the legitimacy of the ends sought to be achieved”; and
- ❖ “a showing that these grounds of liability are ‘necessary to ensure’ the aforementioned ends”.¹⁶²

Article 13(3) further specifically outlaws restrictions on freedom of expression “by indirect methods or means, such as the abuse of government or private controls over newsprint” or various kinds of mass media “tending to impede the communication and circulation of ideas and opinions”. This provision thus prohibits not only indirect governmental restrictions but also “private controls” over the mass media which produce the same result. This means that not only can a violation of the Convention occur when the State itself imposes restrictions of an indirect character which tend to impede “the communication and circulation of ideas and opinions” but that “the State also has an obligation to ensure that the violation does not result from the ‘private controls’” referred to in article 13(3).¹⁶³

Article 13(5) of the American Convention allows restrictions similar to those in article 20 of the International Covenant in that propaganda for war and advocacy of hatred “shall be considered as offenses punishable by law”.

Lastly, a distinctive characteristic of the American Convention on Human Rights is that the right of reply is guaranteed by article 14, the first paragraph of which states that:

¹⁶⁰I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, pp. 103-104, para. 38; emphasis added.

¹⁶¹See I-A Court HR, *The Case of Olmedo Bustos et Al. v. Chile*, judgment of 5 February 2001, Series C, No. 73, paras. 71-73

¹⁶²I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, p. 104, para. 39.

¹⁶³*Ibid.*, pp. 110-111, para. 48.

“Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.”

Furthermore, “the correction or reply shall not in any case remit other legal liabilities that may have been incurred” (article 14(2)). Lastly, “for the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges” (article 14(3)). For an interpretation of article 14 in relation to articles 1 and 2 of the Convention, see the advisory opinion of the Inter-American Court of Human Rights on the “Enforceability of the Right to Reply or Correction”.¹⁶⁴

The exercise of freedom of expression under article 13 of the American Convention on Human Rights must not be subjected to prior censorship. Abuses of the exercise of freedom of expression can only be lawfully controlled through the a posteriori imposition of sanctions on those who are guilty of abuses.

In order to be lawful, however, the imposition of such subsequent liability must comply with the following requirements:

- *the existence of previously established grounds for liability;*
- *the express and precise definition of these grounds by law;*
- *the legitimacy of the ends sought to be achieved; and*
- *a showing that these grounds of liability are necessary to ensure the legitimate ends.*

Article 14 of the American Convention on Human Rights guarantees the right of reply to anyone injured by inaccurate or offensive statements or ideas disseminated to the public.

3.4.1 The individual and collective dimensions of freedom of expression, including the role of the mass media

Basing itself on its advisory opinion in the case concerning *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (hereinafter referred to as the “*Compulsory Membership*” case), the Inter-American Court of Human Rights confirmed in the case of *Ivcher Bronstein v. Peru* that persons protected by article 13 of the American Convention on Human Rights “have not only the right and freedom to express their own thoughts, but also the right and freedom to seek, receive and disseminate information and ideas of all types. Consequently, freedom of expression has both an *individual* and a *social dimension*”, which requires that

¹⁶⁴I-A Court HR, *Enforceability of the Right to Reply or Correction* (arts. 14(1), 1(1) and 2 American Convention on Human Rights), Advisory Opinion OC-7/86 of August 29, 1986, Series A, No. 7; for the text see the Court’s web site: www.corteidh.or.cr/seriecing/A_7_ING.html.

“on the one hand, no one may be arbitrarily harmed or impeded from expressing his own thought and therefore represents a right of each individual; but it also implies, on the other hand, a collective right to receive any information and to know the expression of the thought of others.”¹⁶⁵

With regard to the first dimension of the right contained in article 13, namely the *individual right*, the Court stated that

“freedom of expression is not exhausted in the theoretical recognition of the right to speak or write, but also includes, inseparably, the right to use any appropriate method to disseminate thought and allow it to reach the greatest number of persons. In this respect, the expression and dissemination of thought and information are indivisible, so that the restriction of the possibilities of dissemination represents directly, and to the same extent, a limit to the right to free expression.”¹⁶⁶

With regard to the second element of the right embodied in article 13, namely the *social element*, the Court stated that

“freedom of expression is a medium for the exchange of ideas and information between persons; it includes the right to try and communicate one’s points of view to others, but it implies also everyone’s right to know opinions, reports and news. For the ordinary citizen, the right to know about other opinions and the information that others have is as important as the right to impart their own.”¹⁶⁷

In the Court’s opinion, these two dimensions “are of equal importance and should be guaranteed simultaneously in order to give total effect to the right to freedom of expression in the terms of Article 13 of the Convention”. The importance of this right is further underlined if one examines

“the role that the media plays in a democratic society, when it is a true instrument of freedom of expression and not a way of restricting it; consequently, it is vital that it can gather the most diverse information and opinions.”¹⁶⁸

Furthermore, “it is essential that the journalists who work in the media should enjoy the necessary protection and independence to exercise their functions comprehensively, because it is they who keep society informed, and this is an indispensable requirement to enable society to enjoy full freedom.”¹⁶⁹

¹⁶⁵I-A Court HR, *Ivcher Bronstein Case v. Peru*, judgment of February 6, 2001, Series C, No. 74; the text used is that found on the Court’s web site: www.corteidh.or.cr/seriecing/C_74_ENG.html, para. 146; emphasis added. The *Compulsory Membership* case will be further reviewed *infra* in subsection 3.4.5.

¹⁶⁶Ibid., para. 147.

¹⁶⁷Ibid., para. 148.

¹⁶⁸Ibid., para. 149.

¹⁶⁹Ibid., para. 150.

In its advisory opinion in the *Compulsory Membership* case, the Court stated moreover that the fact that the individual and collective dimensions of freedom of expression must be guaranteed simultaneously means, on the one hand, that “one cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor” and, on the other hand, “that the right to impart information and ideas cannot be invoked to justify the establishment of private or public monopolies of the communications media designed to mold public opinion by giving expression to only one point of view”.¹⁷⁰

It followed that, since “it is the mass media that make the exercise of freedom of expression a reality ... the conditions of its use must conform to the requirements of this freedom, with the result that there must be, **inter alia**, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of the freedom and independence of journalists.”¹⁷¹

The right to freedom of expression in article 13 of the American Convention on Human Rights includes not only the right to express one’s own thoughts but also the right and freedom to seek, receive and disseminate information and ideas of all types and by whatever method one considers appropriate.

*This also means that freedom of expression has both an **individual** and a **social dimension** that must be guaranteed simultaneously: on the one hand, no individual may be arbitrarily prevented from expressing his or her own thoughts; on the other hand, there is a collective right to receive information from others and thoughts and opinions expressed by them.*

The interrelationship between the individual and social dimensions of freedom of expression implies, furthermore, that limitations on the possibility to disseminate information will restrict freedom of expression to the same extent.

In a democratic society the media are a true instrument of freedom of expression and, for a society to be free, journalists must be able to exercise their professional responsibilities independently and in safe conditions.

The right to impart information cannot be invoked to justify prior censorship and the establishment of monopolies within the media.

¹⁷⁰I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, pp. 101-102, para. 33.

¹⁷¹Ibid., p. 102, para. 34.

3.4.2 Freedom of expression and the concept of public order in a democratic society

According to the understanding of the Inter-American Court, which follows logically from its reasoning as set forth in the preceding subsection,

“The concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions, as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard.”¹⁷²

In support of this opinion the Court referred to the jurisprudence of the European Court of Human Rights, according to which freedom of expression is “one of the essential pillars” of a democratic society and “a fundamental condition for its progress and the personal development of each individual”. As noted by the Inter-American Court, its European counterpart has also ruled that “this freedom should not only be guaranteed with regard to the dissemination of information and ideas that are received favourably or considered inoffensive or indifferent, but also with regard to those that offend, are unwelcome or shock the State or any sector of the population.” The European Court has further held that these principles are “of particular importance when applied to the press”.¹⁷³

In the *Compulsory Membership* case, the Court expressed the role of freedom of expression in the following terms:

“[It] is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.”¹⁷⁴

*Freedom of expression is the basic element of the **public order of a democratic society**; it presupposes both the widest possible circulation of news, ideas and opinions and the widest possible access to information by society as a whole.*

¹⁷²I-A Court HR, *Incher Bronstein Case v. Peru*, judgment of February 6, 2001, Series C, No. 74, para. 151.

¹⁷³Ibid., paras. 152-153.

¹⁷⁴I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, p. 123, para. 70.

The hallmark of the concept of public order in a democratic society is free debate, that is to say a debate in which dissenting opinions can be fully heard and views can therefore be disseminated although they may shock, offend or disturb.

A society that is not well informed is not truly free.

3.4.3 Restrictions on freedom of expression: Meaning of the term “necessary to ensure”

It is recalled that, according to article 13(2) of the American Convention, one of the conditions that States must comply with in order to impose valid restrictions on the exercise of freedom of expression is that the restrictions must be “necessary to ensure” one or more of the legitimate aims mentioned in the article. The question therefore arises: What is meant by the term “necessary to ensure” in this context?

The Inter-American Court on Human Rights stated in the *Compulsory Membership* case that article 29 of the American Convention, which concerns restrictions on interpretation, article 32, which deals with relationships between duties and rights, and the Preamble to the Convention define the context within which the restrictions permitted under Article 13(2) must be interpreted:

“It follows from the repeated reference to ‘democratic institutions,’ ‘representative democracy’ and ‘democratic society’ that the question whether a restriction on freedom of expression imposed by a state is ‘necessary to ensure’ one of the objectives listed in subparagraphs (a) or (b) must be judged by reference to the legitimate needs of democratic societies and institutions.”¹⁷⁵

In its view, the “just demands of democracy” must, in particular, guide the interpretation of those provisions of the Convention “that bear a critical relationship to the preservation and functioning of democratic institutions”.¹⁷⁶

Having thus established the interpretative role played by the notion of a democratic society in the interpretation of article 13(2) of the Convention, the Court went on to analyse the term “necessary”. In doing so, it referred to the case law of the European Court of Human Rights, according to which the term “necessary” in article 10 of the European Convention, while not being synonymous with “indispensable”, implies the existence of a “pressing social need” and that for a restriction to be “necessary” it is not enough to show that it is “useful”, “reasonable” or “desirable”. In the opinion of the American Court,

¹⁷⁵I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, p. 106, para. 42. Article 29(c) states that “No provision of this Convention shall be interpreted as: ... precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.” According to article 32(2), “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”

¹⁷⁶Ibid., p. 108, para. 44.

“This conclusion, which is equally applicable to the American Convention, suggests that the ‘necessity’ and, hence, the legality of restrictions imposed under Article 13(2) on freedom of expression, depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.”¹⁷⁷

The term “necessary to ensure” means that a restriction imposed on the exercise of freedom of expression must be interpreted in the light of the just or legitimate demands of a democratic society. The restrictions must be justified by a compelling governmental interest, which clearly outweighs society’s interest in full enjoyment of freedom of expression. Restrictions are not “necessary” if only shown to be useful or desirable.

The term “necessary” therefore also means that a restriction must be proportionate to the legitimate compelling objective that necessitates it and that States must select the least invasive restriction needed to achieve that objective.

3.4.4 Indirect control of the mass media: The case of Ivcher Bronstein v. Peru

Issues relating to freedom of expression have seldom been raised before the Inter-American Court. However, article 13(1) and (3) was found to have been violated by Peru in the *Ivcher Bronstein* case.

Mr. Ivcher was the majority shareholder in the company that operated Peru’s television Channel 2 and was moreover authorized, as director and chairman of the Board of the company, to take editorial decisions on programming. In April 1997, in its programme called *Contrapunto*, Channel 2 aired investigative reports of national interest, such as reports on possible torture committed by members of the Army Intelligence Service, the alleged assassination of a named agent and the extremely large income allegedly obtained by an advisor to the Peruvian Intelligence Service.¹⁷⁸ Evidence showed that Channel 2 had an extensive audience throughout the country in 1997 and that, as a consequence of its editorial line, Mr. Ivcher was the object of threatening action of various kinds. A Peruvian national of Israeli origin, he was eventually deprived

¹⁷⁷ *Ibid.*, p. 109, para. 46.

¹⁷⁸ I-A Court HR, *Ivcher Bronstein Case v. Peru*, judgment of February 6, 2001, Series C, No. 74, para. 156.

of his Peruvian citizenship, following which a judge ordered the suspension of the exercise of his rights as majority shareholder and president of the company. His appointment as director was also revoked and a new Board was appointed.¹⁷⁹ The Court also established that, after the minority shareholders took over the administration of the company, “the journalists who had been working for *Contrapunto* were prohibited from entering the Channel and the program’s editorial line was modified.”¹⁸⁰

The Inter-American Court concluded that the annulment of Mr. Ivcher’s nationality “constituted an *indirect* means of restricting his freedom of expression, as well as that of the journalists who worked and conducted investigations for *Contrapunto*. ... By separating Mr. Ivcher from the control of Channel 2 and excluding the *Contrapunto* journalists, the State not only restricted their right to circulate news, ideas and opinions, but also affected the right of all Peruvians to receive information, thus limiting their freedom to exercise political options and develop fully in a democratic society.” Peru had therefore violated article 13 (1) and (3) of the Convention.¹⁸¹

Indirect measures to control the mass media for the purpose of impeding the communication and circulation of ideas and opinions of public interest are contrary to article 13(1) and (3) of the American Convention. Prohibited measures may thus involve indirect governmental or private controls over the mass media and a variety of other actions including harassment of journalists and owners of newspapers and radio and television stations.

3.4.5 Article 13(2) and the Compulsory Licensing of Journalists case

In its advisory opinion in the *Compulsory Licensing of Journalists* case, the Court examined the compatibility with article 13(2) of the American Convention of a scheme of compulsory licensing of journalists in Costa Rica. It was clear that this scheme could result in non-members of the Colegio de Periodistas incurring liability, including criminal liability, if they engaged in the professional practice of journalism. The requirement therefore constituted a restriction on freedom of expression for those who were not members of the Colegio.¹⁸² The Court had to examine whether this restriction could be justified on any of the grounds enumerated in article 13(2) of the Convention.

It observed “that the organization of professions in general, by means of professional ‘colegios,’ is not *per se* contrary to the Convention, but that it is a method for regulation and control to ensure that they act in good faith and in accordance with the ethical demands of the profession”. If the notion of public order contained in article

¹⁷⁹Ibid., paras. 158-160.

¹⁸⁰Ibid., para. 161.

¹⁸¹Ibid., paras. 162-164; emphasis added.

¹⁸²I-A Court HR, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85 of November 13, 1985, Series A, No. 5, pp. 114-115, para. 58.

13(2)(b) “is thought of ... as the conditions that ensure the normal and harmonious functioning of the institutions on the basis of a coherent system of values and principles, it is possible to conclude that the organization of the practice of professions is included in that order”.¹⁸³

However, the Court also noted, in particular, that the same concept of public order in a democratic society requires “the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole”, and that “freedom of expression is a cornerstone upon which the very existence of a democratic society rests.”¹⁸⁴ In the Court’s view, “journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional ‘colegio’”, such as those created for lawyers and medical doctors.¹⁸⁵ The Court therefore concluded

“that reasons of public order that may be valid to justify compulsory licensing of other professions cannot be invoked in the case of journalism because they would have the effect of permanently depriving those who are not members of the right to make full use of the rights that Article 13 of the Convention grants to each individual. Hence, it would violate the basic principles of a democratic public order on which the Convention itself is based.”¹⁸⁶

The Court nonetheless recognized the need “for the establishment of a code that would assure the professional responsibility and ethics of journalists and impose penalties for infringements of such a code” and it also believed “that it may be entirely proper for a State to delegate, by law, authority to impose sanctions for infringements of the code of professional responsibility and ethics”. However, when dealing with journalists the restrictions contained in article 13(2) “must be taken into account”.¹⁸⁷ It followed “that a law licensing journalists, which does not allow those who are not members of the ‘colegio’ to practice journalism and limits access to the ‘colegio’ to university graduates who have specialized in certain fields, is not compatible with the Convention.” Such a law would contain restrictions to freedom of expression that are not authorized by article 13(2) and would thus violate “not only the right of each individual to seek and impart information and ideas through any means of his choice, but also the right of the public at large to receive information without any interference”.¹⁸⁸ The Court consequently decided by unanimity that “the compulsory licensing of journalists is incompatible with Article 13 of the American Convention ... if it denies any person access to the full use of the news media as a means of expressing opinions or imparting information”, and that the Organic Law of the Association of Journalists of Costa Rica, was “incompatible” with article 13 “in that it [prevented]

¹⁸³Ibid., p. 122, para. 68.

¹⁸⁴Ibid., pp. 122-123, paras. 69-70.

¹⁸⁵Ibid., pp. 123-124, paras. 71-73.

¹⁸⁶Ibid., pp. 125-126, para. 76.

¹⁸⁷Ibid., pp. 127-128, para. 80.

¹⁸⁸Ibid., p. 128, para. 81.

certain persons from joining the Association of Journalists and, consequently [denied] them the full use of the mass media as a means of expressing themselves or imparting information”.¹⁸⁹

The organization of professions, such as those of lawyers and medical doctors, is not per se contrary to article 19 of the American Convention on Human Rights, given that such associations provide a means of ensuring that their members act in good faith and in accordance with the ethical demands of the profession.

On the other hand, as journalism is the primary and principle manifestation of freedom of expression in a democratic society, it would violate the principles of a democratic public order on which the American Convention is based to require them to belong to a specific organization if such compulsory membership denied them full access to the news media in order to express their views and transmit information.

3.5 Article 10 of the European Convention on Human Rights

Article 10 of the European Convention on Human Rights has been interpreted in numerous cases. Only a few will be examined in this section in order to illustrate some key aspects of the substantive content of freedom of expression at the European level.

According to article 10, “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” However, the article does not prevent States “from requiring the licensing of broadcasting, television or cinema enterprises”.

As the exercise of these freedoms “carries with it duties and responsibilities”, article 10(2) provides a list of legitimate grounds for imposing “such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society”. These grounds are:

- ❖ “the interests of national security, territorial integrity or public safety”;
- ❖ “the prevention of disorder or crime”;
- ❖ “the protection of health or morals”;
- ❖ “the protection of the reputation or rights of others”;
- ❖ “for preventing the disclosure of information received in confidence”; and
- ❖ “for maintaining the authority and impartiality of the judiciary”.

¹⁸⁹Ibid., pp. 131-132, para. 85.

To be valid under article 10(2), the “formalities, conditions, restrictions or penalties” must *cumulatively* comply with *the principle of legality, the condition of legitimate purpose and the principle of necessity in a democratic society*.

It is noteworthy that, contrary to article 13 of the American Convention on Human Rights, article 10 of the European Convention “does not in terms prohibit the imposition of prior restraints on publication, as such”. As noted by the European Court of Human Rights, this is evidenced “not only by the words ‘conditions’, ‘restrictions’, ‘preventing’ and ‘prevention’ which appear in that provision” but also by its own case law. However,

“the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.”¹⁹⁰

Contrary to article 13 of the American Convention on Human Rights, article 10 of the European Convention on Human Rights does not expressly prohibit prior restraints on publication. However, in view of the inherent danger of such restraints, they must be subjected to the most careful scrutiny by the European Court of Human Rights.

To be lawful, any formalities, conditions, restrictions or penalties imposed by the Contracting States on freedom of expression under article 10 of the European Convention must cumulatively comply with the principle of legality, the condition of legitimate purpose and the principle of necessity in a democratic society.

3.5.1 Basic interpretative approach to freedom of expression

Before analysing the case law relating to article 10 of the Convention, it may be useful to highlight the basic interpretative approach adopted by the European Court of Human Rights when considering issues relating to freedom of expression. Its approach is conditioned by the role of freedom of expression in a democratic society, the Contracting States’ margin of appreciation and the Court’s own supervisory role. This basic interpretative approach has been consistently applied by the Court in its voluminous jurisprudence.¹⁹¹

The role of freedom of expression in a democratic society: The European Court has emphasized from the outset the important role played by freedom of expression in a democratic society. Thus, in the early *Handyside* case it ruled:

¹⁹⁰*Eur. Court HR, Case of the Observer and Guardian v. the United Kingdom, judgment of 26 November 1991, Series A, No. 216, p. 30, para. 60.*

¹⁹¹Further examples of cases involving article 10 of the European Convention on Human Rights may be found by using the search engine on the Court’s web site (<http://hudoc.coe.int>).

“The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterising a ‘democratic society’. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.”¹⁹²

In the *Sunday Times* case the Court affirmed that:

“These principles are of particular importance as far as the press is concerned. They are equally applicable to the field of the administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.”¹⁹³

In the later *Observer and Guardian* case, the Court added that “were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.”¹⁹⁴

States’ margin of appreciation v. European supervision: With regard to the interpretation of the limitation provision in article 10(2) of the Convention, the Court has stated that the exceptions contained therein:

“must be narrowly interpreted and the necessity of any restrictions must be convincingly established.”¹⁹⁵

¹⁹²*Eur. Court HR, Handyside Case v. the United Kingdom, judgment of 7 December 1976, Series A, No. 24, p. 23, para. 49.* This case concerned the applicant’s criminal conviction and the seizure and subsequent forfeiture and destruction of the matrix and of hundreds of copies of the Little Red Schoolbook for the purpose of protecting morals in a democratic society. This book was primarily aimed at children in the 12-18 age group and included a section on sex. The Court concluded that article 10 had not been violated by the measures taken in this case. See p. 28, para. 59.

¹⁹³*Eur. Court HR, the Sunday Times Case v. the United Kingdom, judgment of 26 April 1979, Series A, No. 30, p. 40, para. 65.*

¹⁹⁴*Eur. Court HR, Case of the Observer and Guardian v. the United Kingdom, judgment of 26 November 1991, Series A, No. 216, p. 30, para. 59(b).*

¹⁹⁵*Ibid.*, p. 30, para. 59(a).

While “the adjective ‘necessary’ within the meaning of Article 10 § 2, implies the existence of a ‘pressing social need’,”¹⁹⁶

“[it] is not synonymous with ‘indispensable’ (cf., in Articles 2 § 2 and 6 § 1, the words ‘absolutely necessary’ and ‘strictly necessary’ and, in Article 15 § 1, the phrase ‘to the extent strictly required by the exigencies of the situation’), neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’ (cf. Article 4 § 3), ‘useful’ (cf. the French text of the first paragraph of Article 1 of Protocol No. 1), ‘reasonable’ (cf. Articles 5 § 3 and 6 § 1) or ‘desirable’. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.

Consequently, Article 10 § 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator (‘prescribed by law’) and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.”¹⁹⁷

Yet article 10(2) “does not give the Contracting States an unlimited power of appreciation. The Court ... is empowered to give the final ruling on whether a ‘restriction’ or ‘penalty’ is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its ‘necessity’; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.”¹⁹⁸

Moreover, the Court’s supervision is not limited to “ascertaining whether a respondent State exercised its discretion reasonably, carefully and in good faith. Even a Contracting State so acting remains subject to the Court’s control as regards the compatibility of its conduct with the engagements undertaken under the Convention.”¹⁹⁹

In short, for the limitation on the exercise of freedom of expression to be “convincingly established”, the European Court must be satisfied that the impugned measures were “proportionate to the legitimate aim pursued” and that the reasons adduced by the national authorities to justify them were “relevant and sufficient”.²⁰⁰

Lastly, it should be observed in this context that the Contracting States’ margin of appreciation is not identical with respect to each of the aims listed in article 10(2). As will be seen in the next subsection, the more objective the legitimate aim, the less power of appreciation is granted to States.²⁰¹

¹⁹⁶Ibid., p. 30, para. 59(c).

¹⁹⁷*Eur. Court HR, Handyside Case v. the United Kingdom, judgment of 7 December 1976, Series A, No. 24, p. 22, para. 48.*

¹⁹⁸Ibid., p. 23, para. 49.

¹⁹⁹*Eur. Court HR, the Sunday Times Case v. the United Kingdom, judgment of 26 April 1979, Series A, No. 30, p. 36, para. 59.*

²⁰⁰*Eur. Court HR, Case of the Observer and Guardian v. the United Kingdom, judgment of 26 November 1991, Series A, No. 216, p. 30, paras. 59(a) and (b).*

²⁰¹*Eur. Court HR, the Sunday Times Case v. the United Kingdom, judgment of 26 April 1979, Series A, No. 30, pp. 36-37, para. 59.*

Freedom of expression as guaranteed by article 10 of the European Convention on Human Rights constitutes one of the essential foundations of a democratic society.

Freedom of expression is also one of the basic conditions for the progress of a democratic society and for the development of every individual.

The hallmarks of a democratic society include pluralism, tolerance and broadmindedness, which means that, subject to the restrictions defined in article 10(2) of the European Convention, the right to freedom of expression covers not only information and ideas that are considered acceptable or otherwise inoffensive but also information and ideas that offend, shock or disturb the State or any part of its population.

These principles are of particular importance to the press, which plays the role of a public watchdog by imparting information and ideas. They are also important to the general public, which has the right to receive such information and ideas.

The term “necessary in a democratic society” in article 10(2) of the European Convention means that there must be “a pressing social need” for limitations imposed on the exercise of freedom of expression. It must, in other words, be “convincingly established” that the measures concerned are proportionate to the legitimate aim pursued. To this end, the Contracting States have to show that the reasons adduced in support of the measures are both “relevant” and “sufficient”. It is not enough in order to fulfil this requirement that the Contracting States show that they have acted carefully or in good faith.

Although domestic authorities have a certain margin of appreciation in deciding the necessity of a measure, this power is coupled with supervision by the European Court of Human Rights.

States’ power of appreciation is not identical in each situation but changes with the legitimate aim to be pursued. The more objective the legitimate purpose, the less power of appreciation is granted to States in deciding on the necessity of the restrictive measures.

3.5.2 Freedom of the press

Freedom of the press has been the subject of many cases under article 10, cases that prove not only the frailty but also the fundamental importance of a free and critical press in Europe. In this subsection examples will be given of cases involving restrictions on freedom of the press in order to maintain the authority of the judiciary and to protect the reputation or rights of others.

Maintenance of the authority of the judiciary: The *Sunday Times* case concerned a court injunction preventing the newspaper from publishing an article on the thalidomide tragedy on the ground that it would constitute contempt of court. The article concerned thalidomide children and the settlement of their compensation claims

in the United Kingdom. Thalidomide was a drug prescribed, in particular, for expectant mothers, some of whom subsequently gave birth to children suffering from severe deformities. Distillers Company (Biochemicals) Limited, which manufactured and marketed the drug in the United Kingdom, eventually entered into settlements with a great majority of the victims of the drug. The applicants alleged, inter alia, that the injunction issued by the High Court and upheld by the House of Lords constituted a breach of article 10 of the Convention.²⁰²

The European Court had no difficulty deciding that there had been in this case “interference by public authority” in the exercise of the applicants’ freedom of expression as guaranteed by article 10(1) of the Convention. To be justified, such interference had to meet the conditions laid down in article 10(2).²⁰³

With regard to the condition that the interference must be “*prescribed by law*”, the Court first noted that the term “law” in article 10(2) “covers not only statute but also unwritten law”.²⁰⁴ Furthermore, the expression “prescribed by law” requires that “the law must be adequately accessible” and “formulated with sufficient precision to enable the citizen to regulate his conduct”.²⁰⁵ After carefully examining whether the law of contempt of court in English law satisfied these criteria of “*accessibility*” and “*foreseeability*”, the European Court concluded that it did and that the interference complained of was “prescribed by law” as required by article 10(2).²⁰⁶

The *foreseeability criterion* means that a person “must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable.”²⁰⁷ As applied in the *Sunday Times* case, the foreseeability principle rather means that a person must be able to foresee, to a degree that is “reasonable in the circumstances”, the risk that a certain conduct entails.²⁰⁸

The next question to be decided was whether the interference had *a legitimate aim* in conformity with article 10(2). Both the applicants and the Government agreed that the law of contempt of court served the purpose of “safeguarding not only the impartiality and authority of the judiciary but also the rights and interests of litigants”.²⁰⁹ Explaining the term “judiciary” (French: “*pouvoir judiciaire*”), the Court stated that it comprises

“the machinery of justice or the judicial branch of government as well as the judges in their official capacity. The phrase ‘authority of the judiciary’ includes, in particular, the notion that the courts are, and are accepted by the public at large as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes relative thereto;

²⁰²*Eur. Court HR, the Sunday Times Case v. the United Kingdom, judgment of 26 April 1979, Series A, No. 30, p. 27, para. 38.*

²⁰³*Ibid.*, p. 29, para. 45.

²⁰⁴*Ibid.*, p. 30, para. 47.

²⁰⁵*Ibid.*, p. 31, para. 49.

²⁰⁶*Ibid.*, pp. 31-33, paras. 50-53.

²⁰⁷*Ibid.*, p. 31, para. 49.

²⁰⁸*Ibid.*, p. 33, para. 52.

²⁰⁹*Ibid.*, p. 33, para. 54.

further, that the public at large have respect for and confidence in the courts' capacity to fulfil that function.”²¹⁰

Having examined the domestic law at issue, the Court took the view that “the majority of the categories of conduct covered by the law of contempt relate either to the position of the judges or to the functioning of the courts and of the machinery of justice: ‘maintaining the authority and impartiality of the judiciary’ is therefore one purpose of that law ... [I]nsofar as the law of contempt may serve to protect the rights of litigants, this purpose is already included in the phrase ‘maintaining the authority and impartiality of the judiciary’”. It was therefore not necessary to consider as a separate issue whether the law of contempt had the further purpose of safeguarding the rights of others.²¹¹ As the question of “impartiality” had not been pleaded before the European Court, the Court only had to consider whether the reasons invoked by the House of Lords for concluding that the draft article was objectionable fell “within the aim of maintaining the ‘authority ... of the judiciary’ as interpreted by the Court”. The Court concluded that they did and accepted, *inter alia*, the following reasons given by the House of Lords:

- ❖ “by ‘prejudging’ the issue of negligence [the article] would have led to disrespect for the processes of the law or interfered with the administration of justice;”
- ❖ “prejudgment by the press would have led inevitably in this case to replies by the parties, thereby creating the danger of a ‘trial by newspaper’ incompatible with the proper administration of justice;” and
- ❖ “the courts owe it to the parties to protect them from the prejudices of prejudgment which involves their having to participate in the flurries of pre-trial publicity.”²¹²

As the interference in this case complied both with *the principle of legality* and *the condition of a legitimate purpose*, the crucial question that remained to be answered was whether it could be considered to be “*necessary in a democratic society*”. In other words,

- ❖ Did the interference correspond to a “pressing social need”?
- ❖ Was it “proportionate to the legitimate aim pursued”?
- ❖ Were the reasons given by the domestic authorities to justify it “relevant” and “sufficient”?²¹³

The Court noted in this regard that a Contracting State’s “power of appreciation is not identical as regards each of the aims listed in Article 10 (2)”. In contrast to the “protection of morals”, for instance, the “authority” of the judiciary is a “far more objective notion” concerning which “the domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground ... Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation” at the domestic level.²¹⁴

²¹⁰Ibid., p. 34, para. 55.

²¹¹Ibid., p. 34, paras. 55-56.

²¹²Ibid., pp. 34-35, paras. 56-57.

²¹³Ibid., p. 38, para. 62.

²¹⁴Ibid., pp. 36-37, para. 59.

In its detailed reasoning, the Court recalled, inter alia, the principles relating to the importance of freedom of expression in a democratic society, which are “equally applicable to the field of the administration of justice”. The exceptions to this freedom contained in article 10(2) “must be narrowly interpreted”.²¹⁵ The Court then pointed out that article 10 “guarantees not only the freedom of the press to inform the public but also the right of the public to be properly informed ... In the present case, the families of numerous victims of the tragedy, who were unaware of the legal difficulties involved, had a vital interest in knowing all the underlying facts and the various possible solutions. They could be deprived of this information which was crucially important for them, only if it appeared absolutely certain that its diffusion would have presented a threat to the ‘authority of the judiciary’”.²¹⁶ The Court therefore had to “weigh the interests involved and assess their respective force”. In so doing, it observed, inter alia, that the facts of the case “did not cease to be a matter of public interest merely because they formed the background to pending litigation. By bringing to light certain facts, the article might have served as a break on speculative and unenlightened discussion.”²¹⁷ It concluded that “the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention”. The Court therefore found the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2). That restraint proved not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary.²¹⁸ There had, consequently, been a violation of article 10.

Protection of the reputation or rights of others: The case of *Lingens v. Austria* concerned the applicant’s conviction for having defamed Mr. Kreisky, the then Chancellor of Austria. In a couple of articles the applicant had, inter alia, criticized Mr. Kreisky’s accommodating attitude towards former Nazis taking part in Austrian politics, using terms such as “the basest opportunism”, “immoral” and “undignified” on the basis of which he was sentenced to a fine and his articles were ordered confiscated.²¹⁹

The European Court of Human Rights accepted that there had been “interference by public authority” with the exercise of Mr. Lingens’s freedom of expression that needed to be justified under article 10(2) in order not to constitute a violation of the Convention, that the conviction was “prescribed by law” since it was based on article 111 of the Austrian Criminal Law, and that the measure pursued a legitimate aim in that it was designed to protect “the reputation or rights of others”.²²⁰ The question that remained to be decided was therefore whether the conviction could be justified as being “***necessary in a democratic society***” in pursuance of the legitimate aim.

²¹⁵Ibid., pp. 40-41, para. 65.

²¹⁶Ibid., pp. 41-42, para. 66.

²¹⁷Ibid., p. 42, para. 66.

²¹⁸Ibid., p. 42, para. 67.

²¹⁹*Eur. Court HR, Case of Lingens v. Austria, judgment of 8 July 1986, Seris A, No. 103*, pp. 21-23, paras. 26-30.

²²⁰Ibid., p. 24, paras. 35-36.

Recalling its *Handyside* and *Sunday Times* rulings, the Court emphasized that it could not accept the opinion, expressed in the judgment of the Vienna Court of Appeal, “to the effect that the task of the press was to impart information, the interpretation of which had to be left primarily to the reader”.²²¹ It added that:

“Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society with prevails throughout the Convention.

The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt Article 10 § 2 enables the reputation of others – that is to say, of all individuals – to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.”²²²

As to the particular facts of Mr. Lingens’s case, the European Court observed that his articles “dealt with political issues of public interest in Austria which had given rise to many heated discussions concerning the attitude of Austrians in general – and the Chancellor in particular – to National Socialism and to the participation of former Nazis in the governance of the country. The content and tone of the articles were on the whole fairly balanced but the use of the aforementioned expressions in particular appeared likely to harm Mr. Kreisky’s reputation. However, since the case concerned Mr. Kreisky in his capacity as a politician, regard must be had to the background against which these articles were written.” They had appeared after the general election in 1975, when Mr. Kreisky had accused Mr. Wiesenthal, the President of the Jewish Documentation Centre, of using “mafia methods” after he had made a number of revelations concerning the past of the President of the Austrian Liberal Party, Mr. Kreisky’s likely coalition partner. “The impugned expressions [were] therefore to be seen against the background of a post-election political controversy; ... in this struggle each used the weapons at his disposal.” Furthermore, these were circumstances that “must not be overlooked” when assessing, under article 10(2) of the European Convention, “the penalty imposed on the applicant and the reasons for which the domestic courts imposed it”.²²³

The European Court noted in this regard that, although the disputed articles had been “widely disseminated” so that the confiscation order imposed on the applicant “did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future.” It added that:

²²¹Ibid., p. 26, para. 41.

²²²Ibid., p. 26, para. 42.

²²³Ibid., pp. 26-27, para. 43.

“In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.”²²⁴

The Court then observed “that the facts on which Mr. Lingens founded his value judgment were undisputed, as was also his good faith”. It was impossible, in the Court’s view, to prove the truth of value-judgments as required by article 111 of the Austrian Criminal Code in order to escape conviction. Moreover, such a requirement “infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention”.²²⁵ The Court therefore concluded that the interference with Mr. Lingens’s freedom of expression was not “necessary in a democratic society” in that it was “disproportionate to the legitimate aim pursued”.²²⁶

In the case of *Jersild v. Denmark*, the applicant was convicted of aiding and abetting three youths – members of a group called the “Greenjackets” – who were themselves convicted of making insulting or degrading remarks against persons of foreign origin. The remarks had been made in a television programme produced by the applicant for the stated purpose of providing “a realistic picture of a social problem”. He was sentenced to pay day-fines of 1,000 Danish kroner or, alternatively, to five days’ imprisonment.²²⁷

It was common ground in this case that the conviction constituted an interference with Mr. Jersild’s freedom of expression, that it was “prescribed by law”, namely, articles 266(b) and 23(1) of the Danish Penal Code, and that it pursued the legitimate aim of protecting “the reputation or rights of others”.²²⁸

The only point in dispute was whether the measures complained of were “*necessary in a democratic society*”. The Court emphasized at the outset that it was “particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations” and that, consequently, “the object and purpose” of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination were

“of great weight in determining whether the applicant’s conviction, which – as the Government ... stressed – was based on a provision enacted in order to ensure Denmark’s compliance with the UN Convention, was ‘necessary’ within the meaning of Article 10 § 2”.²²⁹

Denmark’s obligations under article 10 of the European Convention must therefore “be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention”.²³⁰

²²⁴Ibid., p. 27, para. 44.

²²⁵Ibid., p. 28, para. 46.

²²⁶Ibid., p. 28, para. 47.

²²⁷*Eur. Court HR, Case of Jersild v. Denmark, judgment of 23 September 1994, Series A, No. 298, p. 14-15, paras. 13-14.*

²²⁸Ibid., p. 20, para. 27.

²²⁹Ibid., p. 22, para. 30.

²³⁰Ibid., pp. 22-23, para. 30.

Reiterating the importance of freedom of expression and the role of the press in a democratic society, the Court emphasized that these principles “doubtless apply also to the audiovisual media”. It added that:

“In considering the ‘duties and responsibilities’ of a journalist, the potential impact of the medium concerned is an important factor and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media ... The audiovisual media have means of conveying through images meanings which the print media are not able to impart.

At the same time, the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for the Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. *In this context, the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.*”²³¹.

The Court thus had to decide whether the reasons adduced by the Danish authorities to justify the conviction of Mr. Jersild were “relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued”. In so doing, “the Court [had] to satisfy itself that the national authorities did apply standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.”²³²

The Court’s assessment had regard to “the manner in which the Greenjackets feature was prepared, its contents, the context in which it was broadcast and the purpose of the programme”. It also bore in mind “the obligations on States under the UN Convention and other international instruments to take effective measures to eliminate all forms of racial discrimination and to prevent and combat racist doctrines and practices”.²³³

In so doing, the Court found, in the first place, that the reasons advanced by the national authorities were “relevant”. In its view, “the national courts laid considerable emphasis on the fact that the applicant had himself taken the initiative of preparing the Greenjackets feature and that he not only knew in advance that racist statements were likely to be made during the interview but also had encouraged such statements. He had edited the programme in such a way as to include the offensive assertions. Without his involvement, the remarks would not have been disseminated to a wide circle of people and would thus not have been punishable.”²³⁴

On the other hand, considering the programme in its context, including the presenter’s introduction, there was “no reason to doubt” that the interviews fulfilled the stated aim of addressing aspects of the problem of racism in Denmark. “Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas” because

²³¹Ibid., p. 23, para. 31; emphasis added.

²³²Ibid., pp. 23-24, para. 31.

²³³Ibid., p. 24, para. 31.

²³⁴Ibid., p. 24, para. 32.

“it clearly sought – by means of an interview – to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.”²³⁵

Furthermore, the European Court was “not convinced by the argument, also stressed by the national courts ... that the Greenjackets item was presented without any attempt to counterbalance the extremist views expressed. Both the TV presenter’s introduction and the applicant’s conduct during the interviews clearly dissociated him from the persons interviewed.”²³⁶ The Court added that:

“News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of ‘public watchdog’ ... The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. *In this regard the Court does not accept the Government’s argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.*”²³⁷

There could be no doubt “that the remarks in respect of which the Greenjackets were convicted ... were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10”. However, “it [had] not been shown, that, considered as a whole, the feature was such as to justify also [the applicant’s] conviction of, and punishment for, a criminal offence under the Penal Code.”²³⁸ It followed that “the reasons adduced in support of the applicant’s conviction and sentence were not sufficient to establish convincingly that the interference thereby occasioned with the enjoyment of his right to freedom of expression was ‘necessary in a democratic society’; in particular the means employed were disproportionate to the aim of protecting ‘the reputation or rights of others.’” The measures therefore violated article 10 of the Convention.²³⁹

The protection of the reputation or rights of others was also at issue in the case of *Bergens Tidende and Others v. Norway* concerning a Norwegian newspaper, its editor-in-chief and one of its journalists. The complaint originated in an article published in the newspaper concerning women who were dissatisfied with the work of a cosmetic surgeon. The article followed a previous article in which the newspaper had described the surgeon’s work and the advantages of cosmetic surgery, following which a number of women had contacted the newspaper with their complaints.²⁴⁰ The second article, which was critical of the surgery performed, was published on the newspaper’s front page with the title “Beautification resulted in disfigurement”. In it the women

²³⁵Ibid., p. 24, para. 33.

²³⁶Ibid., p. 25, para. 34.

²³⁷Ibid., p. 25, para. 35; emphasis added.

²³⁸Ibid., pp. 25-26, para. 35.

²³⁹Ibid., p. 26, para. 37.

²⁴⁰*Eur. Court HR, Case of Bergens Tidende and Others v. Norway, judgment of 2 May 2000*; the text used in this context is the unedited version of the judgment found on the Court’s web site: <http://hudoc.echr.coe.int/>, paras. 9-11.

stated, inter alia, that they had been “disfigured and ruined for life”.²⁴¹ As a consequence of the negative publicity, the surgeon lost patients and had to close his business. Following complaints about him to the health authorities by dissatisfied patients, the authorities concluded that he had not performed any improper surgery and therefore took no action.²⁴² The surgeon instituted defamation proceedings against the applicants and, although the court of second instance found in their favour, the Supreme Court eventually found in favour of the surgeon, awarding him damages and costs totalling 4,709,861 Norwegian kroner.²⁴³

There was agreement between the parties before the European Court that this measure constituted an interference with the applicants’ right to freedom of expression that needed to be justified under article 10(2), that it was “prescribed by law”, namely Section 3(6) of the Damage Compensation Act 1969, and that it pursued the legitimate aim of protecting “the reputation or rights of others”. As in so many other cases brought under article 10 of the European Convention, the only question that remained to be decided was whether the interference could be considered to be “*necessary in a democratic society*”.²⁴⁴

Recalling its well-established case law on freedom of expression and the essential role played by the press in a democratic society, including its obligations and responsibilities, the Court stated that it was

“mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation ... In such cases as the present one, the national margin of appreciation is circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of ‘public watchdog’ by imparting information of serious public concern.”²⁴⁵

In the Court’s view, “the impugned articles ... concerned an important aspect of human health and as such raised serious issues affecting the public interest.” Where, as in this case, “measures taken by the national authorities are capable of discouraging the press from disseminating information on matters of legitimate public concern, careful scrutiny of the proportionality of the measures on the part of the Court is called for.”²⁴⁶

However, the exercise of freedom of expression “carries with it ‘duties and responsibilities’ which also apply to the press ... [T]hese ‘duties and responsibilities’ assume significance when, as in the present case, there is question of attacking the reputation of private individuals and undermining the ‘rights of others’.” Consequently,

“by reason of the ‘duties and responsibilities’ inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”²⁴⁷

²⁴¹Ibid., para. 12.

²⁴²Ibid., paras. 17-19.

²⁴³Ibid., paras. 20-24.

²⁴⁴Ibid., para. 33.

²⁴⁵Ibid., para. 49.

²⁴⁶Ibid., paras. 51-52.

²⁴⁷Ibid., para. 53.

The Court attached considerable weight to the fact “that in the present case the women’s accounts of their treatment by Dr R. were found not only to have been essentially correct but also to have been accurately recorded by the newspaper.” Reading the articles as a whole, the Court could not find that the statements were excessive or misleading.²⁴⁸ “The Court [was] further unable to accept that the reporting of the accounts of the women showed a lack of any proper balance.” It pointed out that “news reporting based on interviews constitutes one of the most important means whereby the press is able to play its vital role of ‘public watchdog’.”²⁴⁹ Invoking its judgment in the *Jersild* case, the Court stated that “the methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question”; it was not for the Court, any more than it was for the national courts, “to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists.” Lastly, the Court noted that on the same page as the first impugned article, there was an interview with another cosmetic surgeon referring to the “small margins between success and failure” in this field as well as an interview with the accused cosmetic surgeon who drew attention to the fact that complications occurred in 15-20 per cent of all operations. Moreover, another two articles defending Dr. R. had been published by the newspaper.²⁵⁰

While accepting that the publication of the relevant articles “had serious consequences for the professional practice of Dr R.”, the European Court was of the opinion that, “given the justified criticisms relating to his post-surgical care and follow-up treatment, it was inevitable that substantial damage would in any event be done to his professional reputation.”²⁵¹ In the light of all these considerations, the Court could not find “that the undoubted interest of Dr R. in protecting his professional reputation was sufficient to outweigh the important public interest in the freedom of the press to impart information on matters of legitimate public concern. In short, the reasons relied on by the respondent State, although relevant, [were] not sufficient to show that the interference complained of was ‘necessary in a democratic society’.” It followed that “there was no reasonable relationship of proportionality between the restrictions placed by the measures applied by the Supreme Court on the applicants’ right to freedom of expression and the legitimate aim pursued.”²⁵² Article 10 of the European Convention had therefore been violated.

Subject to the restrictions specified in article 10(2) of the European Convention on Human Rights, freedom of expression has to be guaranteed to allow the press to perform its task as purveyor of information and as public watchdog.

Freedom of political debate is at the very core of the concept of a democratic society which permeates the European Convention.

²⁴⁸Ibid., para. 56.

²⁴⁹Ibid., para. 57.

²⁵⁰Ibid., para. 57.

²⁵¹Ibid., para. 59.

²⁵²Ibid., para. 60.

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.

*Freedom of the press protects not only the substance of ideas and information but also the **form** in which they are conveyed and journalists therefore have the right to decide what technique of reporting to adopt.*

The exercise of freedom of expression carries with it “duties and responsibilities”. To benefit from the protection of article 10 of the European Convention when reporting on issues of general interest, journalists are required to act in good faith in order to provide accurate and reliable information in accordance with the ethics of their profession.

News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of public watchdog. Punishment of journalists for assisting in the dissemination of statements by other persons should not therefore be envisaged unless there are particularly strong reasons for doing so.

Convictions or other sanctions on reporting are likely to hamper the press in performing its task as a public watchdog.

It may be necessary in a democratic society to restrict the exercise of freedom of expression, for instance to maintain “the authority and impartiality of the judiciary” and to protect “the reputation or rights of others”.

However, a matter does not cease to be of public interest just because it is part of pending litigation. Interference with freedom of expression in such a matter is therefore justified only if it corresponds to a social need that is sufficiently pressing to outweigh the public interest in the free flow of information. The Contracting States must provide relevant and sufficient reasons to establish convincingly that such a need exists to justify the interference.

Although political leaders also enjoy protection for their “reputation or rights” under article 10(2) of the Convention, the limits of acceptable criticism are wider in their case than in the case of private individuals. When politicians act in their official capacity, the requirement that they be protected under article 10(2) must be weighed against the interest of an open discussion of political issues.

3.5.3 Freedom of expression of elected members of professional organizations

The case of *Nilsen and Johnsen v. Norway* raised the question of freedom of expression for members of professional organizations, in this case policemen. The first applicant was a police inspector and Chairman of the Norwegian Police Association and the second a police constable and Chairman of the Bergen Police Association. Their complaint under article 10 originated in their conviction by the Oslo City Court

for defamation under the Norwegian Penal Code. The defamatory statements were published in three newspapers and concerned critical remarks regarding a professor's reports on police brutality. One applicant was ordered to pay non-pecuniary damages to the professor and both applicants were ordered to pay him substantial sums for legal costs.²⁵³

It was agreed among the parties that the impugned measures interfered with the applicants' freedom of expression, that the interference was "prescribed by law" and pursued a legitimate aim, namely "the protection of the reputation or rights of others". It therefore only remained for the European Court of Human Rights to decide whether the measure was "*necessary in a democratic society*".²⁵⁴ This question was of particular importance in the case, given that the applicants had tried to counter serious allegations of misconduct by the police in the Norwegian city of Bergen. The Court held in this regard that:

"A particular feature of the present case is that the applicants were sanctioned in respect of statements they had made as representatives of police associations in response to certain reports publicising allegations of police misconduct. While there can be no doubt that any restrictions placed on the right to impart and receive information on arguable allegations of police misconduct call for a strict scrutiny on the part of the Court ... the same must apply to speech aimed at countering such allegations since it forms part of the same debate. This is especially the case where, as here, the statements in question have been made by elected representatives of professional associations in response to allegations calling into question the practices and integrity of the profession. Indeed, it should be recalled that the right to freedom of expression under Article 10 is one of the principal means of securing effective enjoyment of the right to freedom of assembly and association as enshrined in Article 11."²⁵⁵

The European Court considered that the reasons relied upon by the Norwegian courts were "*clearly relevant*" in that they aimed at protecting the professor's reputation. The Norwegian Supreme Court, for instance, had found that the defamatory statements amounted to accusations of "falsehood", "deliberate lies", "unworthy and malicious motives" and "dishonest motives".²⁵⁶ But were these reasons "*sufficient*" for the purposes of article 10(2)? The Court observed in this regard that the case had its background "in a long and heated public debate in Norway on investigations into allegations of police violence, notably in the city of Bergen" and that "the impugned statements clearly bore on a matter of serious public concern." Importantly, however, it noted in this regard

"that, according to the Strasbourg Court's case law, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest."²⁵⁷

²⁵³ *Eur. Court HR, Case of Nilsen and Johnsen v. Norway, judgment of 25 November 1999, Reports 1999-V/III, pp. 72-75, para. 25, and p. 76, para. 27.*

²⁵⁴ *Ibid.*, p. 82, para. 39.

²⁵⁵ *Ibid.*, pp. 85-86, para. 44.

²⁵⁶ *Ibid.*, p. 86, para. 45; emphasis added.

²⁵⁷ *Ibid.*, pp. 86-87, para. 46.

However, “even in debate on matters of serious public concern, there must be limits to the right to freedom of expression.” The issue was therefore “whether the applicants [had] exceeded the limits of permissible criticism”.²⁵⁸

The European Court accepted that the Norwegian courts were justified in declaring null and void the statement accusing the professor of deliberate lies, since this statement “exceeded the limits of permissible criticism”. However the same was not true of the remaining statements, which were “rather akin to value judgments”.²⁵⁹

In assessing the necessity for the interference, the Court also had regard to “the role played by the injured party in the present case”. It noted that “he had used a number of derogatory expressions, such as ‘misinformation’, ‘despotism’” and had alleged that there was “a ‘criminal sub-culture’ in the Bergen police”.²⁶⁰ However,

“bearing in mind that the applicants were, in their capacity as elected representatives of professional associations, responding to criticism of the working methods and ethics within the profession, the Court considers that, in weighing the interests of free speech against those of protection of reputation under the necessity test in Article 10 § 2 of the Convention, greater weight should be attached to the plaintiff’s own active involvement in a lively public discussion than was done by the national courts when applying national law... The statements at issue were directly concerned with the plaintiff’s contribution to that discussion. In the Court’s view, a degree of exaggeration should be tolerated in the context of such a heated and continuing public debate of affairs of general concern, where on both sides professional reputations were at stake.”²⁶¹

In the light of the foregoing, the Court was “not satisfied” that the remaining statements “exceeded the limits of permissible criticism for the purposes of” article 10 of the Convention. At the heart of the long and heated public discussion was the question of the truth of allegations of police violence and there was factual support for the assumption that false allegations had been made by informers. The statements in question essentially addressed this issue and the admittedly harsh language in which they were expressed was not incommensurate with that used by the injured party who, since an early stage, had participated as a leading figure in the debate. The Court concluded that there had been a violation of article 10, since there were not “sufficient reasons” to support the interference with the applicant’s freedom of expression, which was therefore not “necessary in a democratic society”.²⁶²

There is little scope under article 10(2) of the European Convention for restrictions on political speech or on debate on questions of public interest. However, when persons criticize others, there is a limit that may not be exceeded.

²⁵⁸Ibid., p. 87, para. 47.

²⁵⁹Ibid., p. 87, paras. 49-50.

²⁶⁰Ibid., pp. 88-89, para. 52.

²⁶¹Ibid., p. 89, para. 52.

²⁶²Ibid., p. 89, para. 53.

Restrictions placed on the right to impart and receive information on arguable allegations of, for instance, police misconduct call for strict European supervision. The same applies to restrictions on speech aimed at countering such allegations, since they form part of the same debate. This approach is particularly valid where the impugned statements have been made by elected representatives of professional organizations in response to alleged violations of their professional integrity and ethics. Moreover, freedom of expression as guaranteed by article 10 of the European Convention on Human Rights is one of the principal means of securing the effective enjoyment of freedom of assembly and association guaranteed by article 11.

3.5.4 Freedom of expression of elected politicians

The European Court has stated that:

“while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition Member of Parliament ... call for the closest scrutiny on the part of the Court.”²⁶³

In the case in question, *Jerusalem v. Austria*, the applicant, who was a member of the Vienna Municipal Council which also acted as the Regional Parliament, had been prohibited by the Austrian courts, on the basis of article 1330 of the Austrian Civil Code, from repeating statements to the effect that two named associations, IPM and its Swiss counterpart VPM, “were sects of a totalitarian character”.²⁶⁴ During a debate in the Vienna Municipal Council concerning the granting of subsidies to an association assisting parents whose children had become involved in sects, the applicant had stated that sects that were “psycho-sects” existed in Vienna and had common features such as “their totalitarian character” and “fascist tendencies”. The applicant had also stated that IPM had “gained influence on the drug policy of the Austrian People’s Party”.²⁶⁵ The Austrian association, as well as its Swiss counterpart VPM, requested the Vienna Regional Court to issue an injunction against the applicant, prohibiting her from repeating that IPM was a sect. The request was granted.

The Court endorsed the parties’ assessment in this case that the injunction constituted an interference with the applicant’s freedom of expression as guaranteed by article 10(1) of the Convention, and that the interference was both “prescribed by law” and pursued a legitimate aim, namely “the protection of the reputation or rights of others” within the meaning of article 10(2). It therefore remained to be determined

²⁶³ Eur. Court HR, *Case of Jerusalem v. Austria*, judgment of 27 February 2001; the text used is the unedited version found on the Court’s web site: <http://hudoc.echr.coe.int/>, para. 36.

²⁶⁴ Ibid., para. 18.

²⁶⁵ Ibid., para. 10.

whether the injunction was also “necessary in a democratic society” for that particular purpose.²⁶⁶

After emphasizing the importance of freedom of expression also for elected representatives of the people, the European Court recalled

“that the limits of acceptable criticism are wider with regard to politicians acting in their public capacity than in relation to private individuals, as the former inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large. Politicians must display a greater degree of tolerance, especially when they themselves make public statements that are susceptible to criticism.”²⁶⁷

Referring to its abovementioned judgment in the *Nilsen and Johnsen* case, the Court observed, however, that “private individuals or associations lay themselves open to scrutiny when they enter the arena of public debate.” In the case before the Court, the two associations were “active in a field of public concern, namely drug policy. They participated in public discussions on this matter and, as the Government conceded, co-operated with a political party. Since the associations were active in this manner in the public domain, they ought to have shown a higher degree of tolerance to criticism when opponents consider their aims and the means employed in that debate.”²⁶⁸

The Court then noted that the statements in question, which were made in the course of a political debate in the Vienna Municipal Council, were thus also “made in a forum which was at least comparable to a Parliament as concerns the public interest in protecting the participants’ freedom of public expression”. It added that:

“In a democracy, Parliament or such comparable bodies are the essential fora for political debate. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein.”²⁶⁹

Contrary to the Austrian courts, the European Court accepted that the applicant’s statements, which reflected “fair comments on matters of public interest by an elected member of the Municipal Council [were] to be regarded as value judgments rather than statements of fact”. The question that had to be decided was therefore “whether there existed a sufficient factual basis for such value judgments”.²⁷⁰

The Court noted that, in order to prove her value judgments, the applicant had offered documentary evidence on the internal structure and activities of the plaintiffs, including a judgment handed down by a German court on the matter. While the Austrian Regional Court had accepted this evidence, it had rejected the applicant’s proposed witnesses as well as a suggested expert opinion.²⁷¹ The European Court stated that it was “struck by the inconsistent approach of the domestic courts” which, on the hand, required proof of a statement and, on the other, refused to consider all available evidence. It concluded that

²⁶⁶Ibid., para. 30.

²⁶⁷Ibid., para. 38.

²⁶⁸Ibid., paras. 38-39.

²⁶⁹Ibid., para. 40.

²⁷⁰Ibid., paras. 44-45.

²⁷¹Ibid., para. 45.

“in requiring the applicant to prove the truth of her statements, while at the same time depriving her of an effective opportunity to adduce evidence to support her statements and thereby show that they constituted a fair comment, the Austrian Courts overstepped their margin of appreciation and that the injunction granted against the applicant amounted to a disproportionate interference with her freedom of expression.”²⁷²

There had consequently been a breach of article 10.

Freedom of expression as guaranteed by article 10 of the European Convention is of particular importance for elected representatives of the people such as members of local, regional and national parliaments who represent and defend the interests of their electorate.

When entering the arena of public debate, politicians lay themselves open to close scrutiny of what they do and what they say. They must therefore accept wider limits of criticism as well as a correspondingly greater degree of tolerance. The same is true of private persons and associations who participate in political debates on matters of public concern.

In a democratic society, where parliament and other elected bodies are the primary forums for political debate, very weighty reasons must be advanced to justify restrictions on the exercise of freedom of expression in those forums.

3.5.5 Freedom of artistic expression

Article 10 of the European Convention

“includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds ... Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation on the State not to encroach unduly on their freedom of expression.”²⁷³

In the case of *Karatas v. Turkey*, the applicant had been convicted by the Istanbul National Security Court of violating Section 8 of the Prevention of Terrorism Act (Law No. 3713) by publishing an anthology of poems entitled *The song of a rebellion – Dersim*. Following an amendment to the law, the sentence was reduced to one year, one month and ten days, but the fine imposed was increased to 111,111,110 Turkish liras.²⁷⁴ Section 8 of the Prevention of Terrorism Act outlawed written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation.

²⁷²Ibid., para. 46.

²⁷³Enr. Court HR, *Case of Karatas v. Turkey*, judgment of 8 July 1999, Reports 1999-IV, p. 108, para. 49.

²⁷⁴Ibid., pp. 90-95, paras. 9-15.

The Court accepted that the conviction constituted an “interference” with the applicant’s exercise of his right to freedom of expression, that the conviction was “prescribed by law”, namely by article 8 of the Prevention of Terrorism Act, and that the measure pursued a legitimate aim. With regard to the latter point, the Court considered that

“having regard to the sensitivity of the security situation in south-east Turkey ... and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicant can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.”²⁷⁵

It thus remained for the European Court to decide whether the conviction of the applicant was proportionate to this legitimate aim and thus necessary in a democratic society. It observed that the applicant was “a private individual who expressed his views through poetry – which by definition is addressed to a very small audience – rather than through the mass media, a fact which limited their potential impact on ‘national security’, [public] ‘order’ and ‘territorial integrity’ to a substantial degree”. Even though some passages seemed “very aggressive in tone and to call for the use of violence, the Court [considered] that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.”²⁷⁶ Furthermore, the Court noted that the applicant had been convicted “not so much for having incited to violence, but rather for having disseminated separatist propaganda by referring to a particular region of Turkey as ‘Kurdistan’ and for having glorified the insurrectionary movements in that region”²⁷⁷. The Court was “above all ... struck by the severity of the penalty imposed on the applicant”.²⁷⁸ For all these reasons, it concluded that the applicant’s conviction “was disproportionate to the aims pursued and, accordingly, not ‘necessary in a democratic society’. There [had] therefore been a violation of Article 10 of the Convention.”²⁷⁹

Freedom of *artistic* expression was also at issue in the case of *Müller and Others v. Switzerland*, in which the applicants had been convicted under article 204(1) of the Swiss Criminal Code for having published “obscene” items at an exhibition. The Court accepted that this conviction, as well as the order – although subsequently lifted – to confiscate the paintings, constituted an interference with the applicants’ right to freedom of expression which had to be justified under article 10(1) in order to be lawful.²⁸⁰

²⁷⁵Ibid., pp. 105-106, paras. 36, 40 and 44.

²⁷⁶Ibid., p. 109, para. 52.

²⁷⁷Ibid., pp. 109-110, para. 52.

²⁷⁸Ibid., p. 110, para. 53.

²⁷⁹Ibid., p. 110, para. 54.

²⁸⁰*Eur. Court. HR, Case of Müller and Others v. Switzerland, judgment of 24 May 1988, Series A, No. 133, p. 19, para. 28.*

The Court accepted that the measure was prescribed by law and that the conviction pursued a legitimate aim in that it was designed to protect public morals.²⁸¹ Recalling the fundamental role played by freedom of expression in a democratic society, the Court admitted that “artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in [article 10(2) of the Convention]. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, ‘duties and responsibilities’: their scope will depend on his situation and the means he uses.”²⁸² As to the term *morals*,

“ it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. The view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them.”²⁸³

The Court recognized, “as did the Swiss courts, that conceptions of sexual morality [had] changed in recent years. Nevertheless, having inspected the original paintings, the Court [did]not find unreasonable the view taken by the Swiss courts that those paintings, with their emphasis on sexuality in some of its crudest forms, were ‘liable grossly to offend the sense of sexual propriety of persons of ordinary sensitivity’.” Having regard to the margin of appreciation granted to the Swiss courts in the matter, the European Court concluded that the disputed measures did not infringe article 10 of the Convention.²⁸⁴

Freedom of artistic expression is protected by article 10 of the European Convention on Human Rights and is an essential component of a democratic society.

Freedom of artistic expression includes, in particular, the freedom to receive and impart information and ideas which enable people to take part in the public exchange of cultural, political and social information and ideas of all kinds.

The exercise of freedom of artistic expression cannot be lawfully interfered with on any grounds other than those specified in article 10(2) of the European Convention.

²⁸¹Ibid., pp. 20-21, paras. 29-30.

²⁸²Ibid., p. 22, para. 34.

²⁸³Ibid., p. 22, para. 35.

²⁸⁴Ibid., pp. 22-23, paras. 36-37. On the notion of “morals”, see also the *Eur. Court HR, Handyside Case, judgment of 7 December 1976, Series A, No. 24*, pp. 23-28, paras. 49-59. For more information on freedom of expression, see also the web site of the organization “Article 19” (www.article19.org) on which it is possible to consult *The Virtual Freedom of Expression Handbook*.

To determine what is necessary in a democratic society in order to protect public morals, the Contracting States have a wider margin of appreciation than when they impose restrictions on the exercise of freedom of expression for legitimate aims that are of a more objective nature.

4. The Rights to Freedom of Association and Assembly

The rights to freedom of association and assembly are closely related and will therefore be considered jointly in this chapter. As these two freedoms are not dealt with in the same order in the treaties considered, for the sake of consistency freedom of association will generally be dealt with prior to freedom of assembly.

4.1 Relevant legal provisions

Article 20 of the Universal Declaration of Human Rights provides that:

- “1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.”

Article 22 of the International Covenant on Civil and Political Rights concerning the right to freedom of association reads as follows:

- “1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.”

Article 21 of the International Covenant on Civil and Political Rights guarantees the right to peaceful assembly in the following terms:

“The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”

Article 10 of the African Charter on Human and Peoples’ Rights guarantees the right to free association:

- “1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association.”

The right to freedom of assembly is contained in article 11 of the African Charter:

“Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.”

Article 16 of the American Convention on Human Rights guarantees freedom of association:

- “1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this rights shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association on members of the armed forces and the police.”

Article 15 of the American Convention on Human Rights safeguards the right of peaceful assembly:

“The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedoms of others.”

Both freedoms are included in article 11 of the European Convention on Human Rights, which reads:

- “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

The right to freedom of peaceful assembly and association is also guaranteed by article 5(d)(ix) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 15 of the Convention on the Rights of the Child and article 8 of the African Charter on the Rights and Welfare of the Child, while freedom of association is expressly guaranteed also by article 4 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women. The right to form trade unions and to join a trade union of one’s choice is recognized by article 8 of the International Covenant on Civil and Political Rights, article 8 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, article 5 of the European Social Charter, 1961, and article 5 of the European Social Charter, 1996 (revised).

Freedom of association is, of course, also protected by the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The ILO is working extensively in the area of freedom of association, particularly within the framework of the Freedom of Association Committee of its Governing Body. In the present context, however, freedom of assembly and freedom of association will be considered only to the extent that they have been dealt with by the monitoring bodies under the major international human rights treaties.

4.2 Articles 21 and 22 of the International Covenant on Civil and Political Rights

4.2.1 Origin and meaning of the “in a democratic society” concept

The drafting of article 21 and article 22 of the International Covenant on Civil and Political Rights followed each other very closely and, contrary to article 19(3) relating to freedom of expression, the limitation provisions of both articles contain a reference to “a democratic society”. These terms were inserted in article 21 at the eighth session of the United Nations Commission on Human Rights in 1952 at the suggestion of France,²⁸⁵ which had already tried in vain, at the Commission’s fifth session in 1949, to have the concept inserted in the text. At the time, France argued that the insertion of the concept was “essential”, since it was already contained in the general limitation provision of article 29 of the Universal Declaration of Human Rights.²⁸⁶ The proposal was renewed at the Commission’s sixth session in 1950, when Australia opposed it

²⁸⁵For the amendment see UN doc. E/CN.4/L.201. For the vote see UN doc. E/CN.4/SR.325, p. 20.

²⁸⁶UN doc. E/CN.4/SR.120, p. 9. For the vote rejecting the proposal, see UN doc. E/CN.4/SR.121, p. 5.

since, at the time, the notion of “democracy” embraced two diametrically opposed concepts. However, Chile was in favour since “it was possible to classify States as democratic or anti-democratic by taking into consideration how each State complied with the principles laid down in the Charter, the Universal Declaration of Human Rights and the Covenant.”²⁸⁷ The French representative stated that

“63. ... he defined a democratic society as a society based upon respect for human rights. Public order in such a society was based on the recognition by the authorities of the dignity of the individual and the protection of his rights. Undemocratic societies were characterized by a disdain for human rights.

64. ... It was important to adhere to the spirit of the Universal Declaration of Human Rights and to declare forthrightly that even public order was subordinate to human rights. The reference to a democratic society should therefore be included.”²⁸⁸

The Lebanese representative, however, considered that the French definition “was subject to abuse, since often the greatest tyrannies claimed to respect human rights as they conceived those rights.” On the other hand, if the French amendment meant the total doctrine of human rights as promulgated in the Universal Declaration, he would accept it, although he felt “that the statement should be made explicit”.²⁸⁹

In 1952 the term “in a democratic society” was also inserted in the text of the article on the right to freedom of association over objections by the United States because of its “ambiguity”.²⁹⁰ In the subsequent discussions in the Third Committee of the General Assembly, Sweden pointed out that “the right to form and join associations of one’s choice was an important one in a democratic society.”²⁹¹ Italy observed that “freedom of political association completed the freedoms of opinion, expression and assembly, respect for which was the essential characteristic of a truly democratic State.”²⁹² As shown in this chapter, the intrinsic relationship between the freedoms of expression, association and peaceful assembly has subsequently been consistently emphasized by the international monitoring bodies.

The drafters of the International Covenant on Civil and Political Rights considered that freedom of association and freedom of peaceful assembly are fundamental elements of a democratic society, which they described as a society respectful of human rights.

²⁸⁷UN doc. E/CN.4/SR.169, p. 10, para. 41 (Australia), and p. 13, para. 54 (Chile).

²⁸⁸Ibid., p. 14, paras. 63-64.

²⁸⁹Ibid., p. 14, para. 65.

²⁹⁰UN doc. E/CN.4/SR.325, para. 15 (United States). For the text of the French amendment, see UN doc. E/CN.4/L.202. On the vote, see UN doc. E/CN.4/SR.326, p. 5.

²⁹¹UN doc. GAOR, 16th session, 1961-1962, v. 1, Third Committee, doc. A/C.3/SR.1087, p. 134, para. 16.

²⁹²Ibid., UN doc. A/C.3/SR.1088, p. 139, para. 8.

4.2.2 Freedom of association

The Human Rights Committee expressed concern “at the absence of specific legislation on political parties” in the Syrian Arab Republic “and at the fact that only political parties wishing to participate in the political activities of the National Progressive Front, led by the Baath Party, are allowed. The Committee [was] also concerned at the restrictions that can be placed on the establishment of private associations and institutions ... including independent non-governmental organizations and human rights organizations.” Hence, “the State party should ensure that the proposed law on political parties is compatible with the provisions of the Covenant. It should also ensure that the implementation of the Private Associations and Institutions Act No. 93 of 1958 is in full conformity with articles 22 and 25 of the Covenant.”²⁹³

The Committee observed that the restrictions on freedom of expression in force in Iraq not only violated article 19 of the Covenant but also impeded the implementation of articles 21 and 22 which protect the rights to freedom of peaceful assembly and association. “Therefore: penal laws and decrees which impose restrictions on the rights to freedom of expression, peaceful assembly and association should be amended so as to comply with articles 19, 21 and 22 of the Covenant.”²⁹⁴

The Human Rights Committee expressed concern at difficulties in Belarus arising from “the registration procedures to which non-governmental organizations and trade unions are subjected. The Committee also [expressed] concern about reports of cases of intimidation and harassment of human rights activists by the authorities, including their arrest and the closure of the offices of certain non-governmental organizations. In this regard: The Committee, reiterating that the free functioning of non-governmental organizations is essential for the protection of human rights and dissemination of information in regard to human rights among the people, [recommended] that laws, regulations and administrative practices relating to their registration and activities be reviewed without delay in order that their establishment and free operation may be facilitated in accordance with article 22 of the Covenant.”²⁹⁵

The Committee was “very concerned about interference by the [Venezuelan] authorities in trade union activities including the free election of union leaders [and recommended that the] State party should, pursuant to article 22 of the Covenant, guarantee that unions are free to conduct their business and choose their business without official interference.”²⁹⁶ The Committee was also concerned that in Germany “there is an absolute ban on strikes by public servants who are not exercising authority in the name of the State and are not engaged in essential services, which may violate article 22 of the Covenant.”²⁹⁷ The Committee also regretted that civil servants in Lebanon “continue to be denied the right to form associations and to bargain collectively” in violation of article 22 of the Convention.²⁹⁸

²⁹³UN doc. GAOR, A/56/40 (vol. I), pp. 75-76, para. 26.

²⁹⁴UN doc. GAOR, A/53/40 (vol. I), p. 21, para. 105.

²⁹⁵Ibid., p. 29, para. 155.

²⁹⁶UN doc. GAOR, A/56/40 (vol. I), p. 53, para. 27.

²⁹⁷UN doc. GAOR, A/52/40 (vol. I), p. 34, para. 188.

²⁹⁸Ibid., p. 57, para. 357.

4.2.3 Freedom of assembly

While noting the statements by the State party to the effect that freedom of assembly was “fully respected” in the Syrian Arab Republic, the Human Rights Committee remained concerned at the restrictions in the Penal Code on the holding of public meetings and demonstrations, since they exceeded those authorized by article 21.²⁹⁹ The Committee also expressed concern at the fact that the legal rules in the Netherlands Antilles on the right of peaceful assembly “contain a general requirement of prior permission from the local police chief. [It recommended that the] State party should ensure that the right of peaceful assembly may be exercised by all in strict conformity with the guarantees of article 21 of the Covenant.”³⁰⁰

The Committee further expressed concern in the case of the Democratic People’s Republic of Korea “about the restrictions on public meetings and demonstrations, including possible abuse of the requirements of the laws governing assembly. The Committee [requested] the State party to provide additional information on the conditions for public assemblies and, in particular, to indicate whether and under what conditions the holding of a public assembly can be prevented, and whether such a measure can be appealed.”³⁰¹ The Committee was also concerned that the 1958 Cypriot law “regulating lawful assembly and requiring permits for public assemblies [was] not in compliance with article 21 of the Covenant. In this regard, the Committee [emphasized] that restrictions on freedom of assembly must be limited to those which are deemed necessary in conformity with the Covenant.”³⁰² A few years later the Committee noted the enactment of a new law in Cyprus regulating public assemblies and processions and expressed concern about the conditions that the appropriate authorities could impose “regarding the conduct of assemblies and processions upon receiving the required advance notification. The Committee also [noted] that the advance notice required to be given is too early and may unduly curtail the freedom of assembly. The Committee [reiterated] that restrictions on freedom of assembly must be limited only to those which are in conformity with article 21 of the Covenant.”³⁰³

With regard to Mongolia, the Committee observed that the limitations permitted under Mongolian law on the exercise of certain rights guaranteed by the Covenant were “so broad and numerous as to restrict severely the effective exercise of such rights”. This was, for instance, the case with “the requirement of prior permission for the holding of public meetings and the criteria for refusing such meetings”. Furthermore, the absence of adequate mechanisms to appeal against administrative decisions created an uncertainty as to whether such fundamental rights as the freedoms of association, assembly and movement were fully enjoyed in practice.³⁰⁴

The Committee expressed concern “about severe restrictions imposed on the right to freedom of assembly” in Belarus, which were not in compliance with the Covenant. It noted in particular that “applications for permits to hold demonstrations

²⁹⁹UN doc. *GAOR*, A/56/40 (vol. I), p. 75, para. 25.

³⁰⁰*Ibid.*, p. 82, para. 20.

³⁰¹*Ibid.*, p. 103, para. 24.

³⁰²UN doc. *GAOR*, A/49/40 (vol. I), p. 54, para. 323.

³⁰³UN doc. *GAOR*, A/53/40 (vol. I), p. 34, para. 194.

³⁰⁴UN doc. *GAOR*, A/47/40, p. 151, para. 601.

are required to be submitted 15 days prior to the demonstrations and are often denied by the authorities, and that Decree No. 5 of 5 March 1997 imposes strict limits on the organization and preparation of demonstrations, lays down rules to be observed by demonstrators and bans the use of posters, banners or flags that ‘insult the honour and dignity of officials of State organs’ or which ‘are aimed at damaging the State and public order and the rights and legal interests of citizens’. These restrictions cannot be regarded as necessary in a democratic society to protect the values mentioned in article 21 of the Covenant. Therefore: The Committee [recommended] that the right of peaceful assembly be fully protected and guaranteed in Belarus in law and in practice and that limitations thereon be strictly in compliance with article 21 of the Covenant, and that Decree No. 5 of 5 March 1997 be repealed or modified so as to be in compliance with that article.”³⁰⁵

Lastly, the Committee held that the “wholesale ban on demonstrations” on grounds of “public safety and national security” in Lebanon was not compatible with the right to freedom of assembly under article 21 of the Covenant and should be lifted as soon as possible.³⁰⁶

Restrictions on the exercise of freedom of expression under article 19(3) of the International Covenant on Civil and Political Rights may not impede the full and effective enjoyment of freedom of association and freedom of peaceful assembly guaranteed by articles 22 and 21 of the Covenant.

The right to freedom of association in article 22 of the International Covenant protects, inter alia, the right to form political parties, trade unions and private associations such as non-governmental organizations, including human rights organizations.

Article 22 of the Covenant does not authorize States parties to ban civil servants from forming associations and engaging in collective bargaining. Restrictions on the right to freedom of association must strictly respect the conditions laid down in article 22(2) of the Covenant.

States parties must also ensure that the right to peaceful assembly is guaranteed on the strict conditions laid down in article 21 of the Covenant and that limitations on its exercise do not exceed those expressly permitted thereby.

This means, in particular, that rules requiring prior permission for the holding of assemblies or demonstrations or any other rules or requirements governing the holding or conduct of public assemblies must be limited to those necessary in a democratic society for the legitimate purposes enumerated in article 21.

³⁰⁵UN doc. GAOR, A/53/40 (vol. I), p. 29, para. 154.

³⁰⁶UN doc. GAOR, A/52/40 (vol. I), pp. 56-57, para. 356.

A wholesale ban on demonstrations for reasons such as public safety and national security is not compatible with freedom of peaceful assembly as guaranteed by article 21 of the International Covenant.

States parties have a legal duty to provide effective remedies to persons who consider that their freedom of association or freedom of peaceful assembly has been violated.

4.3 Articles 10 and 11 of the African Charter on Human and Peoples' Rights

Article 10(1) of the African Charter on Human and Peoples' Rights guarantees to every individual "the right to free association provided that he abides by the law". Furthermore, article 10(2) stipulates that "subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association." The words "provided that he abides by the law" are admittedly vague and, contrary to the limitation provisions in the corresponding articles of the International Covenant and the American and European Conventions, the reference to "law" is not conditioned by a reference to the terms "necessary", "a democratic society" or any specified purposes which alone can justify restrictions on the exercise of the right to freedom of association.

It is not clear in what circumstances the individual's duties towards his or her family, community and the State as specified in article 29 could justify an obligation to join an association.

The exercise of the "right to assemble freely with others" in article 11 of the Charter can, however, "be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others". The Charter thus adds to the principle of legality ("provided for by law") the principle of proportionality ("necessary"), which provides some safeguards against excessive limitations. It is noteworthy, on the other hand, that, as indicated by the words "in particular", the legitimate objectives enumerated in article 11 are not exhaustive and the provision therefore opens up an area of legal uncertainty.

It should be pointed out, however, that, in accordance with article 60 of the African Charter, the African Commission on Human and Peoples' Rights "shall draw inspiration" from other international legal standards in the human rights field when interpreting the terms of the Charter. As indicated in some of the previous chapters, the Commission has frequently done so, also to some extent, as will be seen below, with regard to restrictions on the exercise of freedom of association.

4.3.1 Freedom of association

Freedom of association as protected by article 10 of the African Charter on Human and Peoples' Rights has been violated on a number of occasions. The African Commission on Human and Peoples' Rights has held, for instance, that article 10(1) was violated in the case of the *World Organization against Torture et Al. v. Zaire*. The

Government of Zaire had imposed restrictions on the number of political parties, allowing only those supportive of the regime in power to operate. “These opposition parties were not permitted to meet in public or private and there was evidence that the government attempted to destabilise these groups by harassment. In addition, human rights groups [had] been prevented from forming and established bodies in certain areas [had] been unable to hold education courses on human rights issues.” In the Commission’s view, these actions by the Government constituted “clear violations” of article 10(1) of the African Charter.³⁰⁷ The Commission likewise found a violation of article 10 in the case of *John D. Ouko v. Kenya*. Mr. Ouko was a student union leader in Kenya, a country he had to leave because of his political opinions after being arrested and detained for ten months without trial. The facts of the case were not refuted by the Government and the Commission therefore concluded that the persecution of Mr. Ouko and his flight abroad “greatly jeopardised his chances of enjoying his right to freedom of association” as guaranteed by article 10 of the Charter.³⁰⁸

Article 10 was further violated in a case concerning the Nigerian Bar Association. This communication concerned the Body of Benchers, the then new governing body of the Nigerian Bar Association, which was dominated by government representatives. The Body of Benchers had “wide discretionary powers”, including “the disciplining of lawyers”.³⁰⁹ The African Commission held that the Nigerian Bar Association, which was “legally independent of the government ... should be able to choose its own governing body. Interference with the self-governance of the Bar Association may limit or negate the reasons for which lawyers desire in the first place to form an association.”³¹⁰ It then recalled its well-established principle that:

“where regulation of the right of freedom of association is necessary, the competent authorities should not enact provisions which limit the exercise of this freedom or are against obligations under the Charter. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.”³¹¹

The Commission concluded that the Government intervention in the governing of the Nigerian Bar Association was “inconsistent with the preamble of the African Charter, where states reaffirm adherence to the principles of human and peoples’ rights contained in declarations such as the UN Basic Principles on the Independence of the Judiciary”. It therefore constituted a violation of article 10 of the Charter.³¹²

³⁰⁷ ACHPR, *World Organization against Torture et Al. v. Zaire*, Communications Nos. 25/89, 47/90, 56/91, 100/93, decision adopted during the 19th session, March 1996, para. 75 of the text as published at: www.up.ac.za/chr/ahrdb/acomm_decisions.html. On the violation of article 10 of the African Charter as a consequence of the persecution of employees of a human rights organization, see also ACHPR, *Huri-Laws (on behalf of Civil Liberties Organization) v. Nigeria*, Communication No. 225/98, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, paras. 48-49 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/225-98.html>

³⁰⁸ ACHPR, *John D. Ouko v. Kenya*, Communication No. 232/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, para. 30 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/232-99.html>

³⁰⁹ ACHPR, *Civil Liberties Organisation (on behalf of the Nigerian Bar Association) v. Nigeria*, Communication No. 101/93, decision adopted during the 17th Ordinary session, March 1995, para. 24 of the text of the decision as published at: www.up.ac.za/chr/ahrdb/acomm_decisions.html

³¹⁰ *Ibid.*, loc. cit.

³¹¹ *Ibid.*, para. 25.

³¹² *Ibid.*, para. 26.

Lastly, the African Commission found a violation of article 10 in a case where a Nigerian Court had concluded that the accused persons were guilty of murder for the simple reason that they were members of the Movement for the Survival of the Ogoni People (MOSOP). According to the Commission, “it would seem furthermore that government officials at different times during the trial declared MOSOP and the accused guilty of the charges, without waiting for the official judgment”. This demonstrated a clear prejudice against the organisation MOSOP, which the government had done nothing to defend or justify.³¹³ There had therefore been a violation of article 10(1).³¹⁴

Under article 10 of the African Charter on Human and Peoples’ Rights, freedom of association implies that permission must be given for the creation and functioning of political parties even when they do not support the party in power. Harassment of political parties constitutes a violation of freedom of association.

Freedom of association under article 10 of the African Charter also means that human rights organizations must be able to function effectively, inter alia for the purpose of teaching human rights.

Freedom of association under article 10 further implies that Bar Associations must be able to function freely and that there should be no governmental interference with their self-governance.

Limitations on the exercise of the right to freedom of association recognized in article 10 of the African Charter must not undermine the fundamental human rights and freedoms guaranteed by national constitutions or international legal standards.

It is a violation of the right to freedom of association recognized in article 10 of the African Charter to find a person guilty of a criminal offence such as murder solely on the ground of that person’s membership of an association.

4.4 Articles 15 and 16 of the American Convention on Human Rights

Article 15 of the American Convention guarantees “the right to peaceful assembly, without arms”. The words “without arms” seem redundant in that the term “peaceful” necessarily implies that there must be an absence of violence and threats of violence, including the carrying of weapons, which may, in themselves, be considered to constitute a threat of violence.

³¹³*International Pen and Others (on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization) v. Nigeria, Communications Nos. 137/94, 139/94, 154/96 and 161/97, decision adopted on 31 October 1998, para. 108 of the text of the decision as published at the following web site: http://www1.umn.edu/humanrts/africa/comcases/137-94_139/94_154-96_161-97.html*

³¹⁴*Ibid.*, loc. cit.

The “right to associate freely” as guaranteed by article 16 covers all dimensions of society such as the freedom to associate “for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes”. As made clear by the words “or other purposes”, this enumeration is simply indicative of the purposes for which a person must be allowed to associate freely with others.

The exercise of both the right to peaceful assembly and the right to associate freely may be subjected to restrictions provided that they are “imposed in conformity with the law” (right of assembly) or “established by law” (freedom of association) and are “necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others”.³¹⁵ Article 16(3) also allows “legal restrictions, including even *deprivation* of the exercise of the right of association, on members of the armed forces and the police” (emphasis added).

Articles 15 and 16 of the American Convention were at the centre of the case of *Baena Ricardo and Others v. Panama* concerning Panamanian Law No. 25 of 14 December 1990, on the basis of which 270 workers were dismissed from their work after participating in a national work stoppage on 5 December 1990. The impugned law granted the Executive and directors of autonomous and semi-autonomous institutions and State and municipal enterprises, among others, wide powers to dismiss civil servants who took part in the organization of actions against democracy and the constitutional order. Dismissal was to ensue regardless of whether the persons concerned were members of, for instance, the boards of management of labour unions and associations of civil servants. It was for the Executive to decide which acts were contrary to democracy and the constitutional order for purposes of the administrative sanction of dismissal. The workers had also taken part in a demonstration for labour claims on 4 December 1990.³¹⁶ The victims alleged violations of several articles of the American Convention, including articles 15 and 16.

With regard to *the right to peaceful assembly*, the Inter-American Court accepted that Panama had not violated article 15 in the case of the 270 workers submitting the complaint. The measures complained of had been due to the work stoppage of 5 December 1990 which was considered to have violated democracy and the constitutional order, while the march of 4 December had taken place “without any interruption or restriction”. According to the Court, the letters of dismissal to the workers concerned did not mention the march of 4 December 1990 but most of them declared the appointments invalid because the workers participated in the organization or execution of the work stoppage of 5 December.³¹⁷

With regard to *freedom of association* as guaranteed by article 16 of the American Convention, the Inter-American Court observed, inter alia, that Law No. 25 not only permitted the dismissal of labour union leaders but also abrogated rights granted to them under the Labour Code regarding the procedure to be followed in the event of dismissal of workers enjoying trade union privileges. Law No. 25 had also

³¹⁵The list of legitimate purposes is quoted from article 16; article 15 refers to “rights *or* freedoms of others” rather than “rights *and* freedoms of others”; emphasis added.

³¹⁶*I-A Court HR, Caso Baena Ricardo y Otros (270 trabajadores v. Panamá, sentencia de 2 de febrero de 2001, Serie C, No. 72*; the Spanish text used here can be found at the Court’s web site: www.corteidh.or.cr/serie_c/C_72_ESP.html, paras. 1 and 104.

³¹⁷*Ibid.*, paras. 148-150.

entered into force retroactively, thereby permitting the authorities to ignore procedures that should have been followed under the legislation in force when the events occurred. The resultant dismissal of a considerable number of trade union leaders “seriously affected” the organization and activities of the trade unions concerned and thereby also interfered with freedom of association for labour purposes.³¹⁸ The Court therefore had to examine whether this interference could be justified on the basis of article 16(2) of the Convention.

The Court first recalled its views on the notion of “laws”, by virtue of which the existence of laws is not sufficient under the American Convention to render restrictions on the enjoyment and exercise of rights and freedoms lawful; the laws must also be based on reasons of general interest.³¹⁹ The Court then considered in particular the facts contained in the report and recommendations adopted by the ILO Freedom of Association Committee in Case 1569 (which had not been contradicted by the Panamanian Government), according to which: (1) Law No. 25 was passed 15 days after the occurrence of the facts at the origin of this case; (2) the authorities did not apply the existing norms regarding dismissal of workers; (3) the trade union premises and bank accounts were interfered with; and (4) numerous dismissed workers were trade union leaders.³²⁰ The Court concluded from the foregoing that it had not been shown either that the measures taken by the State were necessary to protect “public order” in the context of the relevant events or that the principle of proportionality had been respected. The measures taken were therefore not “necessary in a democratic society” as required by article 16(2) of the Convention so that article 16 had been violated in the case of the 270 named workers.³²¹

4.5 Article 11 of the European Convention on Human Rights

The right of every person “to freedom of peaceful assembly and to freedom of association” is contained in article 11 of the European Convention, as is “the right to form and to join trade unions for the protection of his interests”. The restrictions allowed on the exercise of these rights are exhaustively enumerated in article 11(2), and must be “prescribed by law” and be “necessary in a democratic society” for one or more of the purposes specified therein. Moreover, the article “shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State”. In contrast to article 16(2) of the American Convention, article 11(2) of the European Convention uses the word “restrictions” and not “deprivation”, which indicates that the substance of the right as such cannot be compromised. On the other hand, article 11(2) of the European Convention goes further in that it also refers to “the administration of the State” in this connection. A few examples from the jurisprudence of the European Court of Human

³¹⁸Ibid., para. 166.

³¹⁹Ibid., para. 170.

³²⁰Ibid., para. 171.

³²¹Ibid., paras. 172-173. The Court also concluded that Panama had violated the principles of legality and prohibition of ex post facto laws laid down in article 9 as well as articles 8(1), 8(2), 25 and 1(1) and 2 of the American Convention, para. 214.

Rights will illustrate the meaning of the terms of article 11 of the European Convention.

4.5.1 Freedom of association, trade unions and the closed shop system

The case of *Young, James and Webster v. the United Kingdom* concerned three former employees of the British Railways Board (“British Rail”) who were dismissed from their jobs for not being members of one of the three trade unions with which British Rail had concluded a “closed shop” agreement, which meant that, as from the conclusion of that accord, membership of one of the three unions became a condition of employment. The applicants alleged that this system violated article 11 of the Convention. The question was thus whether article 11 “guarantees not only freedom of association, including the right to form and to join trade unions, in the positive sense, but also, by implication, a ‘negative right’ not to be compelled to join an association or a union”.³²²

However, the Court did not consider it necessary to answer this question in the case before it, noting that “the right to form and to join trade unions is a special aspect of freedom of association [and] that the notion of a freedom implies some measure of freedom of choice as to its exercise.”³²³ While thus refraining from any review of the closed shop system per se, the Court limited its examination “to the effects of that system on the applicants”.³²⁴ It noted that after the conclusion of the agreement between British Rail and the three trade unions, the applicants had the choice of losing their work or joining one of the unions, something they refused to do. “As a result of their refusal to yield to what they considered to be unjustified pressure, they received notices terminating their employment. Under the legislation in force at the time ... their dismissal was ‘fair’ and, hence, could not found a claim for compensation, let alone reinstatement.”³²⁵

The Court observed that, on the assumption that article 11 does not guarantee the negative aspect of freedom of association on the same footing as the positive aspect, compulsion to join a particular trade union may not always be contrary to the Convention.

“However, a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present case, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union.

In the Court’s opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11. For this reason alone, there has been an interference with that freedom as regards each of the three applicants.”³²⁶

³²²*Eur. Court HR, Case of Young, James and Webster, judgment of 13 August 1981, Series A, No. 44, p. 21, para. 51.*

³²³*Ibid.*, p. 21, para. 52.

³²⁴*Ibid.*, p. 22, para. 53.

³²⁵*Ibid.*, p. 22, para. 54.

³²⁶*Ibid.*, pp. 22-23, para. 55.

Another facet of the case related to “the restriction of the applicants’ choice as regards the trade unions which they could join of their own free volition” because, as observed by the Court, an individual does not enjoy the right to freedom of association if in reality the freedom of action or choice which remains available to him is either non-existent or so reduced as to be of no practical value.³²⁷ This issue was linked to the fact that Mr. Young and Mr. Webster objected to trade union policies and activities and that Mr. Young also objected to the political affiliations of two of the unions. This meant that, in spite of its autonomous role, article 11 also had to be considered in the present case in the light of Articles 9 and 10 of the Convention:

“The protection of personal opinion afforded by Articles 9 and 10 in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11. Accordingly, it strikes at the very substance of this Article to exert pressure, of the kind applied to the applicants, in order to compel someone to join an association contrary to his convictions.”³²⁸

The Court therefore had to examine whether the interference with the applicants’ right to freedom of association could be justified as being “*necessary in a democratic society*” for any of the reasons set out in article 11(2) of the Convention. In this connection it observed:

“Firstly ‘necessary’ in this context does not have the flexibility of such expressions as ‘useful’ or ‘desirable’... The fact that British Rail’s closed shop agreement may in a general way have produced certain advantages is therefore not of itself conclusive as to the necessity of the interference complained of.

Secondly, pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’ ... Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Accordingly, the mere fact that the applicants’ standpoint was adopted by very few of their colleagues is again not conclusive of the issue ... before the Court.

Thirdly, any restriction imposed on a Convention right must be proportionate to the legitimate aim pursued.”³²⁹

The Court concluded that “even making due allowance for a State’s ‘margin of appreciation’ ... the restrictions complained of were not ‘necessary in a democratic society’ as required by paragraph 2 of Article 11.” It referred in particular to the fact that it had not been informed of any special reasons justifying the imposition of the closed shop system. Many similar systems did not require existing non-union employees to join a specific union and “a substantial majority even of union members themselves disagreed with the proposition that persons refusing to join a union for strong reasons should be dismissed from employment.”³³⁰

³²⁷Ibid., p. 23, para. 56.

³²⁸Ibid., pp. 23-24, para. 57.

³²⁹Ibid., p. 25, para. 63; emphasis added.

³³⁰Ibid., pp. 25-26, paras. 64-65.

A similar issue arose in the case of *Sigurjónsson v. Iceland*, in which the applicant, a taxi driver, was compelled by law to join an organization called “Frami”, failing which he would lose his licence as a cab driver. The Court observed that “such a form of compulsion, in the circumstances of the case, strikes at the very substance of the right guaranteed by Article 11 and itself amounts to an interference with that right.” Moreover, the case had to be considered in the light of articles 9 and 10 of the Convention, since the applicant “objected to being a member of the association in question partly because he disagreed with its policy in favour of limiting the number of taxicabs and, thus, access to the occupation”.³³¹

As in the *Young, James and Webster* case, the Court concluded that there had been a violation of article 11. It accepted that the membership obligation was “prescribed by law” (a law passed in 1989) and that this law pursued a legitimate aim, namely the protection of the “rights and freedoms of others”.³³² **However, was it “necessary in a democratic society”?** The Government considered that it was, arguing that “membership constituted a crucial link between them and Frami in that the latter would not be able to ensure the kind of supervisory functions which it performed unless all the licence-holders within its area were members.”³³³

In the first place, the Court recalled “that the impugned membership obligation was one imposed by law, the breach of which was likely to bring about the revocation of the applicant’s licence. He was thus subjected to a form of compulsion which ... is rare within the community of Contracting States and which, on the face of it, must be considered incompatible with Article 11.” While accepting that Frami served both the occupational interests of its members and the public interest, the Court was not convinced “that compulsory membership of Frami was required in order to perform those functions”. In support of its view, it noted in particular that “membership was by no means the only conceivable way of compelling the license-holders to carry out such duties and responsibilities as might be necessary” and that it had not been established “that there was any other reason that would have prevented Frami from protecting its members’ occupational interests in the absence of the compulsory membership imposed on the applicant despite his opinions”.³³⁴

It followed that the reasons adduced by the Government, **although they could be considered relevant**, were **not sufficient** to show that it was “necessary” to compel the applicant to be a member of Frami, on pain of losing his licence and contrary to his own opinions. The measures complained of were consequently “disproportionate to the legitimate aim pursued” and violated article 11.³³⁵

The right to form and to join trade unions recognized under article 11 of the European Convention on Human Rights is a special aspect of freedom of association.

³³¹ Eur. Court HR, *Case of Sigurdur A. Sigurjónsson v. Iceland*, judgment of 30 June 1993, Series A, vol. 264, pp. 16-17, paras. 36-37.

³³² Ibid., p. 17, para. 39.

³³³ Ibid., p. 18, para. 40.

³³⁴ Ibid., p. 18, para. 41.

³³⁵ Ibid., pp. 18-19, para. 41.

The term “freedom” implies some measure of choice as to its exercise but does not necessarily mean that compulsion to join a specific trade union is always contrary to the European Convention on Human Rights.

An obligation to join a specific trade union on pain of dismissal involving loss of livelihood is a form of compulsion that has been considered to strike at the very substance of freedom of association as guaranteed by article 11 of the European Convention. To be lawful, such interference with the exercise of a person’s freedom of association must comply with the restrictions laid down in article 11(2) of the Convention.

Although it is autonomous, article 11 must be considered in the light of articles 9 and 10 of the Convention guaranteeing freedom of thought, conscience, religion and expression. This means that, in ensuring respect for the exercise of freedom of association and assembly, it is also relevant to ensure respect for a person’s other fundamental freedoms.

4.5.2 Trade unions and collective agreements

In the *Swedish Engine Drivers’ Union v. Sweden* case, the applicant trade union complained of the refusal by the Swedish Collective Bargaining Office to enter into collective agreements with it notwithstanding the fact that it did so with large trade union federations and, occasionally, with independent unions; according to the applicant union, this refusal entailed a series of disadvantages and was also a violation of article 11 of the European Convention.³³⁶

It is noteworthy that the Convention “nowhere makes an express distinction between the functions of a Contracting State as holder of public power and its responsibilities as employer”. Article 11 is accordingly “binding upon the ‘State as employer’, whether the latter’s relations with its employees are governed by public or private law”.³³⁷ The *Swedish Engine Drivers’ Union* case neither concerned the right for trade unions to engage in collective bargaining nor the legal capacity of such unions to conclude collective agreements in the interest of its members, since these rights were granted under Swedish law; the case was instead limited to ascertaining whether article 11(1) “requires the ‘State as employer’ to enter into any given collective agreement with a trade union representing certain of its employees whenever the parties are in accord on the substantive issues negotiated upon”.³³⁸

The Court then pointed out that article 11(1) “presents trade union freedom as one form or a special aspect of freedom of association” but “does not secure any particular treatment of trade unions, or their members, by the State, such as the right that the State should conclude any given collective agreement with them”. Moreover, trade union freedoms are dealt with in article 6(2) of the European Social Charter, which “affirms the voluntary nature of collective bargaining and collective agreements. The prudence of the wording of Article 6 § 2 demonstrates that the Charter does not

³³⁶*Eur. Court HR, Swedish Engine Drivers’ Union Case v. Sweden, judgment of 6 February 1976, Series A, No. 20, p. 13, para. 32.*

³³⁷*Ibid.*, p. 14, para 37.

³³⁸*Ibid.*, pp. 14-15, paras. 38-39.

provide for a real right to have any such agreement concluded, even assuming that the negotiations disclose no disagreement on the issue to be settled.”³³⁹

As to the phrase “for the protection of his interest” contained in article 11(1) of the European Convention, the Court stated that:

“These words, clearly denoting purpose, show that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. In the opinion of the Court, it follows that the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Article 11 § 1 certainly leaves each State a free choice of the means to be used towards this end. While the concluding of collective agreements is one of these means, there are others. What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members’ interests .”³⁴⁰

No one disputed the fact that the Swedish Engine Drivers’ Union could “engage in various kinds of activity vis-à-vis the Government”. The Court concluded that the fact alone that the Collective Bargaining Office had in principle refused during the past few years to enter into collective agreements with the applicant union did not constitute a breach of article 11(1). Lastly, the Office’s policy of restricting the number of organizations with which collective agreements were to be concluded was “not on its own incompatible with trade union freedom.”³⁴¹

The Contracting States to the European Convention on Human Rights must also respect freedom of association as laid down in article 11(1) when they act as employer, regardless of whether their relations with employees are governed by public or private law.

The Convention requires that, under national law, trade unions should be able, in conditions not at variance with the terms of article 11, to strive for the protection of their members’ interests. This means that trade unions should be heard, although the Contracting States are free to choose the means whereby this end is obtained.

The conclusion of collective agreements is one of several means of allowing trade unions to be heard. It is not incompatible with the trade union freedoms guaranteed by article 11 of the European Convention for a State as employer to limit the conclusion of collective agreements to a certain number of trade unions provided that all unions are able to strive for the protection of their members’ interests in accordance with article 11.

³³⁹Ibid., p. 15, para. 39.

³⁴⁰Ibid., pp. 15-16, para. 40.

³⁴¹Ibid., p. 16, paras. 41-42. For a similar case see *Eur. Court HR, National Union of Belgian Police Case, judgment of 27 October 1975, Series A, No. 19.*

4.5.3 Freedom of association and political parties

In recent years a number of important cases involving the dissolution of political parties have been considered by the European Court of Human Rights under article 11 of the European Convention. Selected examples will illustrate the extent and limits of the right to form political parties at the European level.

The leading case in this regard is that of the *United Communist Party of Turkey and Others v. Turkey*, which concerned the dissolution by the Turkish Constitutional Court of the United Communist Party (TBKP) entailing, *ipso jure*, the liquidation of the party and the transfer of its assets to the Treasury.

The Constitutional Court of Turkey held, *inter alia*, that “the mere fact that a political party included in its name a word prohibited by section 96(3) of Law No. 2820” on the regulation of the political parties, i.e. the term “communist”, was sufficient to justify its dissolution. Furthermore, the party’s constitution and programme referred to two nations, the Kurdish nation and the Turkish nation. “But it could not be accepted that there were two nations within the Republic of Turkey, whose citizens, whatever their ethnic origin, had Turkish nationality. In reality, the proposals in the party constitution covering support for non-Turkish languages and cultures were intended to create minorities, to the detriment of the unity of the Turkish nation.” Such objectives “which encouraged separatism and the division of the Turkish nation were unacceptable and justified dissolving the party concerned”.³⁴²

In reply to the submission of the Turkish Government that the reference to trade unions in article 11 is not applicable to political parties, the European Court of Human Rights emphasized that it was and that “the conjunction ‘including’ clearly shows that trade unions are but one example among others of the form in which the right to freedom of association may be exercised.” Even more persuasive than the wording of article 11 was, in the Court’s view,

“the fact that political parties are a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the Convention system ... there can be no doubt that political parties come within the scope of Article 11.”³⁴³

In response to further arguments by the Government, the Court stated in particular that “an association, including a political party, is not excluded from the protection afforded by the Convention simply because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions.”³⁴⁴ “However, it does not follow [from article 11] that the authorities of a State in which an association, through its activities, jeopardises that State’s institutions are deprived of the right to protect those institutions.” According to the Court, “some compromise between the requirements of defending democratic society and individual rights is inherent in the system of the Convention”.

³⁴²*Enr. Court HR, Case of the United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998, Reports 1998-I, pp. 9-10, para.10.*

³⁴³*Ibid.*, pp. 16-17, paras. 24-25.

³⁴⁴*Ibid.*, p. 17, para. 27.

However, for there to be a compromise of that sort any intervention by the authorities must be in accordance with paragraph 2 of Article 11.³⁴⁵

The Court then accepted that the dissolution of TBKP constituted an *interference with the right to freedom of association* within the meaning of article 11(1) of the European Convention in respect of all three applicants, i.e. the party itself and two of its founders and leaders who were banned from discharging similar responsibilities in any other political grouping.³⁴⁶ In examining whether this interference could be justified under article 11(2) of the Convention, the Court accepted that *the interference was “prescribed by law”*, namely by various provisions of the Turkish Constitution and the aforementioned Law No. 2820. It also considered that the dissolution of TBKP *“pursued at least one of the ‘legitimate aims’ set out in Article 11: the protection of ‘national security’”*.³⁴⁷ In considering the final question, whether the interference was also *“necessary in a democratic society”*, the Court synthesized and expanded its general principles relating to the concept of “a democratic society”. In view of its importance at the European level, these principles will be quoted *in extenso*:

“42. The Court reiterates that notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11 ...

43. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy ...

As the Court has said many times, there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb ... The fact that their activities form part of a collective exercise of freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention.

44. In the Informationsverein Lentia and Others v. Austria judgment the Court described the State as the ultimate guarantor of the principle of pluralism ... In the political sphere that responsibility means that the State is under the obligation, among others, to hold, in accordance with Article 3 of Protocol No. 1, free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Such expression is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country’s population. By relaying this range of opinion, not only within political institutions but also – with the help of the media – at all levels of social life, political parties

³⁴⁵ *Ibid.*, p. 18, para. 32.

³⁴⁶ *Ibid.*, p. 19, para. 36.

³⁴⁷ *Ibid.*, pp. 19-20, paras. 38-41; emphasis added.

make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society ...

45. Democracy is without doubt a fundamental feature of the European public order ...

That is apparent, firstly, from the preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights ... The Preamble goes on to affirm that European countries have a common heritage of political tradition, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention ...; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society...

In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is 'necessary in a democratic society'. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from 'democratic society'. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it.

The Court has identified certain provisions of the Convention as being characteristic of democratic society. Thus in its very first judgment it held that in a 'democratic society within the meaning of the Preamble and the other clauses of the Convention', proceedings before the judiciary should be conducted in the presence of the parties and in public and that that fundamental principle was upheld in Article 6 of the Convention ... In a field closer to the one concerned in the instant case, the Court has on many occasions stated, for example, that freedom of expression constituted one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment ... whereas in the *Mathieu-Mohin and Clerfayt* judgment ... it noted the prime importance of Article 3 of Protocol No. 1, which enshrines a characteristic principle of an effective political democracy ...

46. Consequently, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. The Court has already held that such scrutiny was necessary in a case concerning a Member of parliament who had been convicted of proffering insults; ... such scrutiny is all the more necessary where an entire political party is dissolved and its leaders banned from carrying on any similar activity in the future.

47. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity the principles embodied in Article 11, and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.”³⁴⁸

The Court then applied these principles to the *United Communist Party of Turkey and Others* case. It noted that, since the dissolution of the party had been ordered before it even had been able to start its activities, ***it was exclusively based on its constitution and programme***, which contained “nothing to suggest that they did not reflect the party’s true objectives and its leaders’ true intentions”. Like the Constitutional Court, the European Court therefore took those documents “as a basis for assessing whether the interference in question was necessary”.³⁴⁹

With regard to ***the first ground invoked by the Constitutional Court in favour of the dissolution***, namely that the TBKP included the word “communist” in its name, the European Court considered “that a political party’s choice of name cannot in principle justify a measure as drastic as dissolution, in the absence of other relevant and sufficient circumstances. In this connection, it must be noted, firstly, that ... the provisions of the Criminal Code making it a criminal offence to carry on political activities inspired, in particular, by communist ideology were repealed by Law no. 3713 on the prevention of terrorism. The Court also [attached] much weight to the Constitutional Court’s finding that the *TBKP* was not seeking, in spite of its name, to establish the domination of one class over the others, and that, on the contrary, it satisfied the requirements of democracy, including political pluralism, universal suffrage and freedom to take part in politics.” Accordingly, “in the absence of any concrete evidence to show that in choosing to call itself ‘communist’, the *TBKP* had opted for a policy that represented a real threat to Turkish society or the Turkish State, the Court [could not] accept that the submission based on the party’s name, by itself, entail the party’s dissolution.”³⁵⁰

As to the ***second submission accepted by the Constitutional Court in support of the dissolution of the TBKP***, namely that it “sought to promote separatism and the division of the Turkish nation”, the European Court observed that, although the party referred in its programme “to the Kurdish ‘people’ and ‘nation’ and Kurdish ‘citizens’”, it neither described them as a “minority”, nor made any claim “other than for recognition of their existence – for them to enjoy special treatment or rights, still less a right to secede from the rest of the Turkish population. On the contrary its

³⁴⁸Ibid., pp. 20-22, paras. 42-47.

³⁴⁹Ibid., p. 25, para. 51.

³⁵⁰Ibid., p. 26, para. 54.

programme [stated]: “The TBKP will strive for a peaceful, democratic and fair solution of the Kurdish problem, so that the Kurdish and Turkish peoples may live together of their free will within the borders of the Turkish Republic, on the basis of equal rights and with a view to democratic restructuring founded on their common interests.” “The *TBPK* also said in its programme: ‘A solution to the Kurdish problem will only be found if the parties concerned are able to express their opinions freely, if they agree not to resort to violence in any form in order to resolve the problem and if they are able to take part in politics with their own national identity’.”³⁵¹

The European Court went on to state that it considered one of the principal characteristics of democracy to be

“the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned. To judge by its programme, that was indeed the *TBKP*’s objective in this area.”³⁵²

Although it could not be ruled out “that a party’s political programme may conceal objectives and intentions different from the ones it proclaims”, this was an issue that could not be verified in the case before the Court, since the party had not been active but dissolved immediately after its creation. “It was thus penalised for conduct relating solely to the exercise of freedom of expression.”³⁵³

Although the Court was finally also “prepared to take into account the background of cases before it, in particular the difficulties associated with the fight against terrorism ... it [found] no evidence to enable it to conclude, in the absence of any activity by the *TBKP*, that the party bore any responsibility for the problems which terrorism poses in Turkey.”³⁵⁴

It followed that “a measure as drastic as the immediate and permanent dissolution of the *TBKP*, ordered before its activities had even started and coupled with a ban barring its leaders from discharging any other political responsibility, [was] disproportionate to the aim pursued and consequently unnecessary in a democratic society.”³⁵⁵ The Court, sitting as a Grand Chamber, thus *unanimously* decided that article 11 of the European Convention had been violated.³⁵⁶

³⁵¹Ibid., pp. 26-27, paras. 55-56.

³⁵²Ibid., p. 27, para. 57.

³⁵³Ibid., p. 27, para. 58.

³⁵⁴Ibid., p. 27, para. 59.

³⁵⁵Ibid., pp. 27-28, para. 61.

³⁵⁶Ibid., p. 31 as read in conjunction with p. 5.

The general principles applied in the *United Communist Party of Turkey* case have subsequently been confirmed in other similar cases such as that of the *Socialist Party and Others v. Turkey*. This party, the SP, had also been dissolved by decision of the Constitutional Court and its leaders banned from holding similar office in any other political party. Its assets had also been liquidated and transferred to the Treasury.³⁵⁷ Unlike in the abovementioned case, however, ***the decision of the Constitutional Court was based only on the political activities of the SP and not on its constitution or programme.*** The Constitutional Court had noted, inter alia, that, by distinguishing two nations, i.e. the Kurdish and Turkish nations, and advocating a federation to the detriment of the unity of the Turkish nation and the territorial integrity of the State, the aim of the SP was “similar to that of terrorist organisations”. As it “promoted separatism and revolt its dissolution was justified”.³⁵⁸

The European Court therefore had to examine the statements of the SP to decide whether its dissolution was justified. In other words, it had to satisfy itself “that the national authorities based their decisions on an acceptable assessment of the relevant facts”.³⁵⁹

The Court analysed the relevant statements and found nothing in them that could be considered “a call for the use of violence, an uprising or any other form of rejection of democratic principles” – on the contrary. As for the distinction made between the Kurdish and the Turkish nations, the Court noted that “the statements put forward a political programme with the essential aim being the establishment, in accordance with democratic rules, of a federal system in which Turks and Kurds would be represented on an equal footing and on a voluntary basis.” With regard to the references to “self-determination” and the right to “secede” of the Kurdish nation, the Court observed in particular that “read in their context, the statements using these words [did] not encourage secession from Turkey but [sought] rather to stress that the proposed federal system could not come about without the Kurds’ freely given consent, which should be expressed through a referendum.”³⁶⁰ Moreover,

“the fact that such a political programme is considered incompatible with the current principles and structures of the Turkish State does not make it incompatible with the rules of democracy. It is of the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided that they do not harm democracy itself.”³⁶¹

Furthermore, in the absence of concrete actions belying the sincerity of the statements, that sincerity should not be doubted. In the view of the European Court, “the SP was thus penalised for conduct relating solely to the exercise of freedom of expression.”³⁶²

³⁵⁷ *Eur. Court HR, Case of the Socialist Party and Others v. Turkey, judgment of 25 May 1998, Reports 1998-III, p. 1250, para. 24, and p. 1258, para. 51.*

³⁵⁸ *Ibid.*, p. 1256, para. 43.

³⁵⁹ *Ibid.*, p. 1256, para. 44.

³⁶⁰ *Ibid.*, pp. 1256-1257, paras. 46-47.

³⁶¹ *Ibid.*, p. 1257, para. 47.

³⁶² *Ibid.*, pp. 1257-1258, para. 48.

Emphasizing “the essential role of political parties in the proper functioning of democracy”, the Court stated that the exceptions set out in article 11 were to be “construed strictly” where political parties are concerned. Applying correspondingly “rigorous European supervision”, the Court held that radical measures such as those taken in the case before it “**may only be applied in the most serious cases**”.³⁶³ But the impugned statements by the party leader “did not appear to it to call into question the need for compliance with democratic principles and rules” nor had it been established “how, in spite of the fact that in making them their author declared attachment to democracy and expressed rejection of violence, the statements in issue could be considered to have been in any way responsible for the problems which terrorism poses in Turkey”.³⁶⁴ It followed that article 11 of the Convention had been violated, since “the dissolution of the SP was disproportionate to the aim pursued and consequently unnecessary in a democratic society.”³⁶⁵ This finding was reached by a **unanimous** Court sitting as a **Grand Chamber**.³⁶⁶

It is noteworthy that in both of the preceding cases the Court also considered that there was no need to bring article 17 of the Convention into play as suggested by the Government. This was so because there was no evidence warranting the conclusion that the Convention had been relied on to engage in activities or perform acts aimed at the destruction of any of the rights and freedoms set forth in it.³⁶⁷

The outcome was different, however, in the case of *Refah Partisi (Prosperity Party) and Others v. Turkey*, which concerned Refah’s dissolution and the prohibition of its leaders from holding office in any other political party. ***This case is important in that it was made clear that a political party that wants to introduce a plurality of legal systems, that does not take prompt action against party members who call for the use of force as a political weapon and that shows disrespect for political opponents cannot count on the protection of the Convention system.***

In examining whether this measure could be justified under article 11(2) of the Convention, the European Court accepted that it was “**prescribed by law**” (the Constitution and Law No. 2820 on the regulation of political parties). In view of “the importance of the principle of secularism for the democratic system in Turkey”, the

³⁶³Ibid., p. 1258, paras. 50-51; emphasis added.

³⁶⁴Ibid., pp. 1258-1259, para. 52.

³⁶⁵Ibid., p. 1259, para. 54.

³⁶⁶Ibid., p. 1262 as read in conjunction with p. 1236.

³⁶⁷Ibid., p. 1259, para. 53, and *Eur. Court HR, Case of the United Communist Party of Turkey and Others v. Turkey, judgment of 30 January 1998, Reports 1998-I, p. 27; para. 60*. For other cases raising similar issues against Turkey, see *Eur. Court HR, Case of Freedom and Democracy Party (ÖZDEP) v. Turkey, judgment of 8 December 1999, Reports 1999-VIII, p. 293* and *Eur. Court HR, Case of Yazar, Karatas, Aksoy and the People’s Labour Party (HEP) v. Turkey, judgment of 9 April 2002*; for the text see the Court’s web site: <http://hudoc.echr.coe.int/hudoc>. Article 11 was violated in these two cases as well.

Article 17 of the Convention reads: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

Similar provisions are contained in article 5(1) of the International Covenant on Civil and Political Rights and article 29(a) of the American Convention on Human Rights.

Court also considered “that *Refab’s dissolution pursued a number of the legitimate aims listed in Article 11, namely protection of national security and public safety, prevention of disorder or crime and protection of the rights and freedoms of others.*”³⁶⁸

With regard to the notion of being “*necessary in a democratic society*”, the Court drew attention to the following general principles, in which it further elaborated its views on the role of democracy and the rule of law in a system for the protection of human rights:

“43. The European Convention on Human Rights must be understood and interpreted as a whole. Human rights form an integrated system for the protection of human dignity; in that connection, democracy and the rule of law have a key role to play.

Democracy requires that people should be given a role. Only institutions created by and for the people may be vested with the powers and authority of the State; statute law must be interpreted and applied by an independent judicial power. There can be no democracy where the people of a State, even by a majority decision, waive their legislative and judicial powers in favour of an entity which is not responsible to the people it governs, whether it is secular or religious.

The rule of law means that all human beings are equal before the law, in their rights as in their duties. However, legislation must take account of differences, provided that distinctions between people and situations have an objective and reasonable justification, pursue a legitimate aim and are proportionate and consistent with the principles normally upheld by democratic societies. But the rule of law cannot be said to govern a secular society when groups of persons are discriminated against solely on the ground that they are of a different sex or have different political or religious beliefs. Nor is the rule of law upheld where entirely different legal systems are created for such groups.”³⁶⁹

Referring to its judgment in the *United Communist Party of Turkey* case, the Court reaffirmed its view that “democracy is without doubt a fundamental feature of the ‘European public order’” and that “one of the principal characteristics of democracy [is] the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome.”³⁷⁰ It therefore took the view that

“a political party may campaign for a change in the law or the legal and constitutional basis of the State on two conditions: (1) the means used to that end must in every respect be legal and democratic; (2) the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite recourse to violence, or propose a policy which does not comply with one

³⁶⁸ *Eur. Court HR, Case of Refab Partisi (Prosperity Party) and Others v. Turkey, judgment of 31 July 2001*; the text used is the unedited text found at the Court’s web site, <http://hudoc.echr.coe.int/>, paras. 39 and 42; emphasis added.

³⁶⁹ *Ibid.*, para. 43.

³⁷⁰ *Ibid.*, paras. 45-46.

or more of the rules of democracy or is aimed at the destruction of democracy and infringements of the rights and freedoms afforded under democracy cannot lay claim to the protection of the Convention against penalties imposed for those reasons.”³⁷¹

The Court also reiterated that the right to freedom of thought, conscience and religion in article 9 of the Convention is “one of the foundations of a ‘democratic society’ within the meaning of the Convention”. It added that “in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected ... The State’s role as the neutral and impartial organiser of the practising of the various religions, denominations and beliefs is conducive to religious harmony and tolerance in a democratic society.”³⁷² To illustrate this view, the Court recalled its jurisprudence, according to which

“in a democratic society, the freedom to manifest a religion may be restricted in order to ensure the neutrality of the public education service, an objective contributing to protection of the rights of others, order and public safety ... Similarly, measures taken in secular universities to ensure that certain fundamentalist religious movements do not disturb public order or undermine the beliefs of others do not constitute violations of Article 9 ... The Court has likewise held that preventing a Muslim opponent of the Algerian Government from spreading propaganda within Swiss territory was necessary in a democratic society for the protection of national security and public safety.”³⁷³

With regard to the situation in Turkey, the Court confirmed that “the principle of secularism ... is undoubtedly one of the fundamental principles of the State, which are in harmony with the rule of law and respect for human rights. Any conduct which fails to respect that principle cannot be accepted as being part of the freedom to manifest one’s religion and is not protected by Article 9 of the Convention.”³⁷⁴

With regard to the specific case of *Refah*, the Government submitted that the dissolution of the party “had been a preventive measure to protect democracy” since the party “had ‘an actively aggressive and belligerent attitude to the established order’ and was making ‘a concerted attempt to prevent it from functioning properly’ so that it could then destroy it”.³⁷⁵ The applicants, for their part, denied that they had challenged the “vital importance of the principle of secularism” for Turkey. The party “had been in power perfectly legally ... from June 1996 to July 1997. The second applicant ... had been Prime Minister during the same period.”³⁷⁶

In assessing the *necessity* of the dissolution of *Refah*, the European Court noted that the parties before it agreed “that preserving secularism is necessary for protection of the democratic system in Turkey. However, they did *not* agree about the

³⁷¹Ibid., para. 47.

³⁷²Ibid., paras. 49-51.

³⁷³Ibid., para. 51.

³⁷⁴Ibid., para. 52.

³⁷⁵Ibid., para. 63.

³⁷⁶Ibid., paras. 54-55.

content, interpretation and application of the principle of secularism.”³⁷⁷ As in the *Socialist Party and Others* case, the Court based its assessment on the declarations and policy statements of Refah’s chairman and leaders and not on the constitution and programme of the party. These statements, which were considered by the Constitutional Court to infringe the principle of secularism, fell into the following three categories:

- ❖ “those which tended to show that Refah intended to set up a plurality of legal systems, introducing discrimination on the grounds of belief”;
- ❖ “those which tended to show that Refah wanted to apply sharia to the Muslim community”; and
- ❖ “those based on references made by Refah members to jihad (holy war) as a political method”.³⁷⁸

With regard to the *first* category, the Court agreed with the Government that “Refah’s proposal that there should be a plurality of legal systems would introduce into all legal relationships a distinction between individuals grounded on religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement. The Court [took] the view that such a societal model cannot be considered compatible with the Convention system, for two reasons.”

“Firstly, it would do away with the State’s role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society, since it would oblige individuals to obey, not rules laid down by the State in the exercise of its above-mentioned functions, but static rules of law imposed by the religion concerned. But the State has a positive obligation to ensure that everyone within its jurisdiction enjoys in full, *and without being able to waive them*, the rights and freedoms guaranteed by the Convention...

Secondly, such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms, which is one of the fundamental principles of democracy. A difference in treatment between individuals in all fields of public and private law according to their religion or beliefs manifestly cannot be justified under the Convention, and more particularly Article 14 thereof, which prohibits discrimination. Such a difference in treatment cannot maintain a fair balance between, on the one hand, the claims of certain religious groups who wish to be governed by their own rules and on the other the interest of society as a whole, which must be based on peace and on tolerance between the various religions and beliefs.”³⁷⁹

With regard to the *second* category of statements, namely those relating to the introduction of sharia, Islamic law, as the ordinary law and the law applicable to the Muslim community, the Court considered that:

³⁷⁷ Ibid., para. 65; emphasis added.

³⁷⁸ Ibid., para. 68.

³⁷⁹ Ibid., para. 70; emphasis added.

“sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it. The Court notes that, when read together, the offending statements, which contain explicit references to the introduction of sharia, are difficult to reconcile with the fundamental principles of democracy, as conceived in the Convention taken as a whole. It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts. In addition, the statements concerning the desire to found a ‘just order’ or the ‘order of justice’ or ‘God’s order’, when read in their context, and even though they lend themselves to various interpretations, have as their common denominator the fact that they refer to religious or divine rules in order to define the political regime advocated by the speakers. They reveal ambiguity about those speakers’ attachment to any order not based on religious rules. In the Court’s view, a political party whose actions seem to be aimed at introducing sharia in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.”³⁸⁰

The Court considered, furthermore, that “taken separately, the policy statements made by Refah’s leaders particularly on the question of Islamic headscarves or organising working hours in the public sector to accommodate prayers, and some of their acts, such as the visit of Mr Kazan, then Minister of Justice, to a member of his party charged with inciting hatred on the ground of religious discrimination, or the reception given by Mr Erbakan to the leaders of the various Islamic movements, did not constitute an imminent threat to the secular regime in Turkey. However, the Court [found] persuasive the Government’s argument that these acts and policy statements were consistent with Refah’s unavowed aim of setting up a political regime based on sharia.”³⁸¹

With regard to the *third* category of statements, namely those concerning the concept of jihad, the Court stated that, while it was true “that Refah’s leaders did not, in government documents, call for the use of force and violence as a political weapon, they did not take prompt practical steps to distance themselves from those members of Refah who had publicly referred with approval to the possibility of using force against politicians who opposed them. Consequently, Refah’s leaders did not dispel the ambiguity of these statements about the possibility of having recourse to violent methods in order to gain power and retain it.”³⁸²

With regard to specific remarks made by a Member of Parliament for the province of Ankara, which “revealed deep hatred for those he considered to be opponents of an Islamist regime”, the Court held that:

³⁸⁰Ibid., para. 72.

³⁸¹Ibid., para. 73.

³⁸²Ibid., para. 74.

“where the offending conduct reaches a high level of insult and comes close to a negation of the freedom of religion of others it loses the right to society’s tolerance.”³⁸³

The Court concluded, accordingly, that “the offending remarks and policy statements made by Refah’s leaders [formed] a whole and [gave] a fairly clear picture of a model of State and society organised according to religious rules, which was conceived and proposed by Refah.” Moreover, “Refah’s political aims were neither theoretical nor illusory, but achievable” in the light of the large number of Members of Parliament they had at the time of the party’s dissolution (almost one third of the seats in the Turkish Grand National Assembly) and past experience which had shown that political movements based on religious fundamentalism had been able to seize power.³⁸⁴

Given all these considerations, the Court concluded that

“the penalty imposed on the applicants may reasonably be considered to have met a ‘pressing social need’, in so far as Refah’s leaders, under the pretext that they were redefining the principle of secularism, had declared their intention of setting up a plurality of legal systems and introducing Islamic law (sharia), and had adopted an ambiguous stance with regard to the use of force to gain power and retain it. It takes the view that, even though the margin of appreciation left to States must be a narrow one where the dissolution of political parties is concerned, since the pluralism of ideas and parties is itself an inherent part of democracy, a State may reasonably forestall the execution of such a policy, which is incompatible with the Convention’s provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country’s democratic regime.”³⁸⁵

Lastly, in deciding whether the dissolution of Refah was proportionate to the legitimate aim pursued, the Court stated

“that the dissolution of a political party accompanied by a temporary ban prohibiting its leaders from exercising political responsibilities was a drastic measure and that measures of such severity might be applied only in the most serious cases ... In the present case, it has just found that the interference in question met a ‘pressing social need’. It should also be noted that after Refah’s dissolution, only five of its MPs (including the applicants) temporarily forfeited their parliamentary office and their role as leaders of a political party. The 152 remaining MPs continued to sit in parliament and pursued their political careers normally. Moreover, the applicants did not allege that Refah or its members had sustained considerable pecuniary damage on account of the transfer of their assets to the Treasury. The Court considers in that connection that the nature and severity of the interference are also factors to be taken into account when assessing its proportionality.”³⁸⁶

³⁸³Ibid., para. 75.

³⁸⁴Ibid., paras. 76-77.

³⁸⁵Ibid., para. 81.

³⁸⁶Ibid., para. 82.

The Court was thus satisfied that the interference complained of “was not disproportionate to the legitimate aims pursued”. It followed that article 11 had not been violated.³⁸⁷ This decision was taken by a Chamber of the Court with a majority of four votes to three.

Democracy is a fundamental feature of the European public order and the only political model compatible with the European Convention on Human Rights.

There is no democracy where the people of a State, even by majority decision, may waive their legislative and judicial powers in favour of an entity, be it secular or religious, that is not responsible to the people it governs.

In a democratic society, the State is the ultimate guarantor of the principle of pluralism. It is also the guarantor of individual rights and freedoms and the impartial organizer of the practice of the various beliefs and religions in society. This means that the State must ensure that every person within its jurisdiction enjoys fully the rights and freedoms guaranteed by the Convention. These rights and freedoms cannot be waived by anybody.

The rule of law has a key role to play in a democratic society. This means, for instance, that all human beings are equal before the law, in their rights and in their duties, and that there must therefore be no discrimination between them.

Political parties are a form of association essential to a democratic society and are protected by article 11 of the European Convention on Human Rights.

The right to freedom of association of political parties must also be considered in the light of the right to freedom of religion, thought, opinion and expression as guaranteed by articles 9 and 10 of the European Convention. This is because of the essential role played by political parties in ensuring pluralism and a functioning democracy.

In view of the important role played by political parties in a democratic society, only convincing and compelling reasons can justify restrictions on their freedom of association. This means that the Contracting States have only a narrow margin of appreciation in deciding on the necessity of a restriction on the exercise of this right and that the corresponding European supervision is rigorous. Any restrictions on the exercise of the rights contained, inter alia, in articles 9 to 11 of the Convention must, in other words, spring from the pressing social needs of a democratic constitutional order.

³⁸⁷Ibid., paras. 83-84.

One of the principal characteristics of a democracy is also the possibility it offers of resolving a country's problems through dialogue and without recourse to violence. Democracy thrives on a generously understood and applied freedom of expression. There cannot therefore be any justification for not allowing political parties to seek public debate on issues of general interest as long as they do so in accordance with democratic rules.

The fact that a political party's constitution and programme may be considered incompatible with the principles and structures of a Contracting State does not make it incompatible with the rules of democracy as understood by the European Convention on Human Rights.

Political parties which, in their constitutions, programmes or activities, seek to introduce a plurality of legal systems, profess or fail to disavow violence for political aims, and show disrespect and hatred for political opponents will not enjoy protection of freedom of association as guaranteed by article 11 of the European Convention on Human Rights.

4.5.4 A lawyer's right to freedom of assembly

The right to freedom of assembly was at issue in the case of *Ezelin v. France*, in which a disciplinary sanction in the form of a reprimand was imposed on the applicant, who was a lawyer (“*avocat*”), for having participated in a demonstration against two court decisions in response to a call by the Trade Union of the Guadeloupe Bar, of which the applicant was Vice-Chairman at the time. The demonstration turned unruly, although the applicant himself was not involved in any violent incident. The sanction was imposed on him “because he had not dissociated himself from the unruly incidents which occurred during the demonstration”. He argued before the European Court that his rights under articles 10 and 11 of the Convention had been violated.³⁸⁸

The Court noted at the outset that, “notwithstanding its autonomous role and particular sphere of application, Article 11 must, in the present case, also be considered in the light of Article 10 [since the] protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11.”³⁸⁹

The Court then accepted that the measure complained of was “*prescribed by law*”, namely the Decree of 9 June 1972 regulating the profession of *avocat*, implementing the Act of 31 December 1971 reforming certain court and legal professions, and that it was imposed in pursuit of a *legitimate aim*, i.e. the “prevention of disorder”.³⁹⁰ But was it *necessary in a democratic society* for this legitimate purpose? The Government submitted that it was, “having regard in particular to Mr Ezelin’s position as an *avocat* and to the local background”. By not disavowing the unruly incidents that had occurred during the demonstration, the applicant had, in its

³⁸⁸ Eur. Court HR, *Case of Ezelin v. France*, judgment of 26 April 1991, Series A, vol. 202, p. 8, paras. 9-10, and p. 22, para. 47.

³⁸⁹ Ibid., p. 20, para. 37.

³⁹⁰ Ibid., p. 21-22, paras. 43-47.

view, approved them ipso facto. The Government also claimed that “it was essential for judicial institutions to react to behaviour which, on the part of an ‘officer of the court’ ... seriously impaired the authority of the judiciary and respect for court decisions.”³⁹¹

The European Court of Human Rights disagreed. It examined the disciplinary sanction imposed on Mr. Ezelin “in the light of the case as a whole in order to determine in particular whether it was proportionate to the legitimate aim pursued, having regard to the special importance of freedom of peaceful assembly and freedom of expression, which [were] closely linked in this instance”. It added that

“The proportionality principle demands that a balance be struck between the requirements of the purposes listed in Article 11 § 2 and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places. The pursuit of a just balance must not result in *avocats* being discouraged, for fear of disciplinary sanctions, from making clear their beliefs on such occasions.”³⁹²

The Court observed that in this case the penalty imposed on the applicant was, admittedly, “at the lower end of the scale of disciplinary penalties” foreseen in the relevant law and that “it had mainly moral force, since it did not entail any ban, even a temporary one, on practising the profession or on sitting as a member of the Bar Council.” The Court considered, however,

“that the freedom to take part in a peaceful assembly – in this case a demonstration that had not been prohibited – is of such importance that it cannot be restricted in any way, even for an *avocat*, so long as the person concerned does not himself commit any reprehensible act on such an occasion.”³⁹³

As the sanction complained of, however minimal, did not appear to have been “necessary in a democratic society”, it violated article 11 of the Convention.³⁹⁴

The right to freedom of assembly guaranteed by article 11 of the European Convention on Human Rights must also be guaranteed to lawyers provided that they have not committed a reprehensible act.

There are situations which require that article 11 be considered also in the light of the protection of personal opinions as secured by article 10 of the Convention, since such protection is one of the objectives of freedom of peaceful assembly.

³⁹¹Ibid., p. 22, para. 49.

³⁹²Ibid., p. 23, para. 51-52.

³⁹³Ibid., p. 23, para. 53.

³⁹⁴Ibid., loc. cit.

The principle of proportionality, which is one of the conditions laid down in article 11(2) for imposing restrictions on the exercise of freedom of assembly, requires that a balance be struck between, on the one hand, the requirements of the legitimate purposes cited therein and, on the other, the requirements of freedom of expression of opinion by word, gesture or even silence by persons assembled in public places.

5. The Role of Judges, Prosecutors and Lawyers in Ensuring the Protection of Freedom of Thought, Conscience, Religion, Opinion, Expression, Association and Assembly

This chapter has highlighted some of the main aspects of the fundamental freedoms of thought, conscience, religion, opinion, expression, association and assembly. These freedoms constitute cornerstones of the life of every human being and of society as a whole, which depends on them for its proper and efficient functioning. They are also not only relevant but even essential to the legal professions themselves, since they depend on them to be able to exercise their daily work independently, impartially and effectively.

As this chapter has also shown, however, enjoyment of freedom of conscience, religion, opinion, expression, association, assembly and other freedoms is in many instances fragile even in countries with an otherwise largely acceptable human rights record. It is therefore essential that judges, prosecutors and lawyers in every society be made aware of the importance of their efficient protection. Although the exercise of some freedoms may be subject to limitations when necessary for certain legitimate purposes, the legal professions are well placed to strike an indispensable – but fair – balance between, on the one hand, the individual’s interest in maximizing the enjoyment of his or her freedoms and, on the other, society’s general interest in enabling all human beings to enjoy respect for the same freedoms. The large body of international jurisprudence in this area, some of which has been analysed in this chapter, offers the legal professions valuable guidance in this regard.

6. Concluding Remarks

The freedoms of thought, conscience, religion, opinion, expression, association and assembly cover all or virtually all aspects of the life both of individuals and of society. To ensure the full and effective protection of these freedoms for all without discrimination means allowing for divergences of views, opinions and ideas that may enrich not only our personal lives but also the life of society. Furthermore, it helps to nurture increased understanding between, and respect for, persons with different opinions, beliefs and religious convictions. People may not always share each others' views, religious beliefs or opinions on various matters and may even find them repulsive and unacceptable. But by allowing a free flow of information and exchanges of views, ideas and information, a society allows people of all shades of opinions to take an active part in issues of general interest. The effective implementation of these freedoms is thus also a precondition for a society in which people can live in tolerance, peace and security.

The effective protection of freedom of opinion, expression, association and assembly is, moreover, indispensable to enable people to vindicate their human rights before national and international tribunals or other competent authorities, and also to enable others to play a role in contributing to the promotion and protection of human rights and fundamental freedoms. It is noteworthy in this regard that human rights violations involving torture, arbitrary detention, unfair trial proceedings and extrajudicial executions more often than not have their root in a lack of tolerance for the views and beliefs of others. It would thus be an important step towards an improved human rights record for all States to ensure the full and effective exercise of the fundamental freedoms dealt with in this chapter.

.....Chapter 13
**THE RIGHT TO EQUALITY
AND NON-DISCRIMINATION
IN THE ADMINISTRATION
OF JUSTICE**

Learning Objectives

- *To familiarize the participants with the notion of equality before the law and the principle of non-discrimination as understood by international human rights law.*
- *To illustrate how these principles are being applied in practice at the universal and regional levels.*
- *To identify some groups that may be particularly vulnerable to discriminatory treatment.*
- *To explain what legal steps, measures and/or actions judges, prosecutors and lawyers must take in order to safeguard the notion of equality before the law and the principle of non-discrimination.*

Questions

- *How would you define “discrimination” and/or “inequality” of treatment?*
- *How is the notion of equality before the law and the principle of non-discrimination protected in the country in which you work?*
- *Have you ever been faced with cases of discrimination in your professional life?*
- *Are there any particularly vulnerable groups in the country in which you work?*
- *If so, who are they and how are they discriminated against?*
- *In the country in which you work, are there any particular problems of discrimination on the basis of gender?*
- *If so, what are they?*
- *What measures can you take as a legal professional to protect everybody’s right to equality before the law and to ensure the right of individuals and groups not to be subjected to discrimination?*

Relevant Legal Instruments

Universal Instruments

- Charter of the United Nations, 1945
- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention on the Rights of the Child, 1989
- Statute of the International Tribunal for the Former Yugoslavia, 1993
- Statute of the International Tribunal for Rwanda, 1994
- Rome Statute of the International Criminal Court, 1998
- The Four Geneva Conventions of 12 August 1949
- The 1977 Protocols Additional to the Geneva Conventions of 12 August 1949¹

- Universal Declaration of Human Rights, 1948
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- African Charter on the Rights and Welfare of the Child, 1990
- American Convention on Human Rights, 1969
- Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994
- Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999
- European Convention on Human Rights, 1950
- European Social Charter, 1961, and European Social Charter (Revised), 1996
- Framework Convention for the Protection of National Minorities, 1995

¹For more legal instruments relating to discrimination, see *Trainers' Guide, Annex II – Handout No. 1*.

1. Introduction

1.1 Discrimination: A persistent serious human rights violation

In spite of unprecedented progress at the international level in enhancing the legal protection of individuals and groups of individuals against discrimination, reports from all parts of the world confirm the fact that discriminatory acts and practices are anything but a memory from the past. Discrimination is multifaceted and present not only in State or public structures but also in civil society in general. To a greater or lesser extent, discrimination may thus affect the way people are treated in all spheres of society such as politics, education, employment, social and medical services, housing, the penitentiary system, law enforcement and the administration of justice in general.

Discrimination may have many different causes and may affect people of different racial, ethnic, national or social origin such as communities of Asian or African origin, Roma, indigenous peoples, Aborigines and people belonging to different castes. It can also be aimed at people of different cultural, linguistic or religious origin, persons with disabilities or the elderly and, for instance, persons living with the HIV virus or with AIDS. Further, persons may be discriminated against because of their sexual orientation or preferences.

Discrimination based on gender is also commonplace in spite of the progress made in many countries. Laws still exist which, inter alia, deny women the right to represent matrimonial property, the right to inherit on an equal footing with men, and the right to work and travel without the permission of their husbands. Women are also particularly prone to violent and abusive practices, which continue unabated in many countries, and they thus often suffer double discrimination, both because of their race or origin and because they are women.

A major problem in today's world is also the discrimination to which numerous people, especially women and children, are subjected because they live in poverty or extreme poverty. These circumstances may force them to migrate and have contributed to an increase in trafficking in persons, particularly women and children, who are also frequently subjected to physical restraint, violence and intimidation.

Many European countries in particular have in recent years experienced a disturbing increase in racist and xenophobic attacks on asylum-seekers and foreigners in general by neo-Nazi and other groups composed mainly of young people. However, such attacks have been perpetrated not only on persons of foreign origin but also on those who dare to challenge the rightfulness of the acts committed by the groups concerned and the discriminatory or supremacist philosophy that they represent. Such philosophies and other grounds for discriminatory treatment are among the root causes of the tragic upsurge, during the last decade, in flows of refugees and internally displaced people.

As shown by the World Conference against Racism in Durban, South Africa, in 2001, the challenge facing Governments, non-governmental organizations and civil society in stemming the tide of discrimination is considerable and requires serious, effective and concerted efforts by all concerned.

1.2 The role of judges, prosecutors and lawyers in protecting persons against discrimination

Judges, prosecutors and lawyers naturally have an essential role to play in protecting persons against discrimination. Their task is to see to it that existing laws and regulations prohibiting discrimination are respected in legal practice. In some countries discrimination is forbidden *de jure* but the laws are not adequately enforced. Judges, prosecutors and lawyers play a crucial role in remedying these situations and ensuring that impunity for discriminatory acts is not tolerated, that such acts are duly investigated and punished, and that the victims have effective remedies at their disposal.

In situations in which the domestic law on discrimination is non-existent or lacking in clarity, the legal professions may turn to international legal instruments for guidance, including, in particular, the relatively rich existing case law, parts of which will be reviewed below.

1.3 Glimpses of international legal history

The right to equality and non-discrimination was not easily accepted by the international community. During the 1919 Paris Conference, held in the aftermath of the First World War, Japan worked intensively to have the principle of racial equality inserted in the Covenant of the League of Nations. Although a majority of eleven out of seventeen members of the Conference Commission voted in favour of the Japanese proposal, President Wilson of the United States “suddenly declared from the chair that the amendment had failed”. In spite of vigorous protests by several delegates against this rejection of the amendment, President Wilson insisted – to the great disappointment of the Japanese delegation – that the amendment had not been adopted.² Logically, the League Covenant did not even contain any express reference to the principle of equality between States.³

Progress was made, however, during the elaboration of the Charter of the United Nations after yet another global war of unspeakable horror which had its origin in deliberate and carefully systematized discriminatory practices embracing entire State structures. The world could no longer close its eyes to such vile practices and the threat to peace that they represented.

²Paul Gordon Lauren, *Power and Prejudice – The Politics and Diplomacy of Racial Discrimination*, 2nd edn. (Boulder/Oxford, Westview Press), pp. 99-100, and, in general on the issue of racial discrimination, Chapter 3 on “Racial Equality Requested – and Rejected”.

³See Keba Mbaye, “ARTICLE 2, Paragraph 1”, *La Charte des Nations Unies – Commentaire article par article*, 2nd edn, Jean-Pierre Cot and Alain Pellet, eds. (Paris, ECONOMICA, 1991), p. 83.

In the second preambular paragraph to the Charter of the United Nations, the peoples of the Organization express their determination

“to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”.

According to Articles 1(2) and (3) of the Charter, the purposes of the United Nations are, *inter alia*, “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” and

“to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, *and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*” (emphasis added).

While Article 2(1) expressly confirms that the “Organization is based on the principle of the sovereign equality of all its Members”, the principle of non-discrimination in the observance of human rights is reaffirmed in Articles 13(1)(b), 55(c) and 76(c). The Charter of the United Nations testifies to the fact that international peace and security depend to a large extent on “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” (Art. 55(c)).

What can with some justification be called international constitutional law is thus today solidly based both on the principles of *equality between States and the equal worth of all human beings*, although only the latter principle will be dealt with in this chapter.

1.4 The purpose and scope of the present chapter

The scope of the present chapter does not permit an in-depth analysis of the wide, complex and multifaceted subject of discrimination. The aim is rather to provide the legal professions with a brief description of the most important legal provisions on the right to equality and non-discrimination in general international human rights law, and then to focus on some of the most relevant aspects of the judgments, views and comments of the international monitoring bodies. *The ultimate purpose is to sensitize judges, prosecutors and lawyers to some of the numerous aspects of existing unequal and discriminatory treatment of people and thereby also to provide a basic legal framework for their future work at the domestic level.*

2. Selected Universal Legal Provisions Guaranteeing the Right to Equality before the Law and the Right to Non-discrimination

2.1 Universal Declaration of Human Rights, 1948

Following the prohibition of discrimination based on *race, sex, language and religion* in the Charter of the United Nations, the adoption of the Universal Declaration of Human Rights together with the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 became the next important step in the legal consolidation of the principle of equality before the law and the resultant prohibition of discrimination.

Article 1 of the Universal Declaration proclaims that “All human beings are born free and equal in dignity and rights”, while, according to article 2:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

With regard to the right to equality, article 7 of the Universal Declaration stipulates that:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

It is noteworthy that article 2 of the Universal Declaration prohibits “*distinction[s] of any kind*” (emphasis added), which could be read as meaning that no differences *at all* can be legally tolerated. However, as will be seen below, such a restrictive interpretation has not been adopted by the international monitoring bodies.

2.2 Convention on the Prevention and Punishment of the Crime of Genocide, 1948

In article I of the Convention on the Prevention and Punishment of the Crime of Genocide, “the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish”. Article II (a) – (e) enumerates acts considered as genocide, i.e. committed “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. These acts are:

- ❖ killing members of the group;
- ❖ causing serious bodily or mental harm to members of the group;
- ❖ deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- ❖ imposing measures intended to prevent births within the group;
- ❖ forcibly transferring children of the group to another group.

The following acts are punishable under article III (a) – (e) of the Genocide Convention:

- ❖ genocide;
- ❖ conspiracy to commit genocide;
- ❖ direct and public incitement to commit genocide;
- ❖ attempt to commit genocide; and
- ❖ complicity in genocide.

An identical definition of the term genocide is contained in article 6 of the Rome Statute of the International Criminal Court,⁴ in article 4(2) of the Statute of the International Tribunal for the Former Yugoslavia and in article 2(2) of the Statute of the International Tribunal for Rwanda. Contrary to article 6 of the Rome Statute, article 4(3) and article 2(3) respectively of the Statutes of the two Tribunals contain the same list of punishable acts as the Genocide Convention.

Although genocide is the ultimate negation of the right to equality, it will not be further dealt with in this chapter, which considers the more everyday forms of discrimination that face most societies. Suffice it to add in this context that, on 2 August 2001, in the *Radislav Krstic* case, the International Tribunal for the Former Yugoslavia found the General guilty of committing genocide after the fall of Srebrenica in Bosnia and Herzegovina in July 1995.⁵ He was also convicted of other serious crimes, such as murder, and received a sentence of 46 years’ imprisonment. This verdict was significant, since it was the first time the Tribunal found someone guilty of genocide.

⁴See, for example, UN doc. A/CONF.183/9. The Statute entered into force on 1 July 2002.

⁵For the text of the judgment, see <http://www.un.org/icty/krstic/TrialC1/judgement/>

2.3 International Covenant on Civil and Political Rights, 1966

The right to equality and freedom from discrimination is protected by various provisions of the International Covenant on Civil and Political Rights.⁶ First, in article 2(1) each State party:

“undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

Article 26 of the Covenant is the cornerstone of protection against discrimination under the Covenant. It reads:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Contrary to article 2(1), which is linked to the rights recognized in the Covenant, article 26 provides “an autonomous right” of equality and “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.⁷

Article 20(2) obliges States parties to prohibit, by law, any “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

Gender equality is emphasized in article 3, according to which States parties “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”.⁸

Article 14(1) provides that “all persons shall be equal before the courts and tribunals”, an important guarantee which may in certain cases oblige States to provide legal aid in order, for instance, to ensure fair court proceedings for indigent persons. In addition, article 14(3) stipulates that “in the determination of any criminal charge against him, everyone shall be entitled ... in full equality” to the minimum guarantees enumerated therein.

Article 25 guarantees the equal participation in public life of every citizen “without any of the distinctions mentioned in article 2 and without unreasonable restrictions”.⁹

⁶On the question of non-discrimination, see General Comment No. 18 of the Human Rights Committee in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, pp. 134-137 (hereinafter referred to as *United Nations Compilation of General Comments*)

⁷Ibid., p. 136, para. 12.

⁸Ibid., General Comment No. 28 (Equality of rights between men and women), pp. 168-174.

⁹Ibid., General Comment No. 25 (Article 25), pp. 157-162.

Lastly, article 27 of the Covenant provides express protection for *ethnic, religious and linguistic minorities*. According to article 27,

“persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”¹⁰

2.4 International Covenant on Economic, Social and Cultural Rights, 1966

Under article 2(2) of the International Covenant on Economic, Social and Cultural Rights the States parties undertake

“to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

In line with the terms of the International Covenant on Civil and Political Rights, the States parties to the International Covenant on Economic, Social and Cultural Rights also undertake, by virtue of article 3,

“to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”.

The principle of non-discrimination is also contained in article 7(a)(i), which guarantees “fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”. Lastly, article 7(c) of the Covenant secures the right to “equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence”.¹¹

2.5 International Convention on the Elimination of All Forms of Racial Discrimination, 1965

For the purposes of the International Convention on the Elimination of All Forms of Racial Discrimination, “the term ‘racial discrimination’ shall mean”, according to article 1(1),

¹⁰Ibid., see also General Comment No. 23 (Article 27), pp. 147-150.

¹¹For the views of the Committee on Economic, Social and Cultural Rights relating to discrimination, see, inter alia, the following general comments in the *United Nations Compilation of General Comments*: General Comment No. 3 (The nature of States parties’ obligations (art. 2(1)), pp. 18-21; General Comment No. 4 (The right to adequate housing (art. 11(1)), pp. 22-27; General Comment No. 5 (Persons with disabilities), pp. 28-38; General Comment No. 6 (The economic, social and cultural rights of older persons), pp. 38-48; General Comment No. 12 (The right to adequate food (art. 11)), pp. 66-74; General Comment No. 13 (The right to education (art. 13)), pp. 74-89; and General Comment No. 14 (The right to the highest attainable standard of health (art. 12)), pp. 90-109.

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural *or any other field of public life*” (emphasis added).

The Convention does not, however, “apply to distinctions, exclusions, restrictions or preferences made by a State Party ... between citizens and non-citizens” (art. 2), and nothing in the Convention “may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, *provided that such provisions do not discriminate against any particular nationality*” (art. 3; emphasis added). It is also noteworthy that the Convention is only applicable to discrimination that takes place in the “field of public life” and that it does not, in principle, extend to discrimination carried out in private.

The Convention regulates in some detail the obligations of States parties to eliminate racial discrimination and lists, in article 5, the major civil, political, economic, social and cultural rights that must be enjoyed “without distinction as to race, colour, or national or ethnic origin”.¹²

2.6 Convention on the Rights of the Child, 1989

Article 2(1) of the Convention on the Rights of the Child provides that:

“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

The term “disability” has here been added to the grounds on which no discrimination is allowed.

Under article 2(2) of the Convention, States parties are required to take

“all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinion, or beliefs of the child’s parents, legal guardians, or family members”.

With regard to the child’s education, the States parties agree in article 29(d) that it shall be directed, inter alia, to:

¹²For further details on how the Committee on the Elimination of Racial Discrimination interprets the Convention, see, inter alia, the following recommendations in the *United Nations Compilation of General Comments*: General Recommendation XI (Non-citizens), p. 182; General Recommendation XIV (art. 1(1)), pp. 183-184; General Recommendation XV (art. 4), pp. 184-185; General Recommendation XIX (art. 3), p. 188; General Recommendation XX (art. 5), p. 188-189; General Recommendation XXI (The right of self-determination), pp. 189-191; General Recommendation XXIII (The rights of indigenous peoples), pp. 192-193; General Recommendation XXIV (art. 1), pp. 193-194; General Recommendation XXV (Gender-related dimensions of racial discrimination), pp. 194-195; General Recommendation XXVI (art. 6), p. 195; and General Recommendation XXVII (Discrimination against Roma), pp. 196-202.

“(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin”.

Lastly, article 30 of the Convention on the Rights of the Child protects minority rights in terms that are similar to, but not identical with, article 25 of the International Covenant on Civil and Political Rights. It reads as follows:

“In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”¹³

2.7 Convention on the Elimination of All Forms of Discrimination against Women, 1979

Article 1 of the Convention on the Elimination of All Forms of Discrimination against Women describes “discrimination against women” as meaning

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil *or any other field*” (emphasis added).

As noted in subsection 3.2 of Chapter 11, the field of applicability of this Convention is wider than that of the International Convention on the Elimination of All Forms of Racial Discrimination, in that it also covers acts falling within the private sphere.

Given the importance of the rights of women in the administration of justice and the role played by the Convention on the Elimination of All Forms of Discrimination against Women in furthering these rights, they were given particular attention in Chapter 11 of this Manual. However, several cases involving gender discrimination dealt with by the international monitoring bodies under the general human rights treaties will be covered in this chapter.¹⁴

¹³For the views of the Committee on the Rights of the Child on the aims of education, see its General Comment No. 1, which deals, inter alia, with discrimination, in *United Nations Compilation of General Comments*, pp. 255-262.

¹⁴For details regarding the interpretation of the Convention on the Elimination of Discrimination against Women, see, inter alia, the following recommendations in the *United Nations Compilation of General Comments*: General Recommendation No. 12 (Violence against women), p. 209; General Recommendation No. 14 (Female circumcision), pp. 211-212; General Recommendation No. 15 (Avoidance of discrimination against women in national strategies for the prevention and control of acquired immuno-deficiency syndrome (AIDS)), pp. 212-213; General Recommendation No. 16 (Unpaid women workers in rural and urban family enterprises), pp. 213-214; General Recommendation No. 18 (Disabled women), pp. 215-216; General Recommendation No. 19 (Violence against women), pp. 216-222; General Recommendation No. 21 (Equality in marriage and family relations), pp. 222-231; General Recommendation No. 23 (Political and public life), pp. 233-244; and General Recommendation No. 24 (Women and health: article 12), pp. 244-251.

2.8 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981

Article 1(1) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion and Belief guarantees to everyone “the right to freedom of thought, conscience and religion”, a right which “shall include freedom to have a religion or whatever beliefs of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching”. Article 1(2) provides that “no one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice,” while article 1(3) allows for limitations on the freedom “to manifest one’s religion or belief” on condition that such limitations “are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others”.

The right not to be subjected to discrimination “by any State, institution, group of persons, or persons on the grounds of religion or other belief” is laid down in article 2(1) of the Declaration. For the purposes of the Declaration, article 2(2) specifies that

“the expression ‘intolerance and discrimination based on religion or belief’ means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis”.

Since 1987, a Special Rapporteur appointed by the United Nations Commission on Human Rights has been examining acts in all parts of the world that are inconsistent with the provisions of the Declaration and has suggested remedial measures.¹⁵

It is noteworthy that the right to freedom of thought, conscience and religion is also protected by article 18 of the International Covenant on Civil and Political Rights, which, according to article 4(2), can never in any circumstances be derogated from. For the States parties to the Covenant the provisions on discrimination are, of course, fully applicable also with regard to this freedom.

2.9 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992

In the sixth preambular paragraph to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the General Assembly of the United Nations emphasizes

¹⁵On the work of the Special Rapporteur, see, for example, the Report submitted by Mr. Abdelfattah Amor, Special Rapporteur, in accordance with Commission on Human Rights resolution 2000/33 (UN doc. E/CN.4/2001/63).

“that the constant promotion and realization of the rights of persons belonging to national or ethnic, religious and linguistic minorities, as an integral part of the development of society as a whole and within a democratic framework based on the rule of law, would contribute to the strengthening of friendship and cooperation among peoples and States”.

The United Nations thus recognizes that a democratic constitutional order respectful of the rule of law and the rights of minorities plays a crucial role in furthering international peace and security.

Article 1(1) of the Declaration provides that “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.” To achieve these ends, they shall, according to article 1(2), “adopt appropriate legislative and other measures”. Articles 2 and 3 give details of the rights of persons belonging to the protected minorities, while articles 4 to 7 identify the measures that States are required to take in order to fulfil the objectives of the Declaration, either alone or in cooperation with each other.

Suffice it to mention by way of example that, according to article 2(1) of the Declaration,

“Persons belonging to national or ethnic, religious and linguistic minorities ... have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.”

3. Selected Regional Legal Provisions Guaranteeing the Right to Equality before the Law and the Right to Non-discrimination

3.1 African Charter on Human and Peoples’ Rights, 1981

Article 2 of the African Charter on Human and Peoples’ Rights reads as follows:

“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”

Article 3 expressly states that “every individual shall be equal before the law” and “shall be entitled to equal protection of the law” (art. 3(1) and (2)).

Under article 18(3) of the Charter, States parties further undertake to ensure “the elimination of every discrimination against women”.

Considering that the African Charter also deals with the rights of peoples, it is logical that article 19 stipulates that “all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.”

3.2 African Charter on the Rights and Welfare of the Child, 1990

A general prohibition of discrimination is contained in article 3 of the African Charter on the Rights and Welfare of the Child, according to which:

“Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this Charter irrespective of the child’s or his/her parents’ or legal guardians’ race, ethnic group, colour, sex, language, relation, political or other opinion, national and social origin, fortune, birth or other status.”

In addition, under article 21(1) of the Charter, the States parties are required to take “all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular ... those customs and practices discriminatory to the child on the grounds of sex or other status”.

3.3 American Convention on Human Rights, 1969

Under article 1 of the American Convention on Human Rights, the States parties “undertake to respect the rights and freedoms recognized” in the treaty

“and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”.

Contrary to the International Covenants, the term “property” is not contained in article 1 of the American Convention. However, the term “economic status” would seem to cover a wider range of situations than “property”.

The notion of “equality” is found in article 8(2) of the Convention, according to which every person accused of a criminal offence is entitled “with full equality” to certain minimum guarantees during the court proceedings against him or her.

Lastly, article 24 stipulates that “all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

3.4 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also called the “Protocol of San Salvador”, adds a number of rights to the original Convention such as the right to work, social security, health, food and education, as well as the right to special protection of the elderly and the handicapped. The obligation of non-discrimination is contained in article 3, according to which the States parties “undertake to guarantee the exercise of the rights set forth” in the Protocol

“without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition”.

3.5 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women aims at the elimination of gender-based violence in both the public and private spheres, and specifies in article 6(a) and (b) that “the right of every women to be free from violence, includes, among others ... the right of women to be free from all forms of discrimination [and] the right of women to be valued and educated free of stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination.”

Articles 7 and 8 of the Convention give details of the duties of the States parties to prevent, punish and eradicate all forms of violence against women. When adopting the required measures, the States parties shall, moreover, according to article 9,

“take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar considerations shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.”

This Convention is of particular interest in that it is the only international treaty that explicitly and exclusively addresses the serious problem of violence against women.

3.6 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999¹⁶

The objectives of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities are, as stated in article II, “to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society”. For the purpose of the Convention, the term “discrimination against persons with disabilities”

“means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms” (art. I(2)(a)).

However,

“A distinction or preference adopted by a state party to promote the social integration or personal development of persons with disabilities does not constitute discrimination provided that the distinction or preference does not in itself limit the right of persons with disabilities to equality and that individuals with disabilities are not forced to accept such distinction or preference” (art. I (2)(b)).

3.7 European Convention on Human Rights, 1950

The European Convention on Human Rights differs from the other general human rights treaties in that it does not contain an independent prohibition on discrimination but only a prohibition that is linked to the enjoyment of the rights and freedoms guaranteed by the Convention and its Protocols. This means that allegations of discrimination that are not connected to the exercise of these rights and freedoms fall outside the competence of the European Court of Human Rights. Article 14 reads:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

It is interesting to note that the prohibition of discrimination in article 14 covers “association with a national minority”, which is not to be found *expressis verbis* in articles 2(1) and 26 of the International Covenant on Civil and Political Rights, article 1 of the American Convention on Human Rights or article 2 of the African Charter on Human and Peoples’ Rights. However, the latter provision, as seen above, uses the term “ethnic group”, which is of more limited scope than “minority”.

¹⁶As of 17 June 2002, nine States had ratified this Convention, which entered into force on 14 September 2001; see <http://www.oas.org/Juridico/english/signs/a-65.html>

The member States of the Council of Europe have, however, taken important steps to remedy the abovementioned lacuna in the Convention: on 4 November 2000, the fiftieth anniversary of the adoption of the Convention itself, they adopted Protocol No. 12 to the European Convention, which contains the following general prohibition of discrimination:

- “1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

The Protocol requires ten ratifications before it enters into force (art. 5(1)). As of 17 June 2002, only Cyprus and Georgia had ratified it.¹⁷

3.8 European Social Charter, 1961, and European Social Charter (revised), 1996

The revised European Social Charter of 1996 only progressively replaces the 1961 Social Charter. The revised version adds, *inter alia*, new social rights to those existing in the 1961 treaty, such as the right to protection against poverty and exclusion (art. 30), a form of discrimination experienced by an increasing number of people in the industrialized countries towards the end of the last century.

As regards the 1961 Charter, none of the operative provisions contains a general prohibition of discrimination, but the signatory States agree in the third preambular paragraph

“that the enjoyment of social rights *should* be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin” (emphasis added).

However, article E in Part V of the Charter, as revised, contains a non-discrimination provision, according to which

“The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.”

The appendix to the revised Charter specifies that “differential treatment based on an objective and reasonable justification shall not be deemed discriminatory”.

Compared with the legally non-binding reference to the principle of non-discrimination in the preamble to the 1961 Charter, the member States of the Council of Europe have at last, with the adoption of the revised Charter, fully embraced this principle in the field of social rights.

¹⁷For the status of ratifications, see the Council of Europe web site: <http://www.coe.int/>

3.9 Framework Convention for the Protection of National Minorities, 1994

The Framework Convention for the Protection of National Minorities is a unique instrument in that it is “the first ever legally binding multilateral instrument devoted to the protection of national minorities in general”.¹⁸ Article 1 of this Convention also makes it clear that “the protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation.” Moreover, as pointed out in the sixth preambular paragraph to the Convention,

“a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity.”

In other words, concrete, positive measures may be required to ensure due protection for national minorities. Although it is a legally binding international treaty, the term “Framework Convention” makes it clear that the principles it contains “are not directly applicable in the domestic orders of the member States, but will have to be implemented through national legislation and appropriate governmental policies”.¹⁹ Among the primarily programme-type provisions contained in Section II, article 4 deals with discrimination. It reads:

- “1. The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited.
2. The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
3. The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.”

The right to equality before the law and by law, including the prohibition of discrimination, is an overarching principle:

- *that is essential to international peace and security;*
- *that conditions the enjoyment of all human rights, be they civil, political, economic, social or cultural;*
- *that States are obliged under international law to ensure and to respect.*

¹⁸See “Introduction to the Framework Convention for the Protection of National Minorities” at: <http://www.humanrights.coe.int/Minorities/Eng/Presentation/FCNMinIntro.htm>, p. 1.

¹⁹Ibid., loc. cit.

4. The Prohibition of Discrimination and Public Emergencies

Four of the treaties dealt with in this chapter contain provisions authorizing States parties, on certain strictly specified conditions, to derogate from the international legal obligations incurred under the treaties concerned. The relevant provisions are:

- ❖ article 4 of the International Covenant on Civil and Political Rights
- ❖ article 27 of the American Convention on Human Rights
- ❖ article 15 of the European Convention on Human Rights
- ❖ article 30 of the 1961 European Social Charter and article F of the revised Charter of 1996

The subject of derogations from the first three of these treaties will be analysed in Chapter 16 of this Manual. At present it is sufficient to point out that, in order to be permissible under article 4(1) of the International Covenant, the derogatory measures must not involve “discrimination *solely* on the ground of race, colour, sex, language, religion or social origin” (emphasis added). The provision thus does not include the following grounds contained in articles 2(1) and 26 of the Covenant:

- ❖ political or other opinion
- ❖ national origin
- ❖ property
- ❖ birth or other status

During the elaboration of article 4(1), Chile suggested “the insertion of social origin and birth as two additional grounds on which discrimination should be prohibited even in time of emergency”.²⁰ Lebanon for its part suggested deleting the word “solely”, “as it implied that while discrimination was not permitted on any one ground given in the text, it would be permissible on any two grounds”.²¹

The United Kingdom, which had submitted the draft proposal, accepted the reference to social origin “but not the mention of birth, as legitimate restrictions might in some cases be imposed on persons because of their birth in a foreign country, although they were no longer that country’s nationals”.²² With regard to the word “solely”, the United Kingdom considered that it “had a certain importance” since “it might easily happen that during an emergency a State would impose restrictions on a certain national group which at the same time happened to be a racial group” and “that word would make it impossible for the group to claim that it had been persecuted solely

²⁰UN doc. E/CN.4/SR.330, p. 4. Moreover, Uruguay hoped that the United Kingdom “would agree to add a reference to social origin and birth in the commendable non-discrimination provision ... in order to ensure consistency with other articles of the covenant” (p. 5). Lebanon agreed with the Chilean proposal to insert the words “social origin”(p. 8). France agreed with Chile “especially in connexion with social origin” (p. 7).

²¹Ibid., p. 8.

²²Ibid., p. 10.

on racial grounds”.²³ In the light of the United Kingdom’s comments, Chile and Uruguay accepted that it was not desirable to refer to “birth” in the article concerned.²⁴

To be consistent with article 27(1) of the American Convention, derogatory measures must not involve discrimination “on the ground of race, color, sex, language, religion, or social origin”. The only difference from article 4(1) of the International Covenant in this regard is that the term “solely” is absent.

Article 15(1) of the European Convention on Human Rights does not, however, contain any reference to the prohibition of discrimination. But this lacuna cannot be taken to mean that, faced with a true public emergency, the Contracting States would be allowed to derogate at will from the prohibition of discrimination. Other conditions, such as that of strict proportionality, would appear to make the lawfulness of such derogations highly unlikely. Moreover, as will be seen below, the interpretation of the term “discrimination” per se, in article 14 for instance, excludes any distinctions that are not reasonably justified for an objective purpose.

Lastly, neither article 30 of the 1961 European Social Charter nor article F of the revised Charter contains any reference to the principle of non-discrimination.

With regard to the absence of a derogation provision in the African Charter on Human and Peoples’ Rights, the African Commission on Human and Peoples’ Rights has held that the Charter “does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war ... cannot be used as an excuse by the state [for] violating or permitting violations of rights in the African Charter.”²⁵ This means that the non-discrimination provisions in articles 2, 3 and 19 of the Charter must at all times be fully implemented.

Although international humanitarian law *stricto sensu* falls outside the scope of this Manual, it is noteworthy that the principle of non-discrimination runs like a red thread through the four 1949 Geneva Conventions and their two Additional Protocols of 1977. It is contained, inter alia, in the following provisions:

- ❖ common article 3 of the four Geneva Conventions;
- ❖ article 16 of the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 1949;
- ❖ article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 1949;

²³Ibid., loc. cit.

²⁴Ibid., p. 11.

²⁵ACHPR, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Communication No. 74/92, decision adopted during the 18th Ordinary session, October 1995, p. 50, para. 40 of the decision as published at: http://www.up.ac.za/chr/ahrdb/acomm_decisions.html

- ❖ articles 9(1) and 75(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I);
- ❖ articles 2(1), 4(1) and 7(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

What these provisions show is that even in the direst of circumstances, in the heat of an international or non-international armed conflict, the States involved are strictly bound to respect certain legal human standards, including the right to equal treatment and the principle of non-discrimination.

The right to equality before the law and to non-discrimination must, in principle, be respected in all circumstances, including in public emergencies and at times of international and non-international armed conflict.

5. The General Meaning of Equality and Non-Discrimination

As noted above, and as emphasized by the Human Rights Committee, “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”²⁶ However, in discussing the question of equality and non-discrimination, it is essential to be aware of the fact that, despite what seems to be suggested by the wording of, in particular, article 2 of the Universal Declaration of Human Rights and article 2(1) of the International Covenant on Civil and Political Rights, not all distinctions between persons and groups of persons can be regarded as discrimination in the true sense of this term. This follows from the consistent case law of the international monitoring bodies, according to which distinctions made between people are justified provided that they are, in general terms, reasonable and imposed for an objective and legitimate purpose.

With regard to the term “discrimination” in the International Covenant on Civil and Political Rights, the Human Rights Committee has stated its belief

“that the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, *and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*”.²⁷

²⁶See General Comment No. 18, in *United Nations Compilation of General Comments*, p. 134, para. 1.

²⁷*Ibid*, p. 135, para. 7; emphasis added.

However, as noted by the Committee, “the enjoyment of rights and freedoms on an equal footing ... **does not mean identical treatment in every instance**”. In support of its statement, it points out that certain provisions of the Covenant itself contain distinctions between people, for example article 6(5) which prohibits the death sentence from being imposed on persons below 18 years of age and from being carried out on pregnant women.²⁸

Moreover, “the principle of equality sometimes requires States parties to take **affirmative action** in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of **legitimate differentiation** under the Covenant.”²⁹

When dealing with alleged violations of article 26 in communications submitted under the Optional Protocol, the Committee has confirmed that “the right to equality before the law and equal protection of the law without any discrimination, does not make all differences of treatment discriminatory. A differentiation based on **reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26**.”³⁰ It is thus the Committee’s task, in relevant cases brought before it, to examine whether the State party concerned has complied with these criteria.

In the Americas, the right to equal protection of the law as guaranteed by article 24 of the American Convention on Human Rights was considered by the Inter-American Court of Human Rights in its advisory opinion on the *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*. In this opinion, the Inter-American Court undertook an instructive and detailed examination of the concepts of discrimination and equality.

The Court pointed out, to begin with, that although article 24 of the American Convention is not conceptually identical to article 1(1), which contains a general prohibition of discrimination regarding the exercise of the rights and freedoms laid down in the Convention, “Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal prescription.”³¹ The Court then gave the following explanation of the origin and meaning of the notion of equality:

²⁸Ibid., pp. 135-136, para. 8; emphasis added.

²⁹Ibid., p. 136, para. 10; emphasis added.

³⁰Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands* (Views adopted on 9 April 1987), in UN doc. GAOR, A/42/40, p. 150, para. 13; emphasis added.

³¹*I-A Court HR, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A, No. 4, p. 104, para. 54.*

“55. The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with the notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.

56. Precisely because equality and nondiscrimination are inherent in the idea of the oneness in dignity and worth of all human beings, it follows that not all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity. The European Court of Human Rights, ‘following the principles which may be extracted from the legal practice of a large number of democratic States,’ has held that a difference in treatment is only discriminatory when it ‘has no objective and reasonable justification.’... There may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice. They may in fact be instrumental in achieving justice or in protecting those who find themselves in a weak legal position. For example, it cannot be deemed discrimination on the grounds of age or social status for the law to impose limits on the legal capacity of minors or mentally incompetent persons who lack the capacity to protect their interests.

57. Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows, that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on *substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.*”³²

However, the Court then made a concession to the realities that any given Government may face in specific situations:

“58. Although it cannot be denied that a given factual context may make it more or less difficult to determine whether or not one has encountered the situation described in the foregoing paragraph, it is equally true that, starting with the notion of the essential oneness and dignity of the human family, it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree from the standards articulated above. One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them.”³³

³²Ibid., pp. 104-106, paras. 55-57; emphasis added.

³³Ibid., p. 106, para. 58.

At the European level, the European Court of Human Rights first dealt with article 14 of the European Convention on Human Rights in the *Belgian Linguistic* case, holding that the guarantee contained in that article “has no independent existence in the sense that under the terms of Article 14 it relates solely to ‘rights and freedoms set forth in the Convention’.”³⁴ However, “a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may ... infringe this Article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature ... It is as though [Article 14] formed an integral part of each of the articles laying down rights and freedoms.”³⁵

The European Court then made the following ruling on whether article 14 outlaws all differences in treatment:

“10. In spite of the very general wording of the French version (‘sans distinction aucune’), Article 14 does not forbid every difference in the exercise of the rights and freedoms recognised. This version must be read in the light of the more restrictive text of the English version (‘without discrimination’). In addition, and in particular, one would reach absurd results were one to give Article 14 an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities. The extensive interpretation mentioned above cannot consequently be accepted.

It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment ... contravenes Article 14. On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention **must not only pursue a legitimate aim**: Article 14 is likewise violated when it is clearly established that there is **no reasonable relationship of proportionality between the means employed and the aim sought to be realised**.

In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it

³⁴*Eur. Court HR, Case “relating to certain aspects of the laws on the use of languages in education in Belgium” (Merits), judgment of 23 July 1968, Series A, No. 6, p. 33, para. 9.*

³⁵*Ibid.*, p. 34, para. 9.

cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of those measures with the requirements of the Convention.”³⁶

However, the European Court has had occasion to develop further its understanding of discrimination and, although it long considered that the right under article 14 was violated “when States treat differently persons in analogous situations without providing an objective and reasonable justification”, it now also considers “that this is not the only facet of the prohibition of discrimination in Article 14” and that

“the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated *when States without objective and reasonable justification fail to treat differently persons whose situations are significantly different.*”³⁷

However, like the Inter-American Court of Human Rights, the European Court of Human Rights has accepted that “the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.”³⁸ On the other hand, “very weighty reasons” would have to be submitted by the respondent Government before the Court would regard a difference in treatment as a legitimate differentiation under article 14, particularly if it was based exclusively on gender³⁹ or birth out of wedlock.⁴⁰

These are some of the most detailed and authoritative legal rulings on the notion of equality of treatment and non-discrimination in international human rights law. They form the basis of the examples chosen below from the jurisprudence of the Human Rights Committee and the Inter-American and European Courts of Human Rights. The common traits of the case law of these bodies may be summarized as follows:

The principle of equality and non-discrimination does not mean that all distinctions between people are illegal under international law.

Differentiations are legitimate and hence lawful provided that they:

- *pursue a legitimate aim such as affirmative action to deal with factual inequalities, and*
- *are reasonable in the light of their legitimate aim.*

³⁶Ibid., p. 34-35, para. 10; emphasis added.

³⁷Eur. Court HR, *Case of Thlimmenos v. Greece*, judgment of 6 April 2000, (unedited version of the judgment), para. 44; emphasis added.

³⁸Eur. Court HR, *Case of Karlbainz Schmidt v. Germany*, judgment of 18 July 1994, Series A, No. 291-B, pp. 32-33, para. 24.

³⁹Eur. Court HR, *Case of Van Raalte v. the Netherlands*, judgment of 21 February 1997, p. 186, para. 39.

⁴⁰Eur. Court HR, *Case of Inze v. Austria*, judgment of 28 October 1987, Series A, No. 126, p. 18, para. 41.

Alleged purposes for differential treatment that cannot be objectively justified and measures that are disproportionate to the attainment of a legitimate aim are unlawful and contrary to international human rights law.

To ensure the right to equality, States may have to treat differently persons whose situations are significantly different.

6. Selected International Case Law and Legal Comments on the Right to Equality and the Prohibition of Discrimination

This section will highlight some of the many cases concerning discrimination dealt with to date by the major international monitoring bodies. Prime attention has been given to bodies of a judicial or quasi-judicial nature.

Some of the cases chosen may seem to be of relatively minor importance, since many individuals and groups of individuals suffer infinitely greater discrimination than some of those whose cases have been considered by the international monitoring bodies. *However, the case law clearly indicates the path that should be taken in other possibly far more serious situations, since it establishes universal legal criteria that can and must guide both lawmakers and the legal professions in the drafting of laws and the practical enforcement of the right to equality and the prohibition of discrimination.*

6.1 Race, colour or ethnic origin

6.1.1 Racial slurs

In the *Abmad* case, Denmark was found to have violated article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. The author, a Danish citizen of Pakistani origin, complained that he and his brother had been called “a bunch of monkeys” by the headmaster and another teacher at their school. The incident occurred in the school building after the two boys – who had allegedly been noisy – refused to comply with the teacher’s request that they leave the place where they were waiting with a video camera for a friend who was taking an examination.⁴¹

⁴¹Communication No. 16/1999, *K. Abmad v. Denmark* (Opinion adopted on 13 March 2000) in UN doc. GAOR, A/55/18, p. 110, para. 2.1.

The author filed a complaint with the police, who discontinued the case on concluding that the words used did not fall within the scope of Section 266b of the Danish Penal Code concerning insulting or degrading remarks.⁴² The letter from the police also stated “that the expression used had to be seen in the context of a tense incident [and] should not be understood as insulting or degrading in terms of race, colour, national or ethnic origin, since it could also be used of persons of Danish origin who had behaved as the author had.”⁴³ The State Attorney subsequently upheld the police decision.⁴⁴

The Committee on the Elimination of Racial Discrimination concluded that “owing to the failure of the police to continue their investigations, and the final decision of the Public Prosecutor against which there was no right of appeal, the author was denied any opportunity to establish whether his rights under the Convention had been violated. From this it [followed] that the author [had] been denied effective protection against racial discrimination and remedies attendant thereupon by the State party.”⁴⁵ The Committee recommended that the State party “ensure that the police and the public prosecutors properly investigate accusations and complaints relating to acts of racial discrimination, which should be punishable by law [according to] article 4 of the Convention”.⁴⁶

6.1.2 The right to freedom of movement and residence

In the case of *Koptova v. the Slovak Republic*, also brought under the International Convention on the Elimination of Racial Discrimination, the author complained of violations of the terms of the Convention as a result of resolutions adopted by two municipalities in Slovakia prohibiting citizens of Romani ethnicity from settling in their respective territories. One of the resolutions even forbade Roma citizens to enter the village.⁴⁷

After examining the text of the resolutions, the Committee concluded that they represented a violation of article 5(d)(i) of the Convention, which guarantees the right to freedom of movement and residence to all “without distinction as to race, colour, or national or ethnic origin”. It found that “although their wording refers explicitly to Romas previously domiciled in the concerned municipalities, the context in which they were adopted clearly indicates that other Romas would have been equally prohibited from settling.”⁴⁸ The Committee noted, however, that the impugned resolutions were rescinded in April 1999 and that freedom of movement and residence is guaranteed under article 23 of the Constitution of the Slovak Republic. It recommended that the State party “take the necessary measures to ensure that practices restricting the freedom of movement and residence of Romas under its jurisdiction are fully and promptly eliminated”.⁴⁹

⁴²Ibid., p. 110, paras. 2.2 and 2.4, read in conjunction with p. 116, para. 6.3.

⁴³Ibid., p. 110, para. 2.4.

⁴⁴Ibid., p. 110, para. 2.5.

⁴⁵Ibid., p. 116, para. 6.4.

⁴⁶Ibid., p. 116, para. 9.

⁴⁷Communication No. 13/1998, *A. Koptova v. the Slovak Republic* (Opinion of 8 August 2000), in UN doc. *GAOR*, A/55/18, p. 137, paras. 2.1-2.3.

⁴⁸Ibid., p. 149, para. 10.1.

⁴⁹Ibid., p. 149, para. 10.3.

6.1.3 Racial and ethnic discrimination in law enforcement

In its concluding observations on the initial, second and third periodic reports of the United States, the Committee on the Elimination of Racial Discrimination noted with concern “the incidents of police violence and brutality, including cases of deaths as a result of excessive use of force by law enforcement officials, which particularly affects minority groups and foreigners”. It therefore recommended that the State party “take immediate and effective measures to ensure the appropriate training of the police force with a view to combating prejudices which may lead to racial discrimination and ultimately to a violation of the right to security of person. The Committee further [recommended] that firm action is taken to punish racially motivated violence and ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such actions.”⁵⁰

The Committee also noted with concern “that the majority of federal, state and local prison and jail inmates in [the United States] are members of ethnic or national minorities, and that the incarceration rate is particularly high with regard to African-Americans and Hispanics”. It recommended that the State party “take firm action to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equal treatment before the tribunals and all other organs administering justice”. It further recommended that the State party “ensure that the high incarceration rate is not a result of the economically, socially and educationally disadvantaged position of these groups”.⁵¹

Lastly, the Committee on the Elimination of Racial Discrimination noted with concern that, “according to the Special Rapporteur of the UN Commission on Human Rights on extrajudicial, summary or arbitrary executions, there is a disturbing correlation between race, both of the victim and the defendant, and the imposition of the death penalty, particularly in states like Alabama, Florida, Georgia, Louisiana, Mississippi and Texas. It [urged] the State party to ensure, possibly by imposing a moratorium, that no death penalty is imposed as a result of racial bias on the part of prosecutors, judges, juries and lawyers or as a result of the economically, socially and educationally disadvantaged position of the convicted persons.”⁵²

6.1.4 Racial discrimination in ensuring economic, social and cultural rights

In its concluding observations on the fourteenth periodic report of Denmark, the Committee on the Elimination of Racial Discrimination stated: “The Committee is concerned that equal attention be paid to the economic, social and cultural rights listed in article 5 [of the Convention on the Elimination of Racial Discrimination]. It is particularly concerned by the level of unemployment among foreigners and the difficult access to employment of members of ethnic minorities.” The Committee pointed out that, “although the State party is not obliged to provide work permits to foreign

⁵⁰See the unedited version of the concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, in UN doc. CERD/C/59/Misc.17/Rev.3, para. 15.

⁵¹Ibid., para. 16.

⁵²Ibid., para. 17.

residents, it has to guarantee that foreigners who have obtained a work permit are not discriminated against in their access to employment.”⁵³

The same Committee was particularly stern in its concluding observations on the tenth, eleventh and twelfth periodic reports of Australia, in which it expressed serious concern “at the extent of the continuing discrimination faced by indigenous Australians in the enjoyment of their economic, social and cultural rights. The Committee [remained] seriously concerned about the extent of the dramatic inequality still experienced by an indigenous population that represents only 2.1 per cent of the total population of a highly developed industrialized State. The Committee [recommended] that the State party ensure, within the shortest time possible, that sufficient resources are allocated to eradicate these disparities.”⁵⁴

6.2 Gender

6.2.1 The right to represent matrimonial property

The case of *Ato del Avellanal v. Peru* concerned a Peruvian woman who owned two apartment buildings in Lima and who, by decision of the Supreme Court, was not allowed to sue the tenants in order to collect overdue rents because, under article 168 of the Peruvian Civil Code, when a woman is married, only her husband is entitled to represent the matrimonial property before the courts.⁵⁵ According to the Human Rights Committee, this violated the following provisions of the International Covenant on Civil and Political Rights:

- ❖ article 14(1), which guarantees that “all persons shall be equal before the courts and tribunals”, since “the wife was not equal to her husband for purposes of suing in Court”;
- ❖ article 3, pursuant to which the States parties “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the ... Covenant”, and article 26, which states that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” The Committee found that the application of article 168 of the Peruvian Civil Code to the author “resulted in denying her equality before the courts and constituted discrimination on the ground of sex”.⁵⁶

6.2.2 Right to respect for family life

In the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, the European Court of Human Rights had to decide whether the United Kingdom immigration laws violated the right to respect for family life as guaranteed by article 8 taken either alone or in conjunction with the non-discrimination provision contained in

⁵³See UN doc. GAOR, A/55/18, p. 23, para. 67.

⁵⁴See UN doc. GAOR, A/55/18, pp. 19-20, para. 41.

⁵⁵Communication No. 202/1986, *G. Ato del Avellanal v. Peru* (Views adopted on 28 October 1988) in UN doc. GAOR, A/44/40, p. 196, paras. 1 and 2.1.

⁵⁶*Ibid.*, pp. 198-199, paras. 10.1-10.2.

article 14 of the European Convention on Human Rights. The case concerned three women who wanted to establish residence in the United Kingdom with their respective husbands. When lodging their complaints, the applicants, who were of Malawian, Philippine and Egyptian origin, were permanent and lawful residents of the United Kingdom. Their problems started after they married men of foreign origin who were either refused permission to join them in the United Kingdom or to remain there with them. The applicants' husbands were respectively from Portugal, the Philippines and Turkey.

With regard to the right to respect for family life as guaranteed by article 8 of the European Convention, the Court noted that “it was only after becoming settled in the United Kingdom, as single persons, that the applicants contracted marriage.” In its view,

“The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country.

In the present case, the applicants have not shown that there were obstacles to establishing family life in their own or their husbands' home countries or that there were special reasons why that could not be expected of them.

[...]

There was accordingly no ‘lack of respect’ for family life and, hence, no breach of Article 8 taken alone.”⁵⁷

The outcome was different, however, when the Court examined the case under article 14 in conjunction with article 8 of the Convention. The question arose whether, as alleged by the applicant women, these provisions had been violated “as a result of unjustified differences of treatment in securing the right to respect for their family life, based on sex, race and also – in the case of Mrs. Balkandali – birth”.⁵⁸

Invoking its well-established case law, the Court held that:

“For the purposes of Article 14, a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’.”⁵⁹

However, the Contracting States “enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law”.⁶⁰

⁵⁷ Eur. Court HR, *Case of Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A, No. 94, p. 34, paras. 68-69.

⁵⁸ Ibid., p. 35, para. 70.

⁵⁹ Ibid., p. 35, para. 72.

⁶⁰ Ibid., p. 36, para. 72.

It was not disputed that, under the relevant rules, “it was easier for a man settled in the United Kingdom than for a woman so settled to obtain permission for his or her non-national spouse to enter or remain in the country for settlement”. The argument therefore centred on the question whether this difference had an objective and reasonable justification.⁶¹ The Government argued that the difference in treatment was aimed at limiting “primary immigration” and that it was justified “by the need *to protect the domestic labour market* at a time of high unemployment”.⁶² While accepting that the aim of protecting the domestic labour market “was without doubt legitimate”, the Court took the view that this did not in itself establish the legitimacy of the difference made in the rules in force.⁶³ Moreover, “the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.”⁶⁴

After examining the Government’s arguments, the Court stated that it was “not convinced that the difference that may nevertheless exist between the respective impact of men and women on the domestic labour market [was] sufficiently important to justify the difference of treatment, complained of by the applicants, as to the possibility for a person settled in the United Kingdom to be joined by, as the case may be, his wife or her husband”.⁶⁵ While accepting the Government’s argument that the rules were also aimed at *advancing public tranquillity*, the Court was “not persuaded that this aim was served by the distinction drawn in those rules between husband and wives”.⁶⁶

The Court therefore concluded that the applicants had been victims of discrimination on the ground of **sex** in violation of article 14 of the European Convention on Human Rights read in conjunction with article 8. It further concluded, however, that the applicants had **not** been discriminated against on the ground of either race or birth.⁶⁷

6.2.3 Preferential pension rights

In the *Pauger v. Austria* case the author had been refused a pension following the death of his wife on the ground that he was gainfully employed. The author alleged that, contrary to article 26 of the International Covenant on Civil and Political Rights, the Austrian Pension Act of 1965 “granted preferential treatment to widows, as they would receive a pension, regardless of their income, whereas widowers could receive pensions only if they did not have any other form of income”.⁶⁸

⁶¹Ibid., p. 36, para. 74.

⁶²Ibid., p. 36, para. 75; emphasis added.

⁶³Ibid., p. 37, para. 78.

⁶⁴Ibid., p. 38, para. 78.

⁶⁵Ibid., p. 38, para. 79.

⁶⁶Ibid., p. 39, para. 81.

⁶⁷Ibid., p. 39, para. 83, and p. 41, paras. 86 and 89.

⁶⁸Communication No. 415/1990, *D. Pauger v. Austria* (Views adopted on 26 March 1992), in UN doc. GAOR, A/47/40, p. 333, paras. 1.-2.1

The Human Rights Committee concluded that, contrary to article 26 of the Covenant, the author “as a widower, was denied full pension benefits on an equal footing with widows”.⁶⁹ In determining whether application in this case of the Pension Act “entailed a differentiation based on unreasonable or unobjective criteria”, the Committee observed that while Austrian family law imposed equal rights and duties on both spouses, with regard to their income and mutual maintenance, the Pension Act, as amended in 1985, provided for full pension benefits to widowers only if they had no other source of income, a requirement that did not apply to widows. Widowers would in fact only be treated on an equal footing with widows as from 1 January 1995.⁷⁰ In the Committee’s view, this meant that “men and women whose social circumstances are similar are being treated differently, merely on the basis of sex.” Such differentiation was not reasonable, as was also “implicitly acknowledged” by the State party when it pointed out that “the ultimate goal of the legislation [was] to achieve full equality between men and women in 1995”.⁷¹

6.2.4 Social security benefits

Article 26 of the International Covenant of Civil and Political Rights was also violated in the case of *S W M. Broeks v. the Netherlands*, since Ms. Broeks had been the victim of discrimination based on sex in the application of the then valid Netherlands Unemployment Benefits Act.⁷² In order to receive benefits under this law, a married woman “had to prove that she was a ‘breadwinner’ – a condition that did not apply to married men”. According to the Human Rights Committee, this differentiation placed married women at a disadvantage compared with married men and was not reasonable.⁷³

6.2.5 Contributions to general child-care benefit schemes

In the case of *Van Raalte v. the Netherlands*, the applicant complained that the levying of contributions under the Netherlands General Child Care Benefits Act from him, an unmarried childless man over 45 years of age, was a violation of article 14 of the European Convention on Human Rights taken in conjunction with article 1 of Protocol No. 1 to the Convention because of the fact that no similar contributions were exacted at that time from unmarried childless women of the same age.⁷⁴

The Court had no problem examining this case in the light of article 1 of Protocol No. 1, since it concerned the right of the State “to secure the payment of taxes or other contributions”.⁷⁵ It further considered that the situation complained of undoubtedly constituted a “difference in treatment” between persons in similar

⁶⁹Ibid., p. 336, para. 8.

⁷⁰Ibid., pp. 335-336, para. 7.4.

⁷¹Ibid., p. 336, para. 7.4.

⁷²Communication No. 172/1984, *S. W. M. Broeks v. the Netherlands* (Views adopted on 9 April 1987), in UN doc. GAOR, A/42/40, p. 150, paras. 14-15.

⁷³Ibid., p. 150, para. 14. The same issue arose in Communication No. 182/1984, *F. H. Zwaan-de Vries v. the Netherlands* (Views adopted on 9 April 1987), pp. 160-169.

⁷⁴*Eur. Court HR, Case of Van Raalte v. the Netherlands, judgment of 21 February 1997, Reports 1997-I*, p. 183, para. 32.

⁷⁵Ibid., p. 184, paras. 34-35.

situations, based on gender. The factual difference between the two categories relied on by the Government, namely “their respective biological possibilities to procreate” did not lead the Court to a different conclusion because it was precisely that distinction which was “at the heart of the question whether the difference in treatment complained of [could] be justified”.⁷⁶

The Court noted that a “key feature” of the scheme was “that the obligation to pay contributions did not depend on any potential entitlement to benefits that the individual might have ... Accordingly the exemption in the present case ran counter to the underlying character of the scheme.”⁷⁷

However, the Court concluded that, while the Contracting States “enjoy a certain margin of appreciation under the Convention as regards the introduction of exemptions to such contributory obligations, Article 14 requires that any such measure, in principle, applies even-handedly to both men and women unless compelling reasons have been adduced to justify a difference in treatment.” The Court was not persuaded that such reasons existed in the case before it and concluded that there had been a violation of article 14 taken together with article 1 of Protocol No. 1 to the Convention.⁷⁸

6.2.6 Parental leave allowance

In the case of *Petrovic v. Austria*, the outcome was different in that the European Court of Human Rights concluded that the refusal of the Austrian authorities to grant parental leave allowance to a father – on the ground that such allowance was available only to mothers – did not exceed the margin of appreciation granted to the Government under article 14 in conjunction with article 8 of the Convention.⁷⁹

The Court pointed out that “at the material time parental leave allowances were paid only to mothers, not fathers, once a period of eight weeks had elapsed after the birth and the right to a maternity allowance had been exhausted” and that it was not disputed that this was a differential treatment based on grounds of sex.⁸⁰

The Court accepted that the two parents were “similarly placed” to take care of the child during the period concerned. Moreover, considering that

“the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe ... very weighty reasons would be needed for such a difference in treatment to be regarded as compatible with the Convention.”⁸¹

⁷⁶Ibid., p. 186, para. 40.

⁷⁷Ibid., p. 187, para. 41.

⁷⁸Ibid., p. 187, paras. 42-43.

⁷⁹*Eur. Court HR, Case of Petrovic v. Austria, judgment of 27 March 1998, Reports 1998-II, p. 588, para. 43.*

⁸⁰Ibid., p. 587, paras. 34-35.

⁸¹Ibid., p. 587, paras. 36-37.

The Court noted, however, that

“the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States.”⁸²

It was clear, according to the Court, that “at the material time, that is at the end of the 1980s, there was no common standard in this field, as the majority of the Contracting States did not provide for parental leave allowances to be paid to fathers.” Only gradually had the European States “moved towards a more equal sharing between men and women of responsibilities for the bringing up of their children”. “It therefore [appeared] difficult to criticise the Austrian legislature for having introduced in a gradual manner, reflecting the evolution of society in that sphere, legislation which is, all things considered, very progressive in Europe.”⁸³ It followed that the Austrian authorities had not “exceeded the margin of appreciation allowed to them” so that “the difference in treatment complained of was not discriminatory within the meaning of Article 14.”⁸⁴

6.2.7 Acquisition of citizenship

In its advisory opinion on the *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, the Inter-American Court of Human Rights concluded that these amendments constituted discrimination incompatible with articles 17(4) (equality of rights between spouses during marriage) and 24 (right to equal protection) of the American Convention on Human Rights insofar as they favoured only one of the spouses. According to article 14(4) of the proposed amendment, “a foreign women who, by marriage to a Costa Rican loses her nationality or who after two years of marriage to a Costa Rican and the same period of residence in the country, indicates her desire to take on [that] nationality” would be Costa Rican by naturalization.⁸⁵ In the Court’s view, it would have been more consistent with the Convention for the text to refer to “any ‘foreigner’ who marries a Cost Rican national”.⁸⁶

⁸²Ibid., p. 587, para. 38.

⁸³Ibid., p. 588, paras. 40-41.

⁸⁴Ibid., p. 588, para. 43.

⁸⁵*I-A Court HR, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, Series A, No. 4*, p. 111, para. 67 read in conjunction with p. 82, p. 109, para. 64, and p. 113, point 5.

⁸⁶Ibid., pp. 111-112, para. 67. Nationality laws must not, of course, discriminate on other grounds either. In its concluding observations on the initial, second, third and fourth periodic reports of Estonia, the Committee on the Elimination of Racial Discrimination expressed “particular concern that the provisions for restricted immigration quotas established by the 1993 Aliens Act apply to citizens of most countries in the world, except those of the European Union, Norway, Iceland and Switzerland”. It recommended “that the quota system be applied without discrimination based on race or ethnic or national origin”, UN doc. GAOR, A/55/18, p. 25, para. 81.

6.3 Language

The use of language arose in the case of *Diergaardt et al. v. Namibia* in which the authors, all members of the Rehoboth Baster Community, claimed a violation of, inter alia, article 26 of the International Covenant on Civil and Political Rights, since they had been denied the use of their mother tongue – Afrikaans – in the fields of administration, justice, education and public life.⁸⁷ In this case, where “due weight” had to be given to the authors’ allegations in the absence of a Government response, the Committee pointed out that the authors had shown that the State party had “instructed civil servants not to reply to the authors’ written or oral communications with the authorities in the Afrikaans language, even when they are perfectly capable of doing so”. These instructions barred the use of Afrikaans not only for the issuing of public documents but also for telephone conversations.⁸⁸ It followed that the authors, as Afrikaans speakers, were victims of a violation of article 26 of the Covenant.⁸⁹

A person of Breton mother tongue who also spoke French complained of a violation of article 26 of the Covenant since he was not allowed to use the Breton language during court proceedings. The Human Rights Committee pointed out, however, that the author had “not shown that he, or the witnesses called on his behalf, were unable to address the tribunal in simple but adequate French”.⁹⁰ In the Committee’s view, the right to a fair trial in article 14(1) of the Covenant, read in conjunction with article 14(3)(f), “does not imply that the accused be afforded the possibility to express himself in the language which he normally speaks or speaks with a maximum of ease”. If the court is certain, as the two courts were in this case, “that the accused is sufficiently proficient in the court’s language, it is not required to ascertain whether it would be preferable for the accused to express himself in a language other than the court language”.⁹¹ According to French law, the author would have been entitled to the services of an interpreter had he needed it. As that was not the case, he was not a victim of a violation of article 26 or of any other provision of the Covenant.⁹²

In the case of *Ballantyne et al. v. Canada*, the authors, who were of English mother tongue but living in Quebec, alleged that the prohibition on their using English for advertising purposes was a violation of article 26 of the Covenant. The Human Rights Committee concluded that the authors had not been victims of discrimination on the ground of their language, since the prohibition applied to both French and English speakers, so that “a French speaking person wishing to advertise in English, in order to reach those of his or her clientele who are English speaking” could not do so.⁹³

⁸⁷Communication No. 760/1997, *J. G. A. Diergaardt et al. v. Namibia* (Views adopted on 25 July 2000), in UN doc. GAOR, A/55/40 (II), p. 147, para. 10.10.

⁸⁸*Ibid.*, loc. cit.

⁸⁹*Ibid.*

⁹⁰Communication No. 219/1986, *Dominique Guesdon v. France* (Views adopted on 25 July 1990), in UN doc. GAOR, A/45/40 (II), p. 67, para. 10.3.

⁹¹*Ibid.*, loc. cit.

⁹²*Ibid.*, p. 68, paras. 10.4-11.

⁹³Communications Nos. 359/1989 and 385/1989, *J. Ballantyne and E. Davidson, and G. McIntyre v. Canada*, in UN doc. GAOR, A/48/40 (II), p. 103, para. 11.5.

6.4 Religion or belief

6.4.1 Conscientious objection to military service

The Human Rights Committee has consistently held that, under article 8 of the International Covenant on Civil and Political Rights, States parties “may require service of a military character and, in case of conscientious objection, alternative national service, *provided that such service is not discriminatory*”.⁹⁴ In the case of *F. Foin v. France*, the author complained that French law, which required 24 months’ national alternative service for conscientious objectors compared with 12 months for military service, was discriminatory and violated the principle of equality before the law and equal protection of the law as guaranteed by article 26 of the Covenant.⁹⁵ The Committee recognized

“that the law and practice may establish differences between military and national alternative service and that such differences may, in a particular case, justify a longer period of service, provided that the differentiation is based on reasonable and objective criteria, such as the nature of the specific service concerned or the need for a special training in order to accomplish that service”.⁹⁶

In the *Foin* case, however, the argument invoked by the Government was that “doubling the length of service was the only way to test the sincerity of an individual’s conviction”. In the Committee’s view, such an argument did not satisfy the requirement “that the difference in treatment ... was based on reasonable and objective criteria.” Article 26 of the Covenant had therefore been violated, “since the author was discriminated against on the basis of his conviction of conscience”.⁹⁷

In the case of *Järvinen v. Finland*, on the other hand, the Committee found no violation of article 26. The author alleged that he had been discriminated against since alternative service lasted for 16 months, compared with only 8 months for military service. The length of alternative service had been extended from 12 to 16 months when the law was changed so that applicants were assigned to civilian service solely on the basis of their own declarations without having to prove their convictions.⁹⁸ The legislator deemed such prolongation to be “the most appropriate indicator of a conscript’s convictions”.⁹⁹ Considering in particular this *ratio legis*, the Committee concluded that “the new arrangements were designed to facilitate the administration of alternative service.” The legislation was therefore “based on practical considerations and had no discriminatory purpose”.¹⁰⁰ The Committee was, however, aware

⁹⁴See, for example, Communication No. 666/1995, *F. Foin v. France* (Views adopted on 3 November 1999), in UN doc. GAOR, A/55/40 (II), p. 37, para. 10.3; emphasis added.

⁹⁵*Ibid.*, loc. cit.

⁹⁶*Ibid.*

⁹⁷*Ibid.* For identical reasoning see Communication No. 689/1996, *R. Maille v. France* (Views adopted on 10 July 2000), p. 72, para. 10.4.

⁹⁸Communication No. 295/1988, *A. Järvinen v. Finland* (Views adopted on 25 July 1990), in UN doc. GAOR, A/45/40 (II), p. 101, para. 2.1, p. 102, para. 3.1, and p. 104, para. 6.1.

⁹⁹*Ibid.*, p. 102, para. 2.2.

¹⁰⁰*Ibid.*, p. 105, para. 6.4.

“that the impact of the legislative differentiation works to the detriment of genuine conscientious objectors, whose philosophy will necessarily require them to accept civilian service. At the same time, the new arrangements were not merely for the convenience of the State alone. They removed from conscientious objectors the often difficult task of convincing the examination board of the genuineness of their beliefs; and they allowed a broader range of individuals potentially to opt for the possibility of alternative service.”¹⁰¹

A different legal aspect arose in the case of *Thlimmenos v. Greece*, which had its origin in the conviction of the applicant – a Jehovah’s Witness – by Athens Permanent Army Tribunal of insubordination for refusing to wear military uniform at a time of general mobilization. He was sentenced to four years’ imprisonment but released on parole after two years and one day.¹⁰² The applicant subsequently came second out of 60 candidates in a public examination for the appointment of 112 chartered accountants but the Executive Board of the Greek Institute of Chartered Accountants refused to appoint him because he had been convicted of a felony.¹⁰³ The applicant unsuccessfully seized the Supreme Administrative Court, invoking, inter alia, his right to freedom of religion and equality before the law. The Court decided that the Board had acted in accordance with the law when, for the purposes of applying article 22(1) of the Civil Servants Code, it had taken into consideration the applicant’s conviction.¹⁰⁴ According to this provision, no person convicted of a felony could be appointed to the civil service and, on the basis of Legislative Decree No. 3329/1955, as amended, a person who did not qualify for appointment to the civil service could not be appointed a chartered accountant.¹⁰⁵

Before the European Court, the applicant did not complain about his initial conviction for insubordination but only about the fact “that the law excluding persons convicted of a felony from appointment to a chartered accountant’s post did not distinguish between persons convicted as a result of their religious beliefs and persons convicted on other grounds”.¹⁰⁶ The Court examined the complaint under article 9 (right to freedom of thought, conscience and religion) and article 14 of the Convention. Article 9 was relevant because the applicant was a member of the Jehovah’s Witnesses, a religious group committed to pacifism.¹⁰⁷ As noted above, the Court observed in this case that “the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”¹⁰⁸ It thus had to examine

¹⁰¹Ibid., p. 105, para. 6.5.

¹⁰²*Eur. Court HR, Case of Thlimmenos v. Greece, judgment of 6 April 2000*, para. 7 of the text of the decision as published at the Court’s web site: <http://www.echr.coe.int/>

¹⁰³Ibid., para. 8.

¹⁰⁴Ibid., paras. 9-13.

¹⁰⁵Ibid., paras. 15-16.

¹⁰⁶Ibid., para. 33.

¹⁰⁷Ibid., para. 42.

¹⁰⁸Ibid., para. 44.

- ❖ “whether the failure to treat the applicant differently from other persons convicted of a felony pursued a legitimate aim” and, if it did,
- ❖ “whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised”.¹⁰⁹

The Court noted that “States have a legitimate interest to exclude some offenders from the profession of chartered accountant.” However, it considered that

“unlike other convictions for serious criminal offences, a conviction for refusing on religious or philosophical grounds to wear the military uniform cannot imply any dishonesty or moral turpitude likely to undermine the offender’s ability to exercise this profession. Excluding the applicant on the ground that he was an unfit person was not, therefore, justified.”¹¹⁰

In reply to the Government’s argument “that persons who refuse to serve their country must be appropriately punished”, the Court pointed out that the applicant had already served a prison sentence for his refusal. In these circumstances, the Court considered that “imposing a further sanction on the applicant was disproportionate. It [followed] that the applicant’s exclusion from the profession of chartered accountants did not pursue a legitimate aim. As a result, the Court [found] that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a felony.”¹¹¹ There had therefore been a violation of article 14 of the European Convention taken in conjunction with article 9.

6.4.2 Duty to wear safety gear at work

A man of Sikh religion complained to the Human Rights Committee that his right to manifest his religion, as recognized by article 18 of the International Covenant on Civil and Political Rights, had been violated by the requirement under safety regulations to wear a hard hat instead of a turban during his work, which consisted of the nightly inspection of the undercarriage of trains from a pit located between the rails, as well as maintenance work inside and outside the train, such as on the engine. The Committee examined the complaint under article 18 of the Covenant and also ex officio under article 26, concluding that in both cases the outcome was the same: under article 18(3) the limitation on the author’s right to manifest his religion was justified by reference to the grounds laid down in article 18(3), and under article 26 it was a reasonable measure directed towards objective purposes compatible with the Covenant.¹¹² It was, in other words, a reasonable and objective measure to require that workers in federal employment be protected from injury and electric shock by the wearing of hard hats.¹¹³

¹⁰⁹Ibid., para. 46.

¹¹⁰Ibid., para. 47.

¹¹¹Ibid., loc. cit.

¹¹²Communication No. 208/1986, *K. Singh Bhinder v. Canada* (Views adopted on 9 November 1989), in UN doc. GAOR, A/45/40 (II), p. 54, para. 6.2.

¹¹³Ibid., loc. cit.

6.4.3 Public funding of religious schools

The case of *A.H. Waldman v. Canada* concerned public funding of religious schools in the province of Ontario in Canada. Ontario Roman Catholic schools are the only non-secular schools to receive full and direct public funding, while the private Jewish school to which the author sent his two children received nothing, so that the author had to pay the entire tuition fee.¹¹⁴ The question arose whether the public funding of Roman Catholic schools, to the exclusion of schools of the author's religion, constituted a violation of article 26 of the Convention.

The Committee rejected the Government's argument that the distinction was based on objective and reasonable criteria because the privileged treatment of Roman Catholic schools was enshrined in the Constitution. The Committee noted that this distinction dated from 1867 and that there was nothing to show "that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools".¹¹⁵ It concluded "that the differences in treatment between Roman Catholic religious schools, which are publicly funded as a distinct part of the public education system, and schools of the authors' religion, which are private by necessity, cannot be considered reasonable and objective".¹¹⁶

Lastly, the Canadian Government submitted that the aims of its secular public education system were compatible with the principle of non-discrimination laid down in the Covenant, to which the Committee replied "that the proclaimed aims of the system do not justify the exclusive funding of Roman Catholic religious schools".¹¹⁷ It observed, furthermore, that "the Covenant does not oblige States parties to fund schools which are established on a religious basis. However, if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination. This means that providing funding for the schools of one religious group and not for another must be based on reasonable and objective criteria", which was not the case with regard to the author's school.¹¹⁸

6.4.4 Lack of public-law status for purposes of bringing court proceedings

The European Court of Human Rights concluded that article 14 taken together with article 6(1) of the European Convention of Human Rights had been violated in the case of *Canea Catholic Church v. Greece*. The Church in question had tried to bring legal proceedings against two persons living next to the cathedral of the Roman Catholic diocese of Crete who had demolished one of the walls surrounding the church. The purpose of the legal proceedings was to obtain a decision ordering the defendants

¹¹⁴Communication No. 694/1996, *A. H. Waldman v. Canada* (Views adopted on 3 November 1999), in UN doc. GAOR, A/55/40 (II), p. 87, para. 1.2.

¹¹⁵*Ibid.*, p. 97, paras. 10.3-10.4

¹¹⁶*Ibid.*, p. 97, para. 10.5.

¹¹⁷*Ibid.*, p. 97, para. 10.6.

¹¹⁸*Ibid.*, pp. 97-98, para. 10.6.

to cease the nuisance and to restore the previously existing situation.¹¹⁹ However, the Court of Cassation eventually ruled that the Church had no legal standing since it had failed to comply with the State's laws on the acquisition of legal personality.¹²⁰

Before the European Court the applicant Church “maintained that it was the victim of discrimination incompatible with [article 14], since the removal of its right to bring or defend legal proceedings was based exclusively on the criterion of religion”.¹²¹ For the Court it was sufficient to note that “the applicant church, which [owned] its land and buildings, [had] been prevented from taking legal proceedings to protect them, whereas the Orthodox Church or the Jewish community [could] do so in order to protect their own property without any formality or required procedure.” Article 14 taken in conjunction with article 6(1) of the Convention had been violated since the Government had submitted “no objective and reasonable justification for such a difference of treatment”.¹²²

6.5 Property

The case of *Chassagnou and Others v. France* considered by the European Court of Human Rights is a complex case concerning the use of property and hunting rights in France. In general, the applicants, who were all farmers and/or landholders living in France, maintained that, pursuant to French Law No. 64-696 of 1964, the so-called “Loi Verteille”, “they had been obliged, notwithstanding their opposition to hunting on ethical grounds, to transfer hunting rights over their land to approved municipal hunters’ associations, had been made automatic members of those associations and could not prevent hunting on their properties.” This violated, in their view, article 11 of the European Convention on Human Rights, article 1 of Protocol No. 1 thereto and 14 of the Convention “in that only the owners of landholdings exceeding a certain minimum area could escape the compulsory transfer of hunting rights over their land to an approved municipal hunters’ association, thus preventing hunting there and avoiding becoming members of such an association”.¹²³

For reasons that go beyond the scope of this chapter, the European Court first concluded that both article 1 of Protocol No. 1 and article 11 had been violated.¹²⁴ It also found that there had been a violation of article 1 of Protocol No. 1 taken in conjunction with article 14 of the Convention, concluding that “since the result of the difference in treatment between large and small landowners is to give only the former the right to use their land in accordance with their conscience, it constitutes discrimination on the ground of property, within the meaning of Article 14 of the Convention.”¹²⁵ Lastly, the Court found that there had been a violation of article 11 taken in conjunction with article 14, concluding that the Government had not put

¹¹⁹*Enr. Court HR, Case of Canea Catholic Church v. Greece, judgment of 16 December 1997, Reports 1997-V/III, pp. 2847-2848, paras. 6-8.*

¹²⁰*Ibid.*, pp. 2849-2850, para. 13.

¹²¹*Ibid.*, p. 2860, para. 44.

¹²²*Ibid.*, p. 2861, para. 47.

¹²³*Enr. Court HR, Case of Chassagnou and Others v. France, judgment of 29 April 1999, Reports 1999-III, p. 50, para. 66.*

¹²⁴*Ibid.*, pp. 57-58, para. 85 (on article 1 of Protocol No. 1: there was a disproportionate burden on small landowners), and p. 67, para. 117 (art. 11: compulsion to join an association “fundamentally contrary” to one’s convictions).

¹²⁵*Ibid.*, p. 60, para. 95.

forward “any objective and reasonable justification” for the difference in treatment, which obliged small landholders to become members of the municipal hunting associations but enabled large landholders to evade compulsory membership, “whether they exercise their exclusive right to hunt on their property or prefer, on account of their convictions, to use the land to establish a sanctuary or nature reserve”.¹²⁶

6.6 Birth or other status

6.6.1 Social security benefits for married/unmarried couples

The International Covenant on Civil and Political Rights does not require States parties to adopt social security legislation, but when they do so such legislation must comply with article 26 of the International Covenant on Civil and Political Rights and any distinctions made in the enjoyment of benefits “must be based on reasonable and objective criteria”.¹²⁷ In the case of *M. Th. Sprenger v. the Netherlands*, the author, who cohabited with a man without being married to him, complained that her right under article 26 had been violated since she was “denied co-insurance under the Health Insurance Act, which distinguished between married and unmarried couples, whereas other social security legislation already recognized the equality of status between common law and official marriages”.¹²⁸

The Committee pointed out, however, that “social developments occur within the States parties and the Committee has in this context taken note of recent legislation reflecting these developments, including the amendments to the Health Insurance Act”, which recognized the equality of common law and official marriages as of 1 January 1988.¹²⁹ The Committee also noted the explanation of the State party that there had been no general abolition of the distinction between married persons and cohabitants, and the reasons given for the continuation of this differential treatment. It found this differential treatment to be based on reasonable and objective grounds.¹³⁰ Lastly, the Committee observed that “the decision of a State’s legislature to amend a law does not imply that the law was necessarily incompatible with the Covenant; States parties are free to amend laws that are compatible with the Covenant, and to go beyond Covenant obligations in providing additional rights and benefits not required under the Covenant.”¹³¹

¹²⁶Ibid., p. 68, para. 121. The law created “a difference in treatment between persons in comparable situations, namely the owners of land or hunting rights, since those who own 20 hectares or more of land in a single block may object to the inclusion of their land in the [municipal hunters’ association’s] hunting grounds, thus avoiding compulsory membership of the association, whereas those who, like the applicants, possess less than 20 or 60 hectares of land may not”, p. 68, para. 120.

¹²⁷Communication No. 395/1990, *M. Th. Sprenger v. the Netherlands* (Views adopted on 31 March 1992), in UN doc. GAOR, A/47/40, p. 321, para. 7.2.

¹²⁸Ibid., p. 320, para. 3.

¹²⁹Ibid., p. 322, para. 7.4, read in conjunction with p. 320, para. 2.5.

¹³⁰Ibid., p. 322, para. 7.4.

¹³¹Ibid., p. 322, para. 7.5.

6.6.2 Inheritance rights

The case of *Mazurek v. France* concerned the provisions in French law limiting the applicant's inheritance rights over his mother's estate compared with those of his half-brother. According to the law, children born out of wedlock were entitled to receive only "half of the share to which they would have been entitled if all the children of the deceased, including themselves, had been legitimate" (art. 760 of the Civil Code).¹³² The applicant was an adulterine child, while his brother, who was born out of wedlock, had been legitimized through his mother's marriage.

The Court examined the case in the light of an alleged infringement of the applicant's right to peaceful enjoyment of his possessions under article 1 of Protocol No. 1 to the European Convention on Human Rights, in conjunction with the principle of non-discrimination contained in article 14. Article 1 of Protocol No. 1 was relevant, since their deceased mother's estate was the joint property of the half-brothers.¹³³

In examining whether this difference in treatment was discriminatory, the Court emphasized that "the Convention is a living instrument which must be interpreted in the light of present-day conditions" and that "today the member States of the Council of Europe attach great importance to the question of equality between children born in and children born out of wedlock as regards their civil rights."¹³⁴ "Very weighty reasons would accordingly have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention."¹³⁵

Although the Court accepted as legitimate the Government's argument that the French law was aimed at protecting the traditional family, the question remained "whether, regarding the means employed, the establishment of a difference of treatment between adulterine children and children born in wedlock or out of wedlock but not of an adulterous relationship, with regard to inheritance under their parent, appears proportionate and appropriate in relation to the aim pursued".¹³⁶

The Court then pointed out "that the institution of the family is not fixed, be it historically, sociologically or even legally" and referred to the legal development both in France and at the universal level favouring increased equality between children of different descent. Contrary to the assertion of the French Government, the Court also noted with regard to the situation in other member States of the Council of Europe, that there was "a distinct tendency in favour of eradicating discrimination against adulterine children. It [could] not ignore such a tendency in its – necessarily dynamic – interpretation of the relevant provisions of the Convention".¹³⁷ The Court therefore concluded that there was no ground in the instant case on which to justify discrimination based on birth out of wedlock. In any event, "an adulterine child cannot be blamed for circumstances for which he or she is not responsible. It [was] an

¹³²*Eur. Court HR, Case of Mazurek v. France, judgment of 1 February 2000*, paras. 17 and 23 of the text of the decision as published at the Court's web site: <http://www.echr.coe.int/>

¹³³*Ibid.*, paras. 41-43.

¹³⁴*Ibid.*, para. 49.

¹³⁵*Ibid.*, loc. cit.

¹³⁶*Ibid.*, paras. 50-51.

¹³⁷*Ibid.*, para. 52.

inescapable finding that the applicant was penalised, on account of his status as an adulterine child, in the division of the assets of the estate”.¹³⁸ It followed “that there was not a reasonable relationship of proportionality between the means employed and the aim pursued” and article 14 of the Convention read in conjunction with article 1 of Protocol No. 1 to the Convention had therefore been violated.¹³⁹

In the case of *Marckx v. Belgium*, the European Court of Human Rights also found, among several other violations, a violation of article 14 of the Convention read in conjunction with the right to respect for family life as guaranteed by article 8 insofar as there was a difference of treatment in Belgian law between “illegitimate” and “legitimate” children with regard to inheritance rights.¹⁴⁰ The second applicant, Alexandra, had enjoyed only limited rights to receive property from her biological mother prior to her adoption by the latter and had at no time, either before or after her adoption, had any entitlement on intestacy in the estates of members of her mother’s family.¹⁴¹ The Court concluded that such differences in treatment lacked “objective and reasonable justifications”. There had thus been a violation of article 14 in conjunction with article 8 of the Convention.¹⁴²

The limited capacity of Alexandra’s mother, Paula, to make dispositions in her daughter’s favour from the date of her recognition of her daughter until her adoption also constituted a violation of Paula’s right not to be subjected to discrimination. In the view of the European Court, the distinction made in this respect between unmarried and married mothers lacked “objective and reasonable justification” and was therefore contrary to article 14 read in conjunction with article 8 of the Convention.¹⁴³ The limitation on the right of an unmarried mother, as compared with a married mother, to make gifts and legacies in favour of her child was also in breach of article 14 taken in conjunction with article 1 of Protocol No. 1 to the Convention, according to which everyone has the right to the peaceful enjoyment of his or her possessions.¹⁴⁴

6.6.3. Conditions of birth or descent for presidential candidates

In the case brought by the *Legal Resources Foundation* against Zambia, the African Commission on Human and Peoples’ Rights had to consider the Amendment Act 1996 to the Zambian Constitution, according to which anyone who wished to contest the office of President of the country had to prove that both parents were Zambian citizens by birth or decent. It was alleged that the amendment would disenfranchise about 35 per cent of the Zambian electorate from standing as presidential candidates.¹⁴⁵

¹³⁸Ibid., para. 54.

¹³⁹Ibid., para. 55.

¹⁴⁰ECHR, *Marckx Case v. Belgium*, judgment of 13 June 1979, Series A, No. 31, p. 22, para. 48.

¹⁴¹Ibid., pp. 24-25, paras. 55-56.

¹⁴²Ibid., loc. cit. and p. 26, para. 59.

¹⁴³Ibid., pp. 26-27, paras. 60-62.

¹⁴⁴Ibid., pp. 27-28, paras. 63-65.

¹⁴⁵ACHPR, *Legal Resources Foundation v. Zambia*, Communication No. 211/98, decision adopted during the 29th Ordinary session, 23 April–7 May 2001, para. 52 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/211-98.html>

The African Commission pointed out that article 2 of the Charter “abjures discrimination on the basis of any of the grounds set out, among them ‘language ... national and social origin ... birth or other status’. The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens.”¹⁴⁶ In the Commission’s view, the right to equality is also important because it affects the capacity to enjoy other rights. For example, a person who is at a disadvantage because of his or her place of birth or social origin “may vote for others but has limitations when it comes to standing for office. In other words, the country may be deprived of the leadership and resourcefulness such a person may bring to national life.” The Commission noted in this regard “that in a growing number of African States, these forms of discrimination have caused violence and social and economic instability which has benefited no one”.¹⁴⁷

The Commission examined this complaint closely not only under article 2 of the Charter but also under article 13 concerning the right of every citizen “to participate freely in the government of his country, either directly or through freely chosen representatives”. Looking at the history of Zambia, it concluded that rights that had been enjoyed for 30 years could not be “lightly taken away”, and the retrospective application of the impugned measure could not be justified under the African Charter. “The pain in such an instance is caused not just to the citizen who suffers discrimination by reason of place of origin” but the right of the citizens of Zambia to freely choose their political representatives is violated.¹⁴⁸ Articles 2 and 13 of the Charter as well as the right to equality before the law as guaranteed by article 3(1) had therefore been violated.

6.7 National origin

The case of *Gueye et al v. France* was brought by 743 retired Senegalese members of the French Army who claimed that France had violated article 26 of the International Covenant on Civil and Political Rights because its law provided for “different treatment in the determination of pensions of retired soldiers of Senegalese nationality who served in the French Army prior to the independence of Senegal in 1960” in that they received pensions that were “inferior to those enjoyed by retired French soldiers of French nationality”. In the authors’ view, this constituted racial discrimination.¹⁴⁹

While the Committee found no evidence to support the allegation of racial discrimination, it still had to determine whether the situation complained of fell within the purview of article 26 on any other ground.¹⁵⁰ Notwithstanding the fact that “nationality” as such does not figure among the prohibited grounds of discrimination enumerated in article 26 of the Covenant, the Committee accepted that a

¹⁴⁶Ibid., para. 63.

¹⁴⁷Ibid., loc. cit.

¹⁴⁸Ibid., paras. 71 and 72.

¹⁴⁹Communication No. 196/1985, *I. Gueye et al. v. France* (Views adopted on 3 April 1989), in UN doc. GAOR, A/44/40, p. 189, paras. 1.1-1.2.

¹⁵⁰Ibid., pp. 193-195, para. 9.4.

differentiation based on nationality had been made upon the independence of Senegal and that this was an issue that fell within the reference to “other status”. It therefore had to determine whether the differentiation was based on reasonable and objective criteria.¹⁵¹

In so doing, the Committee noted that “it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past ... A subsequent change in nationality [could] not by itself be considered as a sufficient justification for different treatment, since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided.”¹⁵² Considering that there were no other legitimate grounds to justify differential treatment, the Committee concluded that the difference was “not based on reasonable and objective criteria” and therefore constituted discrimination prohibited by article 26.¹⁵³

In a case concerning the expulsion of West Africans from Angola, the African Commission on Human and Peoples’ Rights pointed out that article 2 of the African Charter on Human and Peoples’ Rights requires States parties to ensure that persons living in their territory enjoy the rights guaranteed in the Charter regardless of whether they are nationals or non-nationals. In the case before the Commission, the expelled persons’ right to equality before the law under article 2 of the Charter had been violated because of their “origin”.¹⁵⁴

6.8 Sexual orientation

The right not to be discriminated against on the basis of one’s sexual orientation is not expressly covered by the legal provisions considered in this chapter. However, the grounds enumerated in, for instance, article 26 of the International Covenant on Civil and Political Rights, article 2 of the African Charter on Human and Peoples’ Rights and article 14 of the European Convention on Human Rights are not exhaustive. As is clear from the words “such as” in all these articles, the lists are illustrative only, a fact that was emphasized by the European Court of Human Rights in the case of *Salgueiro da Silva Mouta v. Portugal* with regard to article 14 of the European Convention, in which it ruled that a person’s “sexual orientation” is a concept which is undoubtedly covered by that article.¹⁵⁵

In this case, the applicant complained that the Lisbon Court of Appeal had based its decision to award parental responsibility for their daughter to his former wife rather than to himself exclusively on the ground of his sexual orientation. The court of first instance, the Lisbon Family Affairs Court, had earlier granted parental

¹⁵¹Ibid., p. 194, para. 9.4.

¹⁵²Ibid., p. 194, para. 9.5.

¹⁵³Ibid., loc. cit.

¹⁵⁴ACHPR, *Union Inter-Africaine des Droits de l’Homme et al v. Angola*, Communication No. 159/96, decision adopted on 11 November 1997, para. 18 of the text of the decision as published at the following web site: <http://www1.umn.edu/humanrts/africa/comcases/159-96.html>; this case also involved a violation of article 7(1)(a) of the Charter, since the expelled persons had no opportunity to challenge their expulsion before the competent legal authorities, paras. 19-20.

¹⁵⁵See, for example, *Eur. Court HR, Case of Salgueiro da Silva Mouta v. Portugal*, judgment of 21 December 1999, Reports 1999-IX, p. 327, para. 28.

responsibility to the applicant.¹⁵⁶ The latter considered that his right to respect for his family life had been violated and that he had been discriminated against contrary to article 14 of the Convention.

In examining the alleged violation of article 8 taken in conjunction with article 14, the European Court accepted “that the Lisbon Court of Appeal had regard above all to the child’s interests when it examined a number of points of fact and of law which could have tipped the scales in favour of one parent rather than the other”. However, in reversing the decision of the lower Court, “the Court of Appeal introduced a new factor, namely that the applicant was a homosexual and was living with another man”.¹⁵⁷

The European Court was “accordingly forced to conclude” that there was a difference of treatment between the applicant and his ex-wife that was based on the applicant’s sexual orientation. It therefore had to consider whether this difference in treatment had an objective and reasonable justification, i.e. (1) whether it pursued a “legitimate aim” and, if so, (2) whether there was “a reasonable relationship of proportionality between the means employed and the aim sought to be realised”.¹⁵⁸

The Court concluded that the aim “undeniably pursued” by the decision of the Lisbon Court of Appeal was legitimate, in that it was for the protection of the health and rights of the child.¹⁵⁹ But was it reasonably proportionate to this aim? The Court concluded that it was not.¹⁶⁰ It took the view that the relevant passages from the judgment of the Lisbon Court of Appeal “were not merely clumsy or unfortunate ... or mere *obiter dicta*”. They suggested, quite to the contrary, “that the applicant’s homosexuality was a factor which was decisive in the final decision”. Such a distinction based on considerations regarding the applicant’s sexual orientation was “not acceptable under the Convention”.¹⁶¹ It followed that there had been a violation of article 8 of the European Convention taken in conjunction with article 14.¹⁶²

6.9 Minorities

6.9.1 Right to one’s own culture

The Human Rights Committee has established that article 27 of the International Covenant on Civil and Political Rights “requires that a member of a minority shall not be denied the right to enjoy his culture”. Thus, “measures whose impact amounts to a denial of the right are incompatible with the obligations under article 27”. However, “measures that have a certain limited impact on the way of life and the livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.”¹⁶³

¹⁵⁶Ibid., pp. 324-325, paras. 21-22.

¹⁵⁷Ibid., p. 327, para. 28.

¹⁵⁸Ibid., p. 327, paras. 28-29.

¹⁵⁹Ibid., p. 327, para. 30.

¹⁶⁰Ibid., p. 328, para. 36.

¹⁶¹Ibid., p. 328, paras. 35-36.

¹⁶²Ibid., p. 329, para. 36.

¹⁶³Communication No. 671/1995, *J. E. Lämsman et al. v. Finland* (Views adopted on 30 October 1996), in UN doc. GAOR, A/52/40 (II), p. 203, para. 10.3.

The rights of minorities to their own culture was at issue in the case of *Länsman et al v. Finland*, which was submitted by reindeer breeders of Sami ethnic origin who complained about the decision to carry out logging in an area covering about 3,000 hectares situated within their rightful winter herding lands. In their view, this decision violated their rights under article 27 of the Covenant. The “crucial question” that the Committee had to decide was whether the logging that had already been carried out, as well as such logging as had been approved for the future, was “of such proportions as to deny the authors the right to enjoy their culture” as guaranteed by article 27.¹⁶⁴ The Committee recalled in this regard the terms of paragraph 7 of its General Comment on article 27, “according to which minorities or indigenous groups have a right to the protection of traditional activities such as hunting, fishing or reindeer husbandry, and that measures must be taken ‘to ensure the effective participation of members of minority communities in decisions which affect them’”.¹⁶⁵

However, after “careful consideration” of the case, the Committee was unable to conclude “that the activities carried out as well as approved [constituted] a denial of the authors’ right to enjoy their own culture”. It was uncontested that the Herdsmen’s Committee, to which the authors belonged, had been consulted in the process of the drawing up of the logging plans and had not disavowed them. Furthermore, the domestic courts had considered whether the proposed logging would constitute a violation of article 27 of the Covenant, and there was nothing to suggest that those courts had “misinterpreted and/or misapplied” the article.¹⁶⁶

The Committee added, however, that if logging were to be approved on a wider scale or if it could be shown that the effects of the planned logging were more serious than foreseen, “then it may have to be considered whether it would constitute a violation of the authors’ right to enjoy their own culture within the meaning of article 27.”¹⁶⁷

6.9.2 Right to reside in an Indian reserve

One of the early cases decided by the Human Rights Committee was that of *Lovelace v. Canada*, brought by a woman who was born and registered as a Maliseet Indian but who, in accordance with the Canadian Indian Act, had lost her rights and status as an Indian after marrying a non-Indian. As a man who married a non-Indian woman did not lose his Indian status, the author claimed that the Indian Act was discriminatory and violated, inter alia, articles 26 and 27 of the Covenant.¹⁶⁸ Even after her divorce, the author was not allowed to move back to her tribe.

¹⁶⁴Ibid., p. 203, para. 10.4.

¹⁶⁵Ibid., loc. cit. The relevant paragraph of General Comment No. 23 actually reads as follows: “With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them”, *United Nations Compilation of General Comments*, p. 149, footnote omitted.

¹⁶⁶Communication No. 671/1995, *J. E. Länsman et al.*, in UN doc. *GAOR*, A/52/40 (II), p. 203-4, para. 10.5.

¹⁶⁷Ibid., p. 204, para. 10.7.

¹⁶⁸Communication No. R.6/24, *S. Lovelace v. Canada* (Views adopted on 30 July 1981), in UN doc. *GAOR*, A/36/40, p. 166, para. 1.

Although the Committee was not competent to examine the original cause of the author's loss of Indian status in 1970, since the Covenant only entered into effect with regard to Canada on 19 August 1976, it could consider the *continuing effects* of that cause and examine their consistency with the terms of the Covenant.¹⁶⁹ The Committee actually considered the communication exclusively in the light of article 27, the relevant question being whether the author, because she was “denied the legal right to reside on the Tobique Reserve, [had] by that fact been denied the right guaranteed by article 27 to persons belonging to minorities, to enjoy their own culture and to use their own language in community with other members of their group.”¹⁷⁰

Considering the case in the light of the fact that the author's marriage to a non-Indian had broken up, the Committee concluded that she had been denied the legal right to reside on the Tobique Reserve contrary to article 27 of the Covenant.¹⁷¹

Although article 27 does not guarantee as such the right to live on a reserve, the Committee held that

“statutory restrictions affecting the right to residence on a reserve of a person belonging to the minority concerned, must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant, read as a whole. Article 27 must be construed and applied in the light of the other provisions ... such as articles 12, 17 and 23 in so far as they may be relevant to the particular case, and also the provisions against discrimination, such as articles 2, 3 and 26, as the case may be.”¹⁷²

It did not seem to the Committee “that to deny Sandra Lovelace the right to reside on the reserve [was] reasonable, or necessary to preserve the identity of the tribe. The Committee therefore [concluded] that to prevent her recognition as belonging to the band [was] an unjustifiable denial of her rights under article 27 ... read in the context of the other provisions referred to.”¹⁷³

7. Concluding Remarks

This chapter has undertaken a general survey of major legal provisions at the universal and regional levels that deal with the widespread and multidimensional phenomenon of discrimination. It has also provided examples from international case law of the varied situations that may – or may not – amount to unjustified differentiation, that is to say discrimination. Discriminatory incidents or practices always affect the victim or victims in a particularly negative way because they constitute more often than not a denial of their distinctive human characteristics and thus negate

¹⁶⁹Ibid., p. 172, paras. 10-11.

¹⁷⁰Ibid., p. 173, para. 13.2.

¹⁷¹Ibid., p. 174, paras. 17 and 19.

¹⁷²Ibid., pp. 173-174, paras. 15-16.

¹⁷³Ibid., p. 174, para. 17. For the response of the Government of Canada, dated 6 June 1983, to the Views adopted by the Committee in the *Lovelace* case, see UN doc. *GAOR*, A/38/40, pp. 249-253.

their intrinsic right to be different among human beings who all have equal value, independently of the colour of their skin or of their origin, gender, religion and so forth.

This chapter has shown that international legal provisions guaranteeing the right to equality and non-discrimination are plentiful. Thus, if discriminatory practices persist around the world, it is not for the lack of legal rules but rather for lack of implementation of these rules in the everyday life of our societies. Inevitably, this failure to implement some of the most fundamental principles of international human rights law at the domestic level also has a negative impact on both internal and international peace and security.

Domestic judges, prosecutors and lawyers have a professional duty to turn existing domestic legal provisions on the right to equality and non-discrimination into truly effective legal concepts and, whenever they are competent to do so, they must also apply, or at least be guided by, international legal rules on these matters. If this were done consistently and effectively, there would be a genuine possibility of slowly turning the world into a friendlier place for all.

.....Chapter 14
**THE ROLE OF THE
COURTS IN PROTECTING
ECONOMIC, SOCIAL AND
CULTURAL RIGHTS**

Learning Objectives

- *To familiarize the participants with the main international legal instruments protecting economic, social and cultural rights*
- *To explain to the participants the intrinsic relationship between economic, social and cultural rights, on the one hand, and civil and political rights, on the other*
- *To acquaint the participants with the nature of States parties' legal obligations with respect to the enforcement of economic, social and cultural rights*
- *To inform the participants of the content of some economic, social and cultural rights*
- *To discuss with the participants the question of justiciability of economic, social and cultural rights*
- *To familiarize the participants with the important role of domestic courts in protecting economic, social and cultural rights*
- *To increase the participants' awareness of their potential as judges and lawyers to contribute to the enforcement of economic, social and cultural rights at the domestic level*

Questions

- *How are economic, social and cultural rights protected and enforced in the country in which you work?*
- *What role do the courts play in the enforcement of these rights?*
- *What mechanisms other than the courts exist in your country for the promotion and/or enforcement of economic, social and cultural rights?*
- *What aspects of economic, social and cultural rights are particularly relevant in the country in which you work?*

Questions (cont.d)

- *Are there any vulnerable groups that are in particular need of legal protection in the field of economic, social and cultural rights?*
- *If so, who are they and in what sense do they need special protection?*
- *How, if at all, is this protection provided? Is it efficient?*
- *How would you envisage a remedy at the domestic level for efficiently protecting a person's economic, social and cultural rights?*

Relevant Legal Instruments

Universal Instruments

- International Covenant on Economic, Social and Cultural Rights, 1966
- Universal Declaration of Human Rights, 1948

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988
- European Social Charter, 1961, and European Social Charter (Revised), 1996

1. Introduction

The principal aim of this chapter is to describe the important role played by international monitoring bodies and domestic courts in contributing to the protection of economic, social and cultural rights at the national level.

The chapter will begin, however, by explaining in general terms why the original single human rights covenant was ultimately split into two covenants, one guaranteeing civil and political rights and the other protecting economic, social and cultural rights. It will then briefly describe the intrinsic relationship between these two categories of rights, which depend on each other for their mutual and effective realization. Thirdly, the chapter will undertake a survey of the economic, social and cultural rights guaranteed by the universal and regional human rights treaties and analyse the legal obligations of States to protect these rights. Fourthly, it will discuss the legal nature of economic, social and cultural rights, including their justiciability. This will be followed by an examination of the interpretation by the international monitoring bodies of the right to adequate housing and the right to health. In this connection, reference will be made to examples from domestic case law which show that courts are increasingly called upon to adjudicate questions appertaining to the field of economic, social and cultural rights. The chapter will conclude with a description of the important role played by the legal professions in ensuring the effective protection of these rights.

It should be noted that, notwithstanding their fundamental importance, this chapter will not deal with the many conventions and recommendations adopted within the framework of the International Labour Organization, which provide extensive protection of workers' rights. However, a list of some major ILO Conventions is contained in **Handout No. 1**.

2. History Revisited: Why are there Two International Covenants on Human Rights?

2.1 A chronological overview

The hard lessons learnt from the Second World War are reflected in the Charter of the United Nations, which emphasizes that international peace and stability are conditional upon the promotion of

- ❖ “higher standards of living, full employment, and conditions of economic and social progress and development” (Art. 55(a));

- ❖ “solutions of international economic, social, health, and related problems; and international cultural and educational co-operation” (Art. 55(b)); and
- ❖ “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” (art. 55(c)).

It is logical that this awareness of the need to satisfy all major dimensions of the human person also came to be reflected in the 1948 Universal Declaration of Human Rights, which not only includes the more traditional civil and political rights but also a number of economic, social and cultural rights such as the right to work, the right to social security, the right to an adequate standard of living and the right to education (arts. 22-27).

The goal pursued in drafting an international covenant on human rights was to translate the rather generally worded rights contained in the Universal Declaration into more detailed and legally binding undertakings. The Commission on Human Rights swiftly set about drafting the civil and political rights to be contained in the covenant, and at its fifth session in 1949 adopted, by 12 votes to none, but with 3 abstentions, a resolution in which it stated the view that it was necessary also to include provisions on the enjoyment of economic and social rights in the covenant.¹ However, following the debate at its sixth session in 1950, the Commission reversed its view and decided, by 13 votes to 2, **not** to include economic, social and cultural rights in the first covenant, which was to be limited to civil and political rights. This covenant was to be “the first of the series of covenants and measures to be adopted in order to cover the whole of the Universal Declaration”.² It had now clearly dawned on the Commission, which was under considerable pressure to show the peoples of the world that it could produce tangible results, that it would be extremely difficult to draw up a legally binding document that also covered the complex spectrum of economic, social and cultural rights within a short time.

During the fifth session of the General Assembly in 1950, the question of whether one or two covenants should be elaborated was discussed in the Third Committee. A majority was in favour of including the two categories of rights in one and the same covenant.³ On the recommendation of the Third Committee, the General Assembly adopted resolution 421(V) in which it declared that “the Covenant should be drawn up in the spirit and based on the principles of the Universal Declaration of Human Rights [which] regards man as a person, to whom civic and political freedoms as well as economic, social and cultural rights indubitably belong”. It added that “the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent” and that “when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man”. For all these reasons, the General Assembly decided to include economic, social and cultural rights in the covenant on human rights as well as an explicit recognition of the equality of men and women in related rights. It therefore called on the Economic and Social Council “to request the

¹UN doc. E/1371 (E/CN.4/350), Report of the fifth session of the Commission on Human Rights, 1949, p. 15. The vote was 12 to none, with 3 abstentions.

²For the discussion in the Commission of Human Rights at its sixth session of the question of the inclusion of economic, social and cultural rights in the covenant, see UN docs. E/CN.4/SR.181 and 184-187; for the vote see UN doc. E/CN.4/SR.186, p. 21.

³See, for example, *GAOR, fifth session, 1950, Third Committee*, docs. A/C.3/SR.297-299 and 313.

Commission on Human Rights, in accordance with the spirit of the Universal Declaration, to include in the draft Covenant a clear expression of economic, social and cultural rights in a manner which relates them to the civic and political freedoms proclaimed by the draft covenant”. Resolution 421 (V) as a whole was adopted by 38 votes to 7, with 12 abstentions, and section (E) thereof, which contained the ruling on economic, social and cultural rights, was adopted by 35 votes to 9, with 7 abstentions.⁴ There was, in other words, at the time a large majority in favour of drafting just one legal instrument embracing civil, political, economic, social and cultural rights.

In response to the request by the General Assembly, the Economic and Social Council decided by resolution 349 (XII) to ask the Commission on Human Rights to prepare “a revised draft Covenant on the lines indicated by the General Assembly”.

At its seventh session in 1951, despite the General Assembly resolution, the Commission started its work by extensively debating the question whether or not to introduce economic, social and cultural rights into the covenant, which already contained eighteen articles on civil and political rights.⁵ It eventually proceeded with the drafting of a single covenant, adding to the already existing civil and political rights a number of economic, social and cultural rights.⁶ However, the debate in the Commission shows that the answer to why there are two covenants rather than only one is more complex than is sometimes believed.

After considering the Commission’s report, the Economic and Social Council, in view of “the difficulties which may flow from embodying in one covenant two different kinds of rights and obligations”, invited the General Assembly “to reconsider its decision in resolution 421 E (V) to include in one covenant articles on economic, social and cultural rights, together with articles on civic and political rights” (ECOSOC resolution 384 C (XIII)).

During its sixth session, after a very long and, in political terms, increasingly polarized discussion that was tainted by profound distrust between, in particular, the Socialist countries and some of the Western States, the General Assembly requested the Economic and Social Council “to ask the Commission on Human Rights to draft two Covenants on Human Rights, to be submitted simultaneously for the consideration of the General Assembly at its seventh session, one to contain civil and political rights and the other to contain economic, social and cultural rights”. The covenants were to be approved by the General Assembly at the same time “in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights” (General Assembly resolution 543(VI)). The Commission therefore proceeded at its eighth session in 1952 with the drafting of two covenants.

⁴GAOR, *fifth session, 1950, Plenary Meetings*, doc. A/PV.317, p. 564, paras. 170 and 162.

⁵For details of the discussion, see in particular UN docs. E/CN.4/SR.203-208, 237 and 248.

⁶See UN doc. E/1992 (E/CN.4/640), Report of the seventh session of the Commission on Human Rights, 1951, Annexes, pp. 57-85.

2.2 The substance of the debates

It should be noted at the outset that neither the importance of economic, social and cultural rights nor their intrinsic relationship with civil and political rights was challenged by the speakers. However, once the Commission began work on the drafting of the covenant, it soon became apparent that the very nature of economic, social and cultural rights made it impossible to discuss their substance without also discussing their implementation and hence whether they should be included in the same covenant as civil or political rights or in a separate treaty.

2.2.1 Principal arguments in favour of one covenant

The most important argument advanced by the countries that favoured a single covenant was *the need for unity of rights*, since civil and political rights and economic, social and cultural rights formed an indivisible whole. Some countries believed that two covenants would weaken the moral authority of the Universal Declaration, which reflected the interdependence of rights.⁷ These countries considered in general that the distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, was artificial and that the former would have no meaning or value without the latter.⁸ Several of them thought that the question of whether one or two covenants should be drafted had been closed by General Assembly resolution 421(V) and should not be reopened.⁹ It was further argued that “all those countries who opposed a single covenant automatically rejected the fundamental unity of economic, social and cultural rights with civil and political rights”¹⁰ and that “a few States, including Canada, France, the United Kingdom and the United States of America [placed] their national interest above every other consideration [and] were trying to segregate the economic, social and cultural rights.”¹¹ Some countries also feared that the suggestion that the two covenants should be adopted and opened for ratification simultaneously would cause considerable delay in ratification. The idea was rejected by the USSR as nothing but “an attempt to shelve economic, social and cultural rights”. In its view, the United States and the United Kingdom were “again resorting to the sabotage and delaying manoeuvres to which they had had recourse in the case of the Universal Declaration of Human Rights”.¹²

⁷In this connection see, for example, *GAOR, fifth session, 1950, Third Committee*, doc. A/C.3/SR.297, p. 174, paras. 35-41 (Poland); pp. 175-176, paras. 48-60 (USSR); doc. A/C.3/SR.298, p. 178, paras. 9-15 (Mexico); pp. 178-179, paras. 16-19 (Yugoslavia); p. 181, para. 49 (Iran); pp. 182-183, paras. 63-65 (Iraq); *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.360, p. 81, para. 44 (Mexico); doc. A/C.3/SR.366, p. 114, paras. 13-14 (Indonesia); doc. A/C.3/SR.366, p. 116, paras. 37-40 and doc. A/C.3/SR.393, p. 275, para. 46 (Cuba). For other countries favouring a single covenant, see, for example, *GAOR, fifth session, 1950, Third Committee*, doc. A/C.3/SR.299, p. 187, para. 27 (Saudi Arabia); p. 187, para. 31 (Czechoslovakia); p. 188, para. 40 (Argentina); p. 189, para. 53 (Syria).

⁸See, for example, UN doc. E/CN.4/203, p. 22 (Ukrainian SSR); *GAOR, fifth session, 1950, Third Committee*, doc. A/C.3/SR.297, p. 176, paras 69-72 (Chile); doc. A/C.3/SR.298, p. 178, para. 13 (Mexico); *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.362, p. 91, para. 23 (Iraq); doc. A/C.3/SR.368, p. 127, paras.1-2 (Byelorussian SSR); p. 130, paras. 30-31 (Poland); doc. A/C.3/SR.370, p. 135, para. 3, and doc. A/C.3/SR.395, p. 285, paras. 2-4 (USSR); doc. A/C.3/SR.393, p. 272, paras. 10-11 (Saudi Arabia).

⁹See, for example, *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.367, p. 123, para. 24 (Ukrainian SSR); doc. A/C.3/SR.368, p. 127, paras.1-2 (Byelorussian SSR); p. 130, para. 38 (Poland).

¹⁰*GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.365, p. 108, para. 8 (Yugoslavia);

¹¹*GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.368, p. 127, para. 1 (Byelorussian SSR).

¹²*GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.370, pp. 135-136, para. 6. On fears of delay in linking the two covenants, see also doc. A/C.3/SR.366, p. 118, para. 57 (Czechoslovakia) and doc. A/C.3/SR.393, p. 272, para. 16 (Syria).

Differences of view existed with regard to the implementation mechanism in a single covenant containing both civil and political and economic, social and cultural rights. While some wanted a uniform implementation mechanism,¹³ others wanted different implementation machinery for the two categories of rights.¹⁴ In the opinion of the USSR, however, “there was only one method of implementation which conformed with international law” and that was “the adoption by governments, in their territories, of all the legislative and other measures needed to guarantee peoples the enjoyment of all their rights”.¹⁵ With regard to the enforcement problem, the USSR also denied that “it would be easier to implement civil and political rights since legislative action was all that was needed” and cited examples in support of its opinion.¹⁶

2.2.2 Principal arguments in favour of two covenants

As noted above, the countries arguing for the elaboration of two covenants also emphasized the intrinsic relationship between the two categories of rights as well as the need for an international instrument that also guaranteed economic, social and cultural rights. In order to stress the equal value of these rights, they wanted the two covenants to be opened for signature simultaneously.¹⁷ However, some speakers warned against confusing “the unity of the rights themselves with uniform enforcement” because there was “a distinction between the unity of human rights in principle and their separation in practice”.¹⁸

Many of the countries favouring a separate covenant on economic, social and cultural rights¹⁹ considered that it would be better to finalize the covenant on civil and political rights since any attempt to draft a treaty covering all rights might entail a considerable delay.²⁰ However, the major argument in support of their opinion was *that*, because of their specific nature, economic, social and cultural rights were more difficult to define than civil and political rights, *that* it was more complex and time-consuming to enforce economic, social and cultural rights, *and that* a different mechanism was therefore needed for their implementation.²¹ According to Liberia, it

¹³GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.365, p. 108, para. 9 (Yugoslavia).

¹⁴GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.360, p. 79, para. 23 (Guatemala); doc. A/C.3/SR.393, p. 273, para. 30 (Philippines);

¹⁵GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.370, p. 135, para. 5.

¹⁶*Ibid.*, p. 135, para. 4.

¹⁷See, for example, GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.363, p. 98, para. 8 (Netherlands); see also the amendment submitted by Belgium, India, Lebanon and the United States in UN docs. A/C.3/L.184 and A/C.3/L.184/Rev.1, as well as the statement by Lebanon, in GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.370, pp. 138-139, paras. 35-37.

¹⁸GAOR, *sixth session 1951-1951, Third Committee*, doc. A/C.3/SR.394, pp. 280-281, para. 20 (Lebanon).

¹⁹For countries favouring two or even more covenants, see, for example, UN doc. E/CN.4/SR.205, pp. 8-9 (Denmark); GAOR, *fifth session, 1950, Third Committee*, doc. A/C.3/SR.297, p. 172, para. 17 (USA); p. 173, para. 29 (Netherlands); p. 174, para. 34 (United Kingdom); doc. A/C.3/SR.298, p. 180, paras. 39-40 (Venezuela); p. 182, para. 60 (Dominican Republic); doc. A/C.3/SR.299, p. 186, paras. 8-12 (India).

²⁰GAOR, *fifth session, 1950, Third Committee*, doc. A/C.3/SR.297, p. 172, para. 17 (United States); p. 174, para. 34 (United Kingdom); doc. A/C.3/SR.298, p. 182, para. 60 (Dominican Republic); doc. A/C.3/SR.299, p. 186, para. 10 (India); GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.362, p. 89, para. 3 (Denmark); p. 91, para. 32 (Canada); doc. A/C.3/SR.367, p. 123, para. 25 (Dominican Republic).

²¹See, for example, the proposal by Denmark, in UN doc. E/CN.4/SR.205, p. 9; see also, for example, the view of Australia on the need for a different form of implementation of economic, social and cultural rights in UN doc. E/CN.4/SR.203, p. 21 and GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.363, pp. 100-101, paras. 39-41. At an early stage, however, Australia was inclined to favour one covenant, see UN doc. E/CN.4/SR.203, p. 21. See also UN doc. E/CN.4/SR.248, p. 10 (United

would “be useless to attempt to include civil and political rights and economic, social and cultural rights in one instrument” because, in so doing, one would fail to take into account “the unequal degree of development of the various States composing the world community”.²²

Some countries submitted that, while appropriate legislative and administrative action would in principle be sufficient to protect civil and political rights, the protection of many economic, social and cultural rights depended, *inter alia*, on the financial resources and stage of development of each country and required social reforms, more or less long-term plans and possibly international cooperation.²³ It was also observed in this context that Governments generally have a much more active role to play in ensuring economic, social and cultural rights since they are responsible for the material well-being of their citizens, while they have a more passive role to fulfil with regard to the implementation of civil and political rights, which call for the restraining of governmental powers *vis-à-vis* the individual.²⁴

In explaining the greater difficulties involved in giving effect to economic and social rights and the resultant need for progressive implementation, the representative of France pointed out that it had taken his country “no less than forty years to evolve a more or less complete system of social security”²⁵ and that “the struggle against illiteracy, for instance, demanded the setting up of schools and the training of teachers, a task which in certain countries might require 20 to 25 years.”²⁶ In the view of France, ratification of the draft covenant would not be facilitated by ignoring the fact that the realization of economic, social and cultural rights always took time.²⁷ The United States also pointed out that rights such as medical care and access to education “depended very much on resources of finance, equipment and personnel, which were undoubtedly not available in sufficient measures in all countries”.²⁸

Some countries also rejected as untenable the argument that civil and political rights had no value in themselves, and Lebanon emphasized that these rights had an absolute character which the other rights did not, although they were complementary.²⁹

Kingdom); *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.360, p. 78, paras. 9-12 (United States); doc. A/C.3/SR.362, p. 89, para. 3 (Denmark); p. 91, paras. 27-31 (Canada); doc. A/C.3/SR.367, p. 121, paras. 3-5 (New Zealand). France considered that economic, social and cultural rights “were very different in character, and that a whole legislative and technical structure was required to translate them into practice”, see UN doc. E/CN.4/203, p. 10.

²²*GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.366, p. 115, para. 21.

²³In this connection see, for example, UN doc. E/CN.4/SR.205, p. 10 (Denmark); *GAOR, fifth session, 1950, Third Committee*, doc. A/C.3/SR.298, pp. 177-178, paras. 6-8 (France) (France had an “open mind” as to the number of covenants, “although at first sight it would appear that two parallel documents might be preferable”, para. 7); p. 98, para. 14 (France); *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.360, p. 78, paras. 9-13 (USA); doc. A/C.3/SR.362, p. 91, paras. 30-31 (Canada).

²⁴See, for example, UN doc. E/CN.4/SR.207, p. 10 (Denmark); *GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.367, p. 121, para. 3 (New Zealand). See also the statement by Venezuela to the effect that “the effective implementation of civil and political rights depended on the goodwill of the State and its subjects; whereas such goodwill was in itself inadequate for the implementation of economic, social and cultural rights”, p. 122, para. 12.

²⁵UN doc. E/CN.4/SR.237, p. 7.

²⁶UN doc. E/CN.4/SR.203, p. 11.

²⁷UN doc. E/CN.4/SR.237, p. 8.

²⁸UN doc. E/CN.4/SR.203, p. 15.

²⁹*GAOR, sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.370, p. 139, paras. 36-37.

2.2.3 Pleadings in favour of a practical solution

As underlined by some countries, there was an apparent need to find middle ground between a general enumeration of rights such as that already contained in the Universal Declaration of Human Rights and unduly detailed provisions that would prevent many countries from ratifying the covenant.³⁰ Uruguay advocated a realistic approach: “The principal matter of concern was that international protection should be extended immediately to the greatest possible number of human rights by the greatest possible number of States.”³¹ In a similar vein France warned against “the danger of undue delay in producing at least a first draft covenant, limited in scope though it might be”,³² and emphasized the need to ensure the universality of the Universal Declaration by having as many countries as possible ratify the provisions adopted.³³

Thus, throughout the debates, France adopted a practical approach, arguing that it would be “an unpardonable anachronism” not to adopt a covenant containing economic, social and cultural rights, whether jointly or separately with civil and political rights. It was a matter of finding the “right path”, which could only be done by “progressive efforts”.³⁴ The debate had shown that what was important was “the essential unity of all human rights, a unity which had inspired the Universal Declaration of Human Rights itself”. However, “that unity did not necessarily extend to technicalities [and] the question whether there should be one covenant or two was an essentially technical matter [because] two or more covenants on human rights could well be interlinked by a common underlying design.”³⁵ France also observed that “some of the partisans of unity *à outrance* had not perhaps altogether lived up to their principles,” as when they had “disdained” the inclusion of the right to freedom from arbitrary arrest in the covenant.³⁶ On the other hand, it also considered that the partisans of two covenants tended to exaggerate the differences between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, because “among the latter there were many susceptible of immediate implementation”.³⁷ It was important “not to be hypnotized by differences in the origin and development of various rights, and the only truly valid criterion was whether, and on what conditions, any given right could be implemented”.³⁸ The adoption of two covenants “was therefore permissible on grounds of convenience” in that it would “reduce the number of points of disagreement, and would enjoy greater support”.³⁹

It followed logically that for France “the problem of human rights was a single problem from the point of view of principle but a multiple problem from the point of view of the forms it assumed.” Hence, while speaking in favour of unity, France considered that “the most important problem was not the unity or duality of the

³⁰See, for example, UN docs. E/CN.4/SR.203, p. 20 (Australia); E/CN.4/SR.204, p. 10 (Sweden).

³¹GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.365, p. 110, para. 31.

³²GAOR, *fifth session, 1950, Third Committee*, doc. A/C.3/SR.304, p. 211, para. 8.

³³GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.363, p. 98, para. 12.

³⁴GAOR, *fifth session, 1950, Third Committee*, doc. A/C.3/SR.298, p. 177, paras. 1-2.

³⁵GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.371, p. 142, para. 14.

³⁶*Ibid.*, p. 142, para. 15.

³⁷*Ibid.*, loc. cit.

³⁸*Ibid.*

³⁹*Ibid.*, p. 142, para. 16.

covenant, but the implementation of the rights.”⁴⁰ One of the essential things to do in order to move forward was therefore to design “measures of implementation suited to the nature of each of the obligations assumed”.⁴¹

In view of “the different concepts of their nature and of the methods by which they should be implemented held by different countries, and of the fact that a longer period of time was often required to ensure their enjoyment,” France considered it necessary at an early stage to introduce a general clause that would provide for the progressive implementation of economic, social and cultural rights,⁴² a proposal criticized by Yugoslavia⁴³ but adopted, as amended, by the Commission.⁴⁴ Australia agreed that “the concept of progressive realization was of positive value and should be retained.” It further observed that “the idea expressed in the word ‘progressively’, which must be taken in conjunction with the words ‘full realization of the rights’, was not a static one [but] meant that certain rights would be applied immediately, others as soon as possible”, because, after all, “the immediate implementation of any right or measure such as, for instance, old age pensions, was a practical impossibility.”⁴⁵

2.2.4 The question of justiciability

During the debates at the seventh session of the United Nations Commission on Human Rights, India strongly favoured the drafting of two covenants, emphasizing that economic, social and cultural rights differed from civil and political rights “inasmuch as the former were not justiciable”. It saw no reason to include both categories in one and the same Covenant which would “lack equilibrium”. India therefore wanted the Commission to ask the Economic and Social Council to reconsider its decision to have all rights contained in one covenant.⁴⁶

Yugoslavia could not accept India’s view that “alleged violations of economic, social and cultural rights could not be brought into court”. In its view, “if governments were to assume definite obligations in respect of the observance of such rights, they would have to take legislative and other measures enabling an action to be brought in respect of their non-observance, the courts being empowered to provide redress.”⁴⁷ Guatemala also considered that it was “incorrect” to refer to economic, social and cultural rights as non-justiciable rights as had been done in the preamble to the Indian proposal, and that it “might even prove dangerous”.⁴⁸ The USSR considered this distinction to be “completely arbitrary”, adding that the assumption that civil and political rights but not economic, social and cultural rights could be defended by legal action “would not bear scrutiny, as in many countries certain civil and political rights,

⁴⁰ GAOR, sixth session, 1951-1952, Third Committee, doc. A/C.3/SR.395, p. 286, para. 7.

⁴¹ GAOR, sixth session, 1951-1952, Third Committee, doc. A/C.3/SR.363, p. 98, para. 12.

⁴² UN doc. E/CN.4/SR.237, p. 7.

⁴³ Ibid., p. 8.

⁴⁴ Ibid., p. 13; for the text of the French proposal see UN doc. E/CN.4/618.

⁴⁵ UN doc. E/CN.4/SR.237, p. 6.

⁴⁶ UN doc. E/CN.4/SR.248, p. 6.

⁴⁷ Ibid., p. 19.

⁴⁸ Ibid., p. 21.

such as, for instance, the right to vote, could not easily be defended by legal action initiated by the individual”.⁴⁹

India explained that by “justiciable rights” it meant “those rights for the violation of which governments could be sued”. Governments could not, however, be sued “for failing to carry out economic, social and cultural rights, since the responsible party might well, for example, be employers”.⁵⁰

The formal Indian proposal read as follows:⁵¹

“*The Commission on Human Rights,*

Considering that the economic, social and cultural rights though equally fundamental and therefore important, form a separate category of rights from that of the civil and political rights in that they are not justiciable rights;

Considering that the method of their implementation is, therefore, different;

Recommends to the Economic and Social Council that the decision to include the economic, social and cultural rights in the same covenant with the civil and political rights, be reconsidered.”

The Commission *rejected* this proposal by 12 votes to 5, with 1 abstention.⁵² The Commission thereby also rejected the view contained in the draft resolution that economic, social and cultural rights were not justiciable. Although the Commission did accept that economic, social and cultural rights required a different implementation procedure from civil and political rights, this opinion was thus not based on the justiciable or non-justiciable nature of economic, social and cultural rights per se but on the simple fact that their nature required in many instances considerable efforts by States who, possibly helped by international institutions, would have to engage actively in comprehensive, persistent and long-term planning for their fulfilment.

Warnings against overemphasis on the differences between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, were subsequently raised, in particular, by Israel and France in the General Assembly. Israel submitted that it was not only civil and political rights that could be ensured by legislative or administrative measures but also some economic, social and cultural rights. France for its part, as indicated above, considered that there were “many” among the latter that were “susceptible of immediate implementation”⁵³ and that many could also be justiciable.⁵⁴

⁴⁹Ibid., p. 13.

⁵⁰Ibid., p. 25.

⁵¹See UN doc. E/CN.4/619/Rev.1.

⁵²UN doc. E/CN.4/SR.248, p. 26. The following countries voted *in favour* of the resolution: Denmark, Greece, India, the United Kingdom and the United States of America; the following countries voted *against*: Chile, China, Egypt, France, Guatemala, Lebanon, Pakistan, Sweden, Ukrainian SSR, USSR, Uruguay and Yugoslavia; Australia *abstained*.

⁵³GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.360, p. 82, paras. 54-55 (Israel) and doc. A/C.3/SR.371, p. 142, para. 15 (France).

⁵⁴GAOR, *sixth session, 1951-1952, Third Committee*, doc. A/C.3/SR.390, p. 254, para. 30.

All civil, cultural, economic, political and social human rights are of equal value and dependent on each other for their mutual realization.

There are two International Covenants on Human Rights because of the more complex nature of economic, social and cultural rights which needed particularly careful drafting and mechanisms of implementation adjusted to their specific nature.

In view of the different levels of development of States, the Covenant had to provide for the possibility of progressive implementation, although this was never meant to imply that there were no immediate obligations.

The suggestion that economic, social and cultural rights are not justiciable was never accepted in the course of the elaboration of the International Covenant on Economic, Social and Cultural Rights.

3. Interdependence and Indivisibility of Human Rights

As made clear by the drafters of the two International Covenants on Human Rights, economic, social, and cultural rights, on the one hand, and civil and political rights, on the other, should not be conceived in opposition to each other but as intrinsically interdependent in ensuring that they are all fully respected. The importance of this basic tenet of international human rights law is consistently borne out in practice: in countries where there are obstacles to the enjoyment of civil and political rights, economic, social and cultural rights are less likely to flourish and, conversely, where economic, social and cultural rights fail to thrive, there is little scope for the full development of civil and political rights.

Although the terms “interdependence and indivisibility” of human rights are not explicitly contained in the Universal Declaration of Human Rights, the wording, structure and spirit of the Declaration as a whole confirm that the authors wished to give equal weight to these two categories of rights. They envisioned “a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want” (second preambular paragraph). As seen above, the General Assembly itself emphasized as early as in 1950 that economic, social and cultural rights and civil and political rights are “interconnected and interdependent”, a view subsequently confirmed in the third preambular paragraph of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. In the third preambular paragraph of the former, the States parties recognize

“that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”.

In the corresponding preambular paragraph of the International Covenant on Civil and Political Rights, the States parties recognize

“that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights”.

This intrinsic relationship between the two categories of rights has subsequently been stressed in a number of resolutions such as General Assembly resolution 41/128 of 4 December 1986 containing the Declaration on the Right to Development. Article 6 of the Declaration states this clearly:

- “1. All States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion.
2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.
3. States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.”

The Vienna Declaration and Programme of Action, which was adopted by consensus on 25 June 1993 by the World Conference on Human Rights, is an even more recent confirmation by the States Members of the United Nations of the bond that unites all human rights. In paragraph 5 of part I of the Vienna Declaration, the Member States recognize that:

“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.”

Given the emphasis that has been placed, since drafting work began in the 1940s on the International Bill of Human Rights, on the intrinsic relationship between economic, social and cultural rights and civil and political rights, it was quite logical for the Committee on Economic, Social and Cultural Rights to stress the importance of the following two general principles in the field of *human rights and technical cooperation activities*:

- ❖ The *first general principle* “is that the two sets of human rights are indivisible and interdependent. This means that efforts to promote one set of rights should also take full account of the other. United Nations agencies involved in the promotion of economic, social and cultural rights should [therefore] do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights.”⁵⁵
- ❖ “The *second principle of general relevance* is that development cooperation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of ‘development’ have subsequently been recognized as ill-conceived and even counter-productive in human rights terms.”⁵⁶ A deliberate effort must therefore be made to design development programmes in such a way that they do in fact enhance the human rights of individuals, including, for instance, their right to equality before the law and non-discrimination, legal issues on which domestic courts are particularly well qualified to adjudicate.

The inherent link between economic, social and cultural rights, on the one hand, and civil and political rights, on the other, is particularly apparent in relation to *the right to life*, which is guaranteed by article 6(1) of the International Covenant on Civil and Political Rights. This link has not escaped the Human Rights Committee, which has noted “that the right to life has been too often narrowly interpreted”.⁵⁷ In the Committee’s view:

“The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”⁵⁸

Bearing in mind this wide interpretation of the right to life, the Human Rights Committee has sometimes asked States parties, in connection with the consideration of their initial and/or periodic reports, what measures they have taken, for instance, to improve peoples’ health conditions and increase their life expectancy,⁵⁹ reduce the infant mortality rate and satisfy the population’s food needs,⁶⁰ or protect the population against epidemics.⁶¹ In considering the fourth periodic report of Mongolia in March 2000, the Human Rights Committee expressed concern about “the acute problem of maternal mortality, due in part to unsafe abortions, and the unavailability of family planning advice and facilities”.⁶² These issues could equally well have been considered

⁵⁵See the Committee’s General Comment No. 2 (International technical assistance measures (art. 22 of the Covenant)) in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, p. 16, para. 6 (hereinafter referred to as *United Nations Compilation of General Comments*)

⁵⁶*Ibid.*, p. 16, para. 7; emphasis added.

⁵⁷*Ibid.*, General Comment No. 6 (Article 6 – the right to life), p. 115, para. 5.

⁵⁸*Ibid.*, loc. cit.

⁵⁹With regard to the Gambia, UN doc. GAOR, A/39/40, pp. 61-62, para. 327.

⁶⁰With regard to Peru, UN doc. GAOR, A/38/40, p. 61, para. 264.

⁶¹With regard to Sri Lanka, UN doc. GAOR, A/39/40, p. 21, para. 105; Congo, GAOR, A/42/40, p. 61, para. 230; and Belgium, UN doc. GAOR, A/47/40, p.105, para. 408.

⁶²See UN doc. GAOR, A/55/40 (I), p. 50, para. 323(b).

under article 12 of the International Covenant on Economic, Social and Cultural Rights, which guarantees the right to enjoy “the highest attainable standard of physical and mental health”, a fact that testifies to the intrinsic link that exists between this right and “the inherent right to life” protected by article 6(1) of the International Covenant on Civil and Political Rights.

Trade union rights also illustrate the fundamental relationship between the two categories of rights. While article 22 of the International Covenant on Civil and Political Rights guarantees to everyone the general right to freedom of association, which includes “the right to form and join trade unions for the protection of his interests”, article 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights recognizes “the right of everyone to form trade unions and join the trade union of his choice”. Not to allow the formation of associations or trade unions of employers and employees would seriously undermine the right to freedom of association per se, a right which, as emphasized in the General Assembly during the drafting of article 22, is of fundamental importance in a democratic society.⁶³

The intrinsic link between trade union rights and civil rights has consistently been emphasized by the various organs of the International Labour Organization, especially its Committee of Experts on the Application of Conventions and Recommendations. For instance, in its 1994 General Survey on Freedom of Association and Collective Bargaining, the Committee pointed out that its experience showed “that the restriction of civil and political liberties is a major factor in violations of freedom of association”.⁶⁴ The chapter on trade union rights and civil liberties reached the following conclusion:

“43. The Committee considers that the guarantees set out in the international labour Conventions, in particular those relating to freedom of association, can only be effective if the civil and political rights enshrined in the Universal Declaration of Human Rights and other international instruments, notably the International Covenant on Civil and Political Rights, are genuinely recognized and protected. These intangible and universal principles ... should constitute the common ideal to which all peoples and all nations aspire.”⁶⁵

It is beyond dispute that, for the right to freedom of association to be effective, trade union members must, inter alia, enjoy full freedom of opinion, information, expression and movement, and be able to assemble freely to discuss issues relevant to their interests. They must furthermore enjoy protection against arbitrary arrest, and if a trade union member is nevertheless arrested for whatever reason, *he or she has a right to all due process guarantees described in Chapters 4 to 7, including the right to be treated humanely as set forth in Chapter 8 of this Manual.*

⁶³See, for example *GAOR, sixteenth session, 1961, Third Committee*, doc. A/C.3/SR.1087, p. 134, para. 16 (Sweden) and doc. A/C.3/SR.1088, p. 139, para. 7 (Italy). Italy referred here to “freedom of political association” which “completed the freedoms of opinion, expression and assembly”.

⁶⁴General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949, Report III (Part 4B), International Labour Conference, eighty-first session, Geneva, 1994, p. 13, para. 23.

⁶⁵*Ibid.*, p. 21, para. 43; italic omitted.

These are just two practical examples of the fundamental and complex relationship that exists between, on the one hand, economic, social and cultural rights, and, on the other, civil and political rights, which, in theory as well as in practical application, should not be regarded as two separate categories of rights competing for funds and attention *but rather as forming a whole set of legal rules for the protection of all dimensions of the human person, rules between which there is an ongoing dialectical relationship aimed at the achievement of justice, security and well-being of all.*

The evolution of international human rights law, including its interpretation by international monitoring bodies, has confirmed that essential links exist between civil and political rights and economic, social and cultural rights.

Governments have a fundamental legal duty simultaneously to proceed with the implementation of all these rights which are aimed at protecting the most fundamental dimensions of human life and the human person.

4. Universal and Regional Treaties for the Protection of Economic, Social and Cultural Rights: The Rights Guaranteed

This section contains a list of the principal economic, social and cultural rights guaranteed by the major universal and regional treaties. The treaties cover a wide range of rights, and it is well beyond the scope of this Manual to analyse them all. A strict selection has therefore been made of rights that will be subjected to more extensive analysis in sections **6 and 7**.

For details of the procedures for implementation of universal and regional treaties for the protection of economic, social and cultural rights, see Chapters 2 and 3 of this Manual.

4.1 The universal level

4.1.1 *International Covenant on Economic, Social and Cultural Rights, 1966*

The present section, which deals with the universal level, will focus on the International Covenant on Economic, Social and Cultural Rights, the enforcement of which is monitored by the Committee on Economic, Social and Cultural Rights on the basis of reports submitted by States parties. For further information regarding the

Committee's interpretation of the various provisions of the Covenant, see **Handout No. 2**, which contains a list of all General Comments adopted by the Committee up to 26 April 2001. As of 8 February 2002, the Covenant had 145 States parties. It guarantees, in particular, the following rights:

- ❖ the right to equality and non-discrimination in the enjoyment of rights – article 2(2) (non-discrimination in general) and article 3 (between men and women);
- ❖ the right to work, including the right to gain one's living by work freely chosen or accepted – article 6;
- ❖ the right to enjoy just and favourable conditions of work, including fair wages and equal remuneration for work of equal value without distinction of any kind; a decent living for workers and their families; safe and healthy working conditions; equal opportunity to be promoted; rest, leisure and reasonable limitation of working hours and periodic holidays with pay – article 7;
- ❖ the right to form trade unions and join the trade union of one's choice, including the right to establish national federations or confederations – article 8(1)(a) and (b);
- ❖ the right to strike – article 8(1)(d);
- ❖ the right to social security, including social insurance – article 9;
- ❖ the right to protection and assistance for the family; entry into marriage with free consent, maternity protection; protection and assistance for children and young persons – article 10(1)-(3);
- ❖ the right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions – article 11(1);
- ❖ the right to the highest attainable standard of physical and mental health – article 12;
- ❖ the right to education – article 13;
- ❖ the right to take part in cultural life, to enjoy the benefits of scientific progress and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author – article 15(1).

4.2 The regional level

4.2.1 African Charter on Human and Peoples' Rights, 1981

At the regional level, the African Charter on Human and Peoples' Rights provides protection not only for the economic, social and cultural rights of individuals but also for those of peoples (see article 22 of the Charter). However, the following list relates only to the rights of individuals, which include:

- ❖ the right to non-discrimination in the enjoyment of the rights protected by the Charter – article 2;
- ❖ the right to freedom of association – article 10;
- ❖ the right to work under equitable and satisfactory conditions; the right to receive equal pay for equal work – article 15;
- ❖ the right to enjoy the best attainable state of physical and mental health – article 16;
- ❖ the right to education – article 17(1);

- ❖ the right freely to take part in the cultural life of one's community – article 17(2);
- ❖ the right of the aged and disabled to special measures of protection in keeping with their physical or moral needs – article 18(4).

Other provisions contained in article 18 of the Charter are not framed as rights but as duties of States, for example their obligation to take care of the physical and moral health of the family (art. 18(1)), to assist the family (art. 18(2)) and to ensure the elimination of discrimination against women and protection of the rights of the woman and the child as stipulated in international declarations and conventions (art. 18(3)).

4.2.2 American Convention on Human Rights, 1969, including the Additional Protocol in the Area of Economic, Social and Cultural Rights, 1988

In the Americas, civil, cultural, economic, political and social rights were contained at the outset in the 1948 American Declaration of the Rights and Duties of Man. When the American Convention on Human Rights was adopted in 1969, Chapter III entitled “Economic, Social and Cultural Rights” consisted solely of article 26, according to which:

“The States Parties undertake to adopt measures, both internally and through international co-operation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”

These rights were elaborated in greater detail in the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also called the “Protocol of San Salvador”. The Protocol, which entered into force on 16 November 1999, protects the following rights in particular:

- ❖ the right to non-discrimination in the exercise of the rights guaranteed – article 3;
- ❖ the right to work, including the opportunity to secure the means for living a dignified and decent existence – article 6;
- ❖ the right to just, equitable and satisfactory conditions of work, including remuneration which guarantees, as a minimum, to all workers and their families dignified and decent living conditions; fair and equal wages for equal work; the right to promotion; safety and hygiene at work; prohibition of night work and unhealthy or dangerous working conditions for persons below the age of 18 years; a reasonable limitation of working hours and rest, leisure and paid vacations – article 7;
- ❖ trade union rights such as the right of workers to organize trade unions and to join the union of their choice for the purpose of promoting and protecting their interests, and the right to strike – article 8(1);
- ❖ the right to social security – article 9;
- ❖ the right to health, “understood to mean the enjoyment of the highest level of physical, mental and social well-being” – article 10;

- ❖ the right to a healthy environment – article 11;
- ❖ the right to food, meaning “the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development” – article 12;
- ❖ the right to education – article 13;
- ❖ the right to the benefits of culture, including scientific and technological progress – article 14(1);
- ❖ the right to the formation and protection of families – article 15;
- ❖ the rights of children – article 16;
- ❖ the right of the elderly to special protection – article 17;
- ❖ the right of the handicapped person to receive special attention “designed to help him achieve the greatest possible development of his personality” – article 18.

4.2.3 European Social Charter, 1961, and European Social Charter (revised), 1996

As of 19 June 2002, the European Social Charter of 1961 had been ratified by 25 member States of the Council of Europe. It contains the rights enumerated below:

- ❖ the right to work – article 1;
- ❖ the right to just conditions of work – article 2;
- ❖ the right to safe and healthy working conditions – article 3;
- ❖ the right to a fair remuneration – article 4;
- ❖ the right to organize – article 5;
- ❖ the right to bargain collectively – article 6;
- ❖ the right of children and young persons to protection – article 7;
- ❖ the right of employed women to protection – article 8;
- ❖ the right to vocational guidance – article 9;
- ❖ the right to vocational training – article 10;
- ❖ the right to protection of health – article 11;
- ❖ the right to social security – article 12;
- ❖ the right to social and medical assistance – article 13;
- ❖ the right to benefit from social welfare services – article 14;
- ❖ the right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement – article 15;
- ❖ the right of the family to social, legal and economic protection – article 16;
- ❖ the right of mothers and children to social and economic protection – article 17;
- ❖ the right to engage in a gainful occupation in the territory of other Contracting Parties – article 18;
- ❖ the right of migrant workers and their families to protection and assistance – article 19.

The 1988 Additional Protocol entered into force on 4 September 1992 and had been ratified, as of 19 June 2002, by ten States. Under this Protocol, which does not prejudice the provisions of the European Social Charter, the Contracting Parties also undertake to consider themselves bound by one or more articles recognizing the following rights:

- ❖ the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex – article 1;
- ❖ the right to information and consultation for workers – article 2;
- ❖ the right of workers to take part in the determination and improvement of the working conditions and working environment – article 3;
- ❖ the right of elderly persons to social protection – article 4.

The revised version of the European Social Charter was adopted in 1996 and entered into force on 1 July 1999. As of 19 June 2002, it had been ratified by 13 States. The revised Social Charter will progressively replace the original Charter, the terms of which it updates and extends. By taking into account new social and economic development, the revised Charter amends certain existing provisions and adds new ones. The new features include, in particular, a considerably longer list of rights and principles in Part I than those contained in the old Charter (31 rights and principles, compared with 19 in the 1961 Charter). In addition to the rights taken from the 1988 Additional Protocol, new important features include:

- ❖ the right to protection in cases of termination of employment – article 24;
- ❖ the right of workers to protection of their claims in the event of the insolvency of their employer – article 25;
- ❖ the right to dignity at work – article 26;
- ❖ the right of workers with family responsibilities to equal opportunities and equal treatment – article 27;
- ❖ the right of workers' representatives to protection in the undertaking, and facilities to be accorded to them – article 28;
- ❖ the right to information and consultation in collective redundancy procedures – article 29;
- ❖ the right to protection against poverty and social exclusion – article 30;
- ❖ the right to housing – article 31.

The economic, social and cultural rights guaranteed by international human rights law cover wide areas and essential aspects of human life such as the right to work and to favourable conditions of work, the right to an adequate standard of living, the right to adequate physical and mental health, the right to education and the right to special assistance for families and children.

The enjoyment of all these rights is conditioned by respect for the principle of equality before the law and in the application of the law.

5. The Legal Obligations of States to Protect Economic, Social and Cultural Rights

5.1 International Covenant on Economic, Social and Cultural Rights, 1966

5.1.1 Introductory remarks

The general legal duties of States parties to give effect to their obligations under the International Covenant on Economic, Social and Cultural Rights are laid down in article 2, which reads as follows:

“1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

It should be pointed out in general that, unlike article 2(1) of the International Covenant on Civil and Political Rights, which imposes a legal duty of *immediate enforcement* of the rights guaranteed, article 2(1) of the International Covenant on Economic, Social and Cultural Rights allows for *progressive realization* of the rights recognized. However, as is clear from the debates during the drafting of the Covenants as summarized in section 2, it would not only be a serious oversimplification, but legally incorrect, to conclude that the International Covenant on Economic, Social and Cultural Rights only entails duties of progressive implementation with no obligation of immediate action. The nature of the rights per se, the way in which they are phrased, the views of the drafters, and the opinions expressed to date by the Committee on Economic, Social and Cultural Rights show that the nature and extent of the legal obligations that States parties have assumed in ratifying or otherwise adhering to the Covenant are much more dynamic. This conclusion is only logical in view of the fact that, notwithstanding the many economic and social problems facing Governments, the Covenant has been and remains a legal tool aimed at achieving a steady improvement in the living conditions of people worldwide.

As pointed out by the Committee on Economic, Social and Cultural Rights in one of its earliest general comments, the legal obligations laid down in article 2 of the Covenant include both “*obligations of conduct and obligations of result*”.⁶⁶ This means, inter alia, that, “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*.”⁶⁷ One of these obligations of immediacy is the undertaking in article 2(2) to guarantee that the rights contained in the Covenant are exercised without discrimination.⁶⁸ A second such obligation “is the undertaking in article 2(1) ‘to take steps’, which in itself is not qualified or limited by other considerations”.⁶⁹ As noted by the Committee, the full meaning of the phrase can also be gauged by comparing the English text with the French and Spanish versions, according to which the States parties undertake “to act” (French: “s’engage à agir”) and “to adopt measures” (Spanish: “a adoptar medidas”).⁷⁰ This legal obligation means that

“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.”⁷¹

A third obligation has to be added to the obligations of conduct and result, namely the duty *to give effect to the relevant legal duties, including by providing domestic remedies*. These three aspects of States parties’ legal undertakings are interrelated and to some extent overlapping, but, as noted by the Committee, they have distinctive features that will be described below.

5.1.2 The obligation of conduct

With regard to the means that States parties should use to comply with the obligation “to take steps”, article 2(1) of the Covenant refers to “all appropriate means, including particularly the adoption of legislative measures”. While it is for States parties themselves to assess what are the most “appropriate” measures, in addition to *legislation*, to fulfil their treaty obligations under the Covenant, the Committee holds that such measures “include, but are not limited to, *administrative, financial, educational, and social* measures”.⁷²

Another measure that is considered “appropriate” by the Committee 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

⁶⁶See General Comment No. 3 (The nature of States parties’ obligations -article 2(1)), *United Nations Compilation of General Comments*, p. 18, para. 1; emphasis added.

⁶⁷*Ibid.*, loc. cit.; emphasis added.

⁶⁸*Ibid.*

⁶⁹*Ibid.*, p. 18, para. 2.

⁷⁰*Ibid.*, loc. cit.

⁷¹*Ibid.*; emphasis added.

⁷²*Ibid.*, p. 19, para. 7; emphasis added.

remedies”.⁷³ In addition, there are a number of provisions of the Covenant, including articles 3, 7(a) (i), 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.”⁷⁴

5.1.3 The obligation of result

The “principal obligation of result” contained in article 2(1) “is to take steps ‘with a view to achieving progressively the full realization of the rights recognized’ in the Covenant”.⁷⁵ However, as underlined by the Committee, the fact that the Covenant allows for the “progressive realization” of rights, i.e. for “realization over time”, “should not be misinterpreted as depriving the obligation of all meaningful content”.⁷⁶ The Committee describes this obligation in the following terms:

“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.”⁷⁷

Moreover, the Committee is of the view that every State party has “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” guaranteed by the Covenant, failing which the latter “would be largely deprived of its *raison d’être*”.⁷⁸ This means, for instance, in the words of the Committee, that

“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.”⁷⁹

In this regard the Committee has further specified that, since article 2(1) requires each State party “to take the necessary steps ‘to the maximum of its available resources’”, a State must, in order to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, “demonstrate that every

⁷³Ibid., p. 19, para. 5.

⁷⁴Ibid., loc. cit.

⁷⁵Ibid., p. 20, para. 9.

⁷⁶Ibid., loc. cit.

⁷⁷Ibid.

⁷⁸Ibid., p. 20, para. 10.

⁷⁹Ibid., loc. cit.

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”.⁸⁰ However, as emphasized by the Committee, “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.”⁸¹

5.1.4 The obligation to give effect: the provision of domestic remedies

In General Comment No. 9 concerning the domestic application of the Covenant, the Committee on Economic, Social and Cultural Rights elaborated on some of the statements made in General Comment No. 3. It noted in particular that the Covenant, by requiring Governments to give effect to the rights it guarantees “by all appropriate means”, adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.⁸² “But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus, the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental responsibility must be put in place.”⁸³

In the Committee’s view, “questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law”:

- ❖ **first**, pursuant to article 27 of the Vienna Convention on the Law of Treaties, a State party may not invoke the provisions of its internal law to justify non-performance of its treaty obligations; hence, in order to give effect to its treaty obligations, it “should modify the domestic legal order as necessary”;⁸⁴
- ❖ **second**, according to article 8 of the Universal Declaration of Human Rights, “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”; although the International Covenant on Economic, Social and Cultural Rights does not directly require States parties to establish judicial remedies for alleged violations of its provisions, the Committee considers that “a State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not ‘appropriate means’, within the terms of article 2, paragraph 1 ... or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.”⁸⁵

⁸⁰Ibid.

⁸¹Ibid., p. 20, para. 11.

⁸²Ibid., p. 58, para. 1.

⁸³Ibid., p. 58, para. 2.

⁸⁴Ibid., p. 58, para. 3.

⁸⁵Ibid., pp. 58-59, para. 3.

From the Committee's General Comments it may be concluded that, *as a general rule, the effective enforcement of the International Covenant on Economic, Social and Cultural Rights requires the availability of domestic remedies for those who consider that their rights have been violated by the State.* The fact that the Covenant, unlike the International Covenant on Civil and Political Rights, does not expressly provide for legal or other remedies for aggrieved persons indicates a reluctance on the part of the drafters to subject themselves to individual complaints in a field that depends to a considerable extent on financial resources and stage of development. This reluctance has recently been confirmed by the difficulties encountered in securing adoption of an optional protocol to the International Covenant on Economic, Social and Cultural Rights which would provide for an international individual and group complaints procedure.

The States parties to the International Covenant on Economic, Social and Cultural Rights cannot rely on their internal legislation to justify failure to implement the Covenant.

*The States parties to the Covenant have an **obligation of conduct** and must, in particular, take all legislative, administrative, financial, educational and social measures that are appropriate to give effect to the terms of the Covenant.*

*The States parties also have an **obligation of result** in that they must move as expeditiously and effectively as possible towards the realization of the rights contained in the Covenant, using their available resources to the maximum.*

*Every State party has a legal duty **immediately** to ensure the **minimum core obligations** of each of the rights contained in the Covenant.*

Even in situations of demonstrably inadequate resources, the States parties have to prove that they are striving to ensure the widest possible enjoyment of the rights contained in the Covenant.

*States parties have a legal duty to give effect to the Covenant by using all means at their disposal. This duty comprises the provision of **means of redress or remedies** enabling individuals effectively to vindicate their economic, social and cultural rights at the domestic level.*

5.2 African Charter on Human and Peoples' Rights, 1981

Article 1 of the African Charter on Human and Peoples' Rights defines the legal obligations of States parties with regard to all rights, duties and freedoms contained in the Charter, including economic, social and cultural rights. This means that they "shall recognize" them and "shall undertake to adopt legislative or other measures to give effect to them". Neither this provision nor the provisions defining the rights in question suggest anything other than a legal duty to implement the legal obligations *immediately*.

5.3 American Convention on Human Rights, 1969, and Additional Protocol in the Area of Economic, Social and Cultural Rights, 1988

In article 1 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, the members of the Organization of American States (OAS) have opted for a *progressive approach*, whereby the States parties

“undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol”.

Although the approach is progressive, it is clearly also result-oriented in that the States parties “undertake to adopt the necessary measures” for the purpose of achieving “the full observance of the rights recognized” in the Protocol.

5.4 European Social Charter, 1961, and European Social Charter (revised), 1996

It may be said in general that the revision of the European Social Charter of 1961 was not intended to represent “a lowering of the level of protection provided for therein” but that, on the contrary, “the reform would involve taking account both of developments in social and economic rights as reflected in other international instruments and in legislation of member states and also of social problems not covered by the other international instruments in force.”⁸⁶ It was further agreed that “all amendments were to be made bearing in mind the need to ensure equal treatment of men and women.”⁸⁷

With regard to the precise legal obligations, both the 1961 and 1966 versions of the European Social Charter contain a specific scheme of undertakings that allows the Contracting States to engage in progressive implementation of the rights they contain. However, while each Contracting Party accepts that it considers Part I of each Charter “as a declaration of the aims which it will pursue by all appropriate means” (article 20(1)(a) of the 1961 Charter and article A of the 1996 Charter), *both Charters also define the core undertakings all States have to accept when becoming Parties thereto.*

Under the 1961 Charter, the Contracting Parties undertake to become bound by at least *five* of the following articles:

⁸⁶See *European Social Charter: Explanatory Report (ETS No. 163)*, at the Council of Europe web site: <http://conventions.coe.int/treaty/en/Reports/Html/163.htm> p. 1.

⁸⁷*Ibid.*, loc. cit.

- ❖ the right to work – article 1;
- ❖ the right to organize – article 5;
- ❖ the right to bargain collectively – article 6;
- ❖ the right to social security – article 12;
- ❖ the right to social and medical assistance – article 13;
- ❖ the right of the family to social, legal and economic protection – article 16;
- ❖ the right of migrant workers and their families to protection and assistance – article 19.

Moreover, the States parties have to choose to be bound by no less than a total of 10 articles or 45 numbered paragraphs (art. 20(1)(c)).

Under the revised 1996 Charter, the number of core obligations was increased and the Contracting States have to accept to be bound by at least **six** of the core articles, to which the following two have been added to those contained in the old Charter:

- ❖ the right of children and young persons to protection – article 7;
- ❖ the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex – article 20.

The Contracting States must then also accept to be bound by an additional number of provisions totalling no less than 16 articles or 63 numbered paragraphs (Part III, art. A).

The Contracting States must thus agree to be bound by a considerable number of provisions to be implemented with effect from the day of ratification of the respective Charter and they are, of course, free to increase the number of provisions by which they want to be bound at any time thereafter (see art. 20(3) of the 1961 Charter and art. A(3) of the 1996 Charter).

The European Social Charter adopts a hybrid approach to international legal duties in that it imposes on the Contracting States a certain number of immediately enforceable rights while allowing them to engage in progressive implementation of other rights.

6. Economic, Social and Cultural Rights: Are they Justiciable?

As described in sub-section 2.2.4, the question of justiciability of economic, social and cultural rights was discussed in connection with the elaboration of the Covenant. Although a handful of Governments in the Commission on Human Rights voted at the time in favour of a resolution which expressly denied that these rights were justiciable, the States concerned were in a clear minority. Other countries emphasized the inaccuracy and even danger of labelling economic, social and cultural rights

non-justiciable and France pointed out that many aspects of such rights would be justiciable. Although half a century has passed in the meantime, there is still no unanimity in practice with regard to the competence that domestic courts have or should have in adjudicating claims involving alleged violations of economic, social and cultural rights. This uncertainty was highlighted by a Workshop on the Justiciability of Economic, Social and Cultural Rights, with Particular Reference to an Optional Protocol to the Covenant on Economic, Social and Cultural Rights held in Geneva, Switzerland, in February 2001. It was organized by the Office of the United Nations High Commissioner for Human Rights and the International Commission of Jurists. As shown by the reports submitted to the Workshop, domestic courts are being called upon with increasing frequency to adjudicate claims relating to economic, social and cultural rights, such as the right to adequate housing and the right to equality before the law. Taken together with an objective analysis of the rights concerned, this evolution shows that the issue of justiciability is not clear-cut and that decisions as to whether specific rights lend themselves to judicial review may have more to do with political expediency than law *stricto sensu*.

An interesting parallel indicates that the same argument also applies to some extent in the field of civil and political rights. Questions concerning the lawfulness of the exercise of emergency powers by Governments in times of crisis have often been held to be non-justiciable, but the European and American Courts of Human Rights in particular have shown that the declaration of a public emergency and the imposition of extraordinary limitations on the exercise of human rights in derogation of international legal obligations are justiciable issues that have to be examined in the light of the relevant State's treaty obligations.⁸⁸

With regard to the International Covenant on Economic, Social and Cultural Rights, the competent Committee has considered the question of justiciability in connection with the role of legal remedies in General Comment No. 9. Although the Committee considers that “the right to an effective remedy need not be interpreted as always requiring a judicial remedy” and that “administrative remedies will, in many cases, be adequate,” it is also of the view that

“whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.”⁸⁹

In this General Comment the Committee regrets that, in contrast to civil and political rights, the “assumption is too often made” that judicial remedies are not essential with regard to violations of economic, social and cultural rights, although “this discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions.”⁹⁰ The Committee notes that it has already made clear “that it considers many of the provisions in the Covenant to be capable of immediate implementation,” for instance articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3).⁹¹ These provisions, which the Committee cites *by way of example*, contain the following rights:

⁸⁸For more information on this issue, see Chapter 16 of this Manual.

⁸⁹*United Nations Compilation of General Comments*, p. 60, para. 9.

⁹⁰*Ibid.*, p. 60, para. 10.

⁹¹*Ibid.*, loc. cit.

- ❖ the right to equality between men and women in the enjoyment of rights – article 3;
- ❖ the right to fair wages and equal remuneration for work of equal value – article 7(a)(i);
- ❖ the right to form trade unions that can function freely; the right to strike – article 8;
- ❖ the right of children and young people to special measures of protection and assistance, to be taken without discrimination – article 10(3);
- ❖ the right to free compulsory primary education for all – article 13(2)(a);
- ❖ the right of parents or legal guardians to choose for their children schools other than public schools to ensure religious and moral education in conformity with their convictions – article 13(3);
- ❖ the right of individuals and bodies to establish and direct educational institutions in conformity with legal standards – article 13(4);
- ❖ the freedom indispensable for scientific research and creative activity – article 15(3).

On the issue of justiciability of the rights contained in the International Covenant on Economic, Social and Cultural Rights, the Committee added that:

“It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”⁹²

With regard to the self-executing nature of the provisions of the Covenant, the Committee has pointed out that “the Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered ‘non-self-executing’ were strongly rejected.”⁹³ The Committee goes on to say that:

“In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of

⁹²Ibid.

⁹³Ibid., p. 61, para. 11.

the Covenant and of the important role of judicial remedies in its implementation. Thus, for example, when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations. Similarly, judicial training should take full account of the justiciability of the Covenant. It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.”⁹⁴

In the light of what has been said in the foregoing sections, the question of whether economic, social and cultural rights lend themselves to judicial determination may be summarized as follows:

Neither the nature of economic, social and cultural rights as such nor the terms of the International Covenant on Economic, Social and Cultural Rights or its travaux préparatoires may be invoked to deny the justiciability of such rights.

On the contrary, many aspects of the rights concerned lend themselves to judicial determination.

States parties to the Covenant must provide judicial remedies for alleged violations of economic, social and cultural rights whenever such measures are necessary for their effective enforcement. Such remedies must exist alongside adequate administrative remedies.

The classification of economic, social and cultural rights as non-justiciable amounts to a denial of the indivisibility and interdependence of such rights and civil and political rights.

7. Case-Study I: The Right to Adequate Housing

7.1 Introductory remarks

The following sections will present two rights, *the right to adequate housing* and *the right to health*, first analysing them in terms of their interpretation by the competent international monitoring bodies and then giving examples of rulings by domestic tribunals on their enjoyment or the enjoyment of certain aspects of them.

It is beyond the scope of this chapter to provide a complete picture of the multiple roles of domestic courts in enforcing economic, social and cultural rights.

⁹⁴Ibid., loc. cit.

However, as a general rule both ordinary and administrative courts in many countries adjudicate a multitude of questions relating to, for instance, various forms of social security such as help for the sick, the elderly and persons with disabilities, the rights of minorities to culture, the right to adequate housing, questions of equality and non-discrimination, and so forth. Furthermore, labour courts may exist to decide issues relating to occupational rights such as the right to freedom of association and collective bargaining of trade unions, the right to strike and occupational health hazards. Although domestic law may not expressly provide, for instance, for the right to food or the right to adequate housing as defined by international human rights law, it may nonetheless provide legal guarantees that enable local judges to arrive at the same or similar substantive results. Economic, social and cultural rights constitute, in other words, a field of law in which courts fulfil an important role alongside administrative procedures.

The rights dealt with below have been selected because of their somewhat more difficult legal contours as compared to other economic and social rights that are more easily accepted as lending themselves to judicial decision-making, such as the relatively long list of workers' rights.

7.2 International Covenant on Economic, Social and Cultural Rights: article 11(1)

The right to adequate housing, following its recognition in article 25 of the Universal Declaration of Human Rights, was incorporated in article 11(1) of the International Covenant on Economic, Social and Cultural Rights as a component of the right to an adequate standard of living. At the universal level, the right to housing may also be found, in particular, in article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women and article 27(3) of the Convention on the Rights of the Child. At the regional level, only the revised European Social Charter of 1996 expressly guarantees the right to housing (art. 31).

The right to housing has also been affirmed in numerous other documents such as article 8(1) of the Declaration on the Right to Development. At the 1996 United Nations Conference on Human Settlements (Habitat II), the participating Governments also unanimously agreed to reaffirm their “commitment to the full and progressive realization of the right to adequate housing, as provided for in international instruments”.⁹⁵ They further recognized that they have “an obligation ... to enable people to obtain shelter and to protect and improve dwellings and neighbourhoods”, and they committed themselves

“to the goal of improving living and working conditions on an equitable and sustainable basis, so that everyone will have adequate shelter that is healthy, safe, secure, accessible and affordable and that includes basic services, facilities and amenities, and will enjoy freedom from discrimination in housing and legal security of tenure”.⁹⁶

⁹⁵See UN doc. A/CONF.165/14, report of the United Nations Conference on Human Settlements (Habitat II), Istanbul, 3-14 June 1996, p. 17, para. 39.

⁹⁶Ibid., loc. cit.

Lastly, the Governments agreed to “implement and promote this objective in a manner fully consistent with human rights standards”.⁹⁷

In the present context, however, the principal legal text to be considered is article 11(1) of the International Covenant on Economic, Social and Cultural Rights. The texts of other relevant conventions and declarations may be found in **Handout 3**.

Article 11(1) of the International Covenant on Economic, Social and Cultural Rights reads:

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including *adequate* food, clothing, *housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent” (emphasis added).

This provision has to be read in conjunction with article 2(1), which provides that:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

As may be seen, the right to “an adequate standard of living” in article 11(1) is a right with many components. This section will only consider the question of adequate housing, which was dealt with in General Comment No. 4 of the Committee on Economic, Social and Cultural Rights. It has also been dealt with in General Comment No. 7 on forced evictions. The Committee’s work shows that problems relating to adequate housing exist in virtually all countries and affect a considerable part of humanity. As noted by the Committee in its General Comments Nos. 4 and 7, the right to adequate housing has the following personal and material fields of application:

7.2.1 Persons covered by the right

The right to adequate housing “applies to everyone” and “the concept of ‘family’ must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status or such factors. In particular, enjoyment of this right must, in accordance with article 2(2) of the Covenant, not be subject to any form of discrimination.”⁹⁸

⁹⁷Ibid.

⁹⁸United Nations *Compilation of General Comments*, p. 23, para. 6.

7.2.2 Interpretative approach, including interdependence of rights

The Committee has rejected a “narrow or restrictive” interpretation of the right to adequate housing, which would imply, for instance, the mere provision of a shelter in the sense of having a roof over one’s head or which would view shelter exclusively “as a commodity”. “Rather it should be seen as the right to live somewhere in security, peace and dignity.”⁹⁹ This interpretation consists of at least two components:

- ❖ the fact that “the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised”, and
- ❖ the concept of adequacy.¹⁰⁰

With regard to the first component, the Committee holds that the right to adequate housing cannot be considered in isolation but requires, for its full enjoyment, the protection of other rights as well, such as “the concept of human dignity and the principle of non-discrimination, ... the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making”. Similarly, “the right not to be subjected to arbitrary or unlawful interference with one’s privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.”¹⁰¹ In view of its particular complexity, the concept of adequacy will be dealt with separately.

7.2.3 The concept of adequacy

In the Committee’s opinion, “the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute ‘adequate housing’ for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:”¹⁰²

- ❖ **Legal security of tenure:** This means that “notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats;”¹⁰³
- ❖ **Availability of services, materials, facilities and infrastructure:** “An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;”¹⁰⁴

⁹⁹Ibid., p. 23, para. 7.

¹⁰⁰Ibid., loc. cit.

¹⁰¹Ibid., p. 25, para. 9.

¹⁰²Ibid., p. 23, para. 8.

¹⁰³Ibid., p. 23, para. 8(a).

¹⁰⁴Ibid., p. 24, para. 8(b).

- ❖ **Affordability:** “Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of house-related costs is, in general, commensurate with income levels.” Moreover, “tenants should be protected by appropriate means against unreasonable rent levels or rent increases;”¹⁰⁵
- ❖ **Habitability:** “Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the [WHO] *Health Principles of Housing*.”¹⁰⁶
- ❖ **Accessibility:** “Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups;”¹⁰⁷
- ❖ **Location:** “Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas.” Further, “housing should not be built on polluted sites or in immediate proximity to pollution sources that threaten the right to health of the inhabitants;”¹⁰⁸
- ❖ **Cultural adequacy:** “The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed and that, *inter alia*, modern technological facilities, as appropriate are also ensured.”¹⁰⁹

7.2.4 Immediate legal obligations

In spite of the progressive nature of the legal undertakings incurred by States parties to the Covenant, the Committee has defined a number of steps that they are required to take with *immediate effect*, regardless of their state of development,¹¹⁰ for example:

¹⁰⁵Ibid., p. 24, para. 8(c).

¹⁰⁶Ibid., p. 24, para. 8(d).

¹⁰⁷Ibid., p. 24, para. 8(e). On the right to *accessible* housing for persons with disabilities, see also General Comment No. 5, p. 35, para. 33.

¹⁰⁸Ibid., General Comment No. 4, p. 24, para. 8(f).

¹⁰⁹Ibid., p. 25, para. 8(g).

¹¹⁰Ibid., p. 25, para. 10.

- ❖ “States parties must give due priority to those social groups in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others;”¹¹¹
- ❖ “While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that each State party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a *national housing strategy*” in order to define “the objectives for the development of shelter conditions, ... the resources available to meet these goals and the most cost-effective way of using them and ... the responsibilities and time-frame for the implementation of the necessary measures”. Such a national housing strategy “should reflect extensive genuine consultation with, and participation by, all those affected, including the homeless, the inadequately housed and their representatives”.¹¹²
- ❖ *Effective monitoring*: “Effective monitoring of the situation with respect to housing is another obligation of immediate effect. For a State party to satisfy its obligations under article 11(1) it must demonstrate, *inter alia*, that it has taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction.”¹¹³

7.2.5 Domestic remedies

On the question of domestic legal remedies, “the Committee views many component elements of the right to adequate housing as being at least consistent with the provision of [such] remedies.” They might include, for instance:

- ❖ “legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions”;
- ❖ “legal procedures seeking compensation following an illegal eviction”;
- ❖ “complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination”;
- ❖ “allegations of any form of discrimination in the allocation and availability of access to housing”; and
- ❖ “complaints against landlords concerning unhealthy or inadequate housing conditions”.¹¹⁴

¹¹¹Ibid., p. 25, para. 11.

¹¹²Ibid., pp. 25-26, para. 12; emphasis added.

¹¹³Ibid., p. 26, para. 13.

¹¹⁴Ibid., pp. 26-27, para. 17.

The **right to adequate housing** is an essential component of the right to an adequate standard of living. It must be interpreted in the light not only of other economic, social and cultural rights but also of civil and political rights.

The **principle of adequacy** means that:

- there must be legal security of tenure;
- there must be availability of basic services, materials, facilities and infrastructure;
- the housing must be affordable, habitable, accessible and located close to employment and other facilities;
- the housing must be built so as not to jeopardize the health of its occupants;
- the housing must be culturally adequate.

The International Covenant on Economic, Social and Cultural Rights imposes, in particular, the following **immediate obligations** on States parties:

- they must give particular consideration to social groups living in unfavourable conditions;
- they must almost invariably adopt a national housing plan to define the objectives, resources, responsibilities and time frame of the measures required;
- they must effectively monitor the housing situation.

States parties must also provide **domestic legal remedies**, in particular for cases of eviction and demolition of houses, discrimination, illegal action by landlords, and unhealthy and inadequate housing conditions.

7.2.6 Forced evictions

In its General Comment No. 4, the Committee states that “instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”¹¹⁵ In General Comment No. 7, the Committee defines the term “forced evictions” as:

“the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.”¹¹⁶

¹¹⁵Ibid., p. 27, para. 18.

¹¹⁶Ibid., pp. 49-50, para. 3.

The Committee points out that such evictions, while “manifestly breaching” the rights enshrined in the International Covenant on Economic, Social and Cultural Rights, may also, owing to the interrelationship and interdependency which exist among all human rights, “result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions”.¹¹⁷ *In other words, in cases of forced eviction, States parties must not only comply with the requirements of the International Covenant on Economic, Social and Cultural Rights but also with the relevant provisions of the International Covenant on Civil and Political Rights.*

In situations where it may be necessary to impose *limitations* on the right to adequate housing and the right not to be subjected to forced eviction as guaranteed by article 11(1) of the International Covenant on Economic, Social and Cultural Rights, “full compliance with article 4 of the Covenant is required”. Accordingly, the rights guaranteed may be subjected “only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society”.¹¹⁸

In essence therefore, the obligations of States parties in relation to forced evictions are based on article 11(1) of the Covenant “read in conjunction with other relevant provisions”. These obligations include, in particular:

- ❖ “The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced convictions;”¹¹⁹
- ❖ Interpreting the words “all appropriate means” in article 2(1) in this context, the Committee states that “it is clear that legislation against forced evictions is an essential basis upon which to build a system of effective protection. Such legislation should include measures which (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out. The legislation must ... apply to all agents acting under the authority of the State or who are accountable to it. Moreover, ... States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies;”¹²⁰
- ❖ States parties must comply with the provisions of articles 2(2) and 3 of the Covenant, which impose an additional obligation upon them “to ensure that, where evictions do occur, appropriate measures are taken to ensure that *no form of discrimination is involved*”. The Committee notes in this regard that “women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction;”¹²¹

¹¹⁷Ibid., p. 50, para. 4.

¹¹⁸Ibid., p. 50, para. 5.

¹¹⁹Ibid., p. 50, para. 8.

¹²⁰Ibid., p. 51, para. 9.

¹²¹Ibid., p. 51, para. 10; emphasis added.

- ❖ “Whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause”, the competent authorities must “ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected”;¹²²
- ❖ “Forced eviction and house demolition as a punitive measure are ... inconsistent with the norms of the Covenant;”¹²³
- ❖ “States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force. Legal remedies or procedures should be provided to those affected by the eviction orders” as well as “adequate compensation for any property, both personal and real, which is affected. In this respect, it is pertinent to recall article 2.3 of the International Covenant on Civil and Political Rights, which requires States parties to ensure ‘an effective remedy’ for persons whose rights have been violated and the obligation upon the ‘competent authorities (to) enforce such remedies when granted’;”¹²⁴
- ❖ “In cases where eviction is considered to be justified, it should be carried out in strict compliance with the relevant provisions on international human rights law and in accordance with **general principles of reasonableness and proportionality.**” In this regard, the Committee on Economic, Social and Cultural Rights found it “especially pertinent” to invoke the terms of General Comment No. 16 of the Human Rights Committee, according to which “interference with a person’s home can only take place ‘in cases envisaged by the law’”, a law that “‘should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances’”. The Human Rights Committee also indicated that relevant legislation must “specify in detail the precise circumstances in which such interferences may be permitted”;¹²⁵
- ❖ “Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available;”¹²⁶
- ❖ “Appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognized in both International Covenants on Human Rights. The Committee considers that the procedural protections which should be applied in relation to forced evictions include:

¹²²Ibid., p. 51, para. 11.

¹²³Ibid., p. 51, para. 12.

¹²⁴Ibid., pp. 51-52, para. 13.

¹²⁵Ibid., p. 52, para. 14; emphasis added.

¹²⁶Ibid., p. 52, para. 16.

- (a) an opportunity for genuine consultation with those affected;
- (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- (e) all persons carrying out the eviction to be properly identified;
- (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- (g) provision of legal remedies; and
- (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.”¹²⁷

Forced evictions are prima facie incompatible not only with the International Covenant on Economic, Social and Cultural Rights but also with the International Covenant on Civil and Political Rights.

Domestic legislation should provide effective protection against forced evictions, including evictions carried out by private persons. The law should provide, inter alia, the following guarantees:

Whenever evictions occur, they must conform to international human rights law and must not involve any form of discrimination.

Forced eviction and demolition of houses as punitive measures are prohibited.

Evictions must only be carried out after due notice and consultation with the persons affected and there must be provision for adequate domestic legal remedies and compensation for any property affected by the eviction.

Evictions should not result in people being rendered homeless.

7.3 Relevant European case law: The *Selçuk and Asker* case

Although the right to adequate housing is not, per se, guaranteed by the European Convention on Human Rights, the right to respect for one’s private and family life and home, as well as the right to peaceful enjoyment of one’s possessions, are guaranteed, respectively, by article 8 of the Convention and article 1 of Protocol No. 1 to the Convention. Further, article 3 of the Convention provides that no person “shall be subjected to torture or to inhuman or degrading treatment or punishment”.

¹²⁷Ibid., p. 52, para. 15.

In the case of *Selçuk and Asker v. Turkey*, the European Court of Human Rights had to deal with allegations that the applicants' property had been destroyed by Turkish security forces. Mrs. Selçuk was a widow and the mother of five children, while Mr. Asker was married and had seven children. Both were Turkish citizens of Kurdish origin living in the village of Islamköy. The facts, "proved beyond reasonable doubt", were as follows:¹²⁸

In the morning of 16 June 1993, a large force of gendarmes arrived in Islamköy, and a number of them, under the "apparent command" of CO Cömert, went to Mr. Asker's house and set it on fire, thereby causing the destruction of the property and most of its contents. Villagers who came to see what was happening were prevented from putting out the fire. Mr. and Mrs. Asker ran inside the house in an attempt to save their possessions and this occurred either while the gendarmes were setting fire to the house by pouring petrol on it, or just before. A number of gendarmes, including CO Cömert, then proceeded to Mrs. Selçuk's house and, despite her protests, poured petrol on it and set it on fire "by, or under the orders of, CO Cömert". Villagers were again prevented from putting out the fire, which completely destroyed Mrs. Selçuk's house and its contents. About ten days later, a force of gendarmes returned to Islamköy where they set fire to, and thereby destroyed, a mill belonging to Mrs. Selçuk and others; CO Cömert was seen with the gendarmes at the mill on this occasion.

The Court first examined the facts under article 3 of the Convention, emphasizing that this article "enshrines one of the fundamental values of democratic society" and that "even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment."¹²⁹ The Court concluded that the treatment suffered by the applicants in this case was so severe as to constitute a violation of article 3. It referred in particular to the fact that the applicants' homes and most of their property

"were destroyed by the security forces, depriving the applicants of their livelihoods and forcing them to leave their village. It would appear that the exercise was premeditated and carried out contemptuously and without respect for the feelings of the applicants. They were taken unprepared; they had to stand by and watch the burning of their homes; inadequate precautions were taken to secure the safety of Mr and Mrs Asker; Mrs Selçuk's protests were ignored, and no assistance was provided to them afterwards."¹³⁰

"Bearing in mind in particular the manner in which the applicants' homes were destroyed ... and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as *inhuman treatment* within the meaning of Article 3."¹³¹

¹²⁸For the summary of the facts as established, see *Eur. Court HR, Case of Selçuk and Asker v. Turkey, judgment of 24 April 1998, Reports 1998-II*, p. 900, paras. 27-30; see also pp. 904-905, paras. 50-57.

¹²⁹*Ibid.*, p. 909, para. 75.

¹³⁰*Ibid.*, p. 910, para. 77.

¹³¹*Ibid.*, p. 910, para. 78; emphasis added.

Moreover, “even if it were the case that the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes being used by terrorists or as a discouragement to others, *this would not provide a justification for the ill-treatment.*”¹³²

The Court also found a violation of article 8 of the Convention and article 1 of Protocol No. 1. It recalled in this context that “it established that security forces deliberately destroyed the applicants’ homes and household property, and the mill partly owned by Mrs Selçuk, obliging them to leave Islamköy ... There [could] be no doubt that these acts, in addition to giving rise to violations of Article 3, constituted particularly grave and unjustified interferences with the applicants’ right to respect for their private and family lives and homes, and to the peaceful enjoyment of their possessions.”¹³³

The Court concluded that the Turkish Government had violated article 13 of the European Convention since it had not carried out “a thorough and effective investigation” as required by that article. The applicants therefore did not have an effective domestic remedy at their disposal for the violations of their rights under the Convention as required by article 13.¹³⁴

The *Selçuk and Asker* case is an excellent example not only of the justiciability of acts interfering with the right to respect for one’s home but also of the fundamental interdependence of rights and of the far-reaching and devastating consequences that the demolition of a person’s home and belongings can have for the person concerned. The next case chosen from South African jurisprudence confirms these conclusions.

7.4 Relevant domestic case law: The example of South Africa

The question of *forced eviction* was considered by the South African Constitutional Court in the *Grootboom and Others* case, which was brought by Mrs. Grootboom on her own behalf and on behalf of 510 children and 390 adults who had allegedly been “rendered homeless as a result of their eviction from their informal homes”.¹³⁵ The analysis in this case is of such relevance to the judicial protection of economic, social and cultural rights that it warrants extensive consideration.

The following is a brief description of the facts of the case.¹³⁶ Mrs. Grootboom and most other respondents had lived in an informal squatter settlement called Wallacedene where their shacks had no water, sewage or refuse removal services. Only 5 per cent of them had electricity. Having failed to obtain subsidized low-cost housing, the respondents left Wallacedene one day and put up their shacks and shelters on vacant land that was privately owned and had been ear-marked for low-cost housing. They called the land “New Rust”. The owner obtained an eviction order and

¹³²Ibid., p. 910, para. 79; emphasis added.

¹³³Ibid., p. 911, paras. 86-87.

¹³⁴Ibid., pp. 913-914, paras. 96-98.

¹³⁵*The Government of South Africa v. Irene Grootboom and Others, Case CCT 11/00, judgment of 4 October 2000, para. 4.*

¹³⁶Ibid., paras. 7-11.

the respondents' homes were bulldozed and burnt and their possessions destroyed. They put up new shelters on the Wallacedene sports field with such temporary structures as they could find, but when the winter rains started shortly afterwards "the plastic sheeting they had erected afforded scant protection". Having failed to obtain help, Mrs. Grootboom and the other respondents applied for an order directing the authorities on the basis of Section 26 of the South African Constitution to provide "adequate basic temporary shelter or housing to the respondents and their children pending their obtaining permanent accommodation".¹³⁷

Justice Yacoob, with whom all other Justices concurred, wrote the judgment, which contains a rich legal analysis of the right of access to adequate housing under South African constitutional law. However, only the major points of the judgment can be reflected here and only insofar as they concern Section 26 of the South African Constitution which states:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

On the question of justiciability: On the issue of whether socio-economic rights are at all justiciable in South Africa, the Court stated clearly that this had been "put beyond question by the text of [the] Constitution as construed in the *Certification* judgment". In response to the contention in that case that these rights were not justiciable and should not have been contained in the new Constitution, the Court had held that:

"[T]hese rights are, at least to some extent, justiciable. As we have stated ... many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give right to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost invariably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion."¹³⁸

The question was not therefore whether socio-economic rights were justiciable under the South African Constitution "but how to enforce them in a given case".¹³⁹

¹³⁷Ibid., para. 13. This chapter will not deal with the aspect of the case relating to children's right to shelter under article 28(1)(c) of the South African Constitution.

¹³⁸Ibid., para. 20.

¹³⁹Ibid., loc. cit.

On the interdependence of rights: Interpreting the obligations imposed on the State by Section 26, the Court pointed out that the Constitution entrenches both civil and political rights and social and economic rights, and that all these rights “are inter-related and mutually supporting”. In the Court’s view, “there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [of the Constitution]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.”¹⁴⁰

The Court added that “the right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights [which] must all be read together in the setting of the Constitution as a whole.” In the words of the Court:

“The state is obliged to take *positive* action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.”¹⁴¹

On the impact of international law on South African constitutional law: The South African Constitution provides in Section 39(1)(b) that, “when interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law.” According to the Court, “the relevant international law can be a guide to interpretation, but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.”¹⁴²

In examining the extent to which articles 11(1) and 2(1) of the International Covenant on Economic, Social and Cultural Rights may be a guide to an interpretation of Section 26 of the South African Constitution, the Court noted that there are two differences between the legal instruments insofar as they relate to housing: *first*, “the Covenant provides for a *right to adequate housing* while section 26 provides for the *right of access* to adequate housing” and, *second*, “the Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures.”¹⁴³

In response to the argument made to the Court that the States parties to the International Covenant have, as stated by the Committee on Economic, Social and Cultural Rights, an obligation to guarantee *a minimum core of obligations* to ensure the satisfaction of, at the very least, the minimum essential levels of each right, the Court noted that “the determination of a minimum core in the context of ‘the right to have access to adequate housing’ presents difficult questions.” It did not in the event

¹⁴⁰Ibid., para. 23.

¹⁴¹Ibid., para. 24; emphasis added.

¹⁴²Ibid., para. 26; footnote omitted.

¹⁴³Ibid., para. 28.

find it necessary to decide whether it was “appropriate for a court to determine in the first instance the minimum core content of a right”.¹⁴⁴ It noted, however, that the Committee had not specified what the minimum core precisely means.¹⁴⁵

On the domestic right of access to adequate housing: With regard to the South African constitutional requirement that everyone has the right to have *access* to adequate housing, the Court ruled that all of the following conditions have to be met:

- ❖ “there must be *land*,”
- ❖ “there must be *services*,”
- ❖ “there must be *a dwelling*,” and
- ❖ “access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26.”¹⁴⁶

It follows that “the state must create the conditions for access to adequate housing for people at all economic levels of our society.”¹⁴⁷ Although this obligation depends on the particular circumstances and context of each place or person involved, “the poor are particularly vulnerable and their needs require special attention.”¹⁴⁸

On the State’s positive constitutional obligation: The positive obligation imposed on the State under Section 26(2) of the South African Constitution “requires the state to devise a comprehensive and workable plan to meet its obligation”. However, this obligation “is not an absolute or unqualified one” but is defined by “three key elements”:

- ❖ the obligation to “take *reasonable* legislative and other measures”;
- ❖ the obligation “to achieve the *progressive* realisation” of the right; and
- ❖ the obligation to act “within *available* resources”.¹⁴⁹

With regard to the requirement that the state take “*reasonable legislative and other measures*”, the Court held that “a reasonable programme ... must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.”¹⁵⁰ Further, it must be a “comprehensive” programme and “the measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state’s available means ... The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable.”¹⁵¹ It was, however, “necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the

¹⁴⁴Ibid., para. 33.

¹⁴⁵Ibid., para. 30.

¹⁴⁶Ibid., para. 35; emphasis added.

¹⁴⁷Ibid., loc. cit.

¹⁴⁸Ibid., paras. 35-37; quote from para. 36.

¹⁴⁹Ibid., para. 38; emphasis added.

¹⁵⁰Ibid., paras. 39; emphasis added.

¹⁵¹Ibid., paras. 40-41.

requirement of reasonableness.”¹⁵² On the other hand, as further held by the Court, “mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will [therefore] invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation ... An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.”¹⁵³

What is meant then by the term “reasonable” in this context? The Court took the following view:

“43. In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. *The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs.* A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.

44. *Reasonableness must also be understood in the context of the Bill of Rights as a whole.* The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”¹⁵⁴

With regard to the obligation to achieve *the progressive realization of the right of access to adequate housing*, the Court held that “the term ‘progressive realisation’ shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal.” This means more particularly:

¹⁵²Ibid., para. 41.

¹⁵³Ibid., para. 42.

¹⁵⁴Ibid., paras. 43-44; emphasis added.

“that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.”¹⁵⁵

In support of its reasoning with regard to the term “progressive realisation” in Section 26(2) of the Constitution of South Africa, a term that was taken, in particular, from article 2(1) of the International Covenant on Economic, Social and Cultural Rights, the Court referred to paragraph 9 of General Comment No. 3, in which the Committee on Economic, Social and Cultural Rights “helpfully analysed this requirement in the context of housing”.¹⁵⁶ Although the General Comment was intended to explain States parties’ obligations under the Covenant, it was “also helpful in plumbing the meaning of ‘progressive realisation’ in the context of” the South African Constitution. According to the Court:

“The meaning ascribed to the phrase is in harmony with the text in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived.”¹⁵⁷

It remained for the Court to explain the meaning of “the third defining aspect of the obligation to take the requisite measures”, namely “*that the obligation does not require the state to do more than its available resources permit*”.¹⁵⁸ In the view of the Court, “this means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.” In other words, “there is a balance between goals and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.”¹⁵⁹

On the application of the constitutional requirements to the national Housing Act: The Court then analysed the national Housing Act, which provides a framework establishing the responsibilities and functions of each sphere of government in respect of housing. It concluded that “it emerges from the general principles read together with the functions of national, provincial and local government that the concept of housing development, as defined, is central to the Act. Housing development as defined seeks to provide citizens and permanent residents with access to permanent residential structures with secure tenure ensuring internal and external privacy and to provide adequate protection against the elements.”¹⁶⁰ However, the Housing Act does not contemplate “the provision of housing that falls short of the definition of housing development in the Act”. In other words, there is no express provision

¹⁵⁵Ibid., para. 45.

¹⁵⁶Ibid. This aspect of the Committee’s General Comment No. 3 was dealt with in sub-section 5.1.3.

¹⁵⁷See the *Grootboom judgment*, para. 45.

¹⁵⁸Ibid., para. 46; emphasis added.

¹⁵⁹Ibid., loc. cit.

¹⁶⁰Ibid., para. 51.

“to facilitate access to *temporary relief* for people who have no access to land, no roof over their heads, for people who are living in intolerable conditions and for people who are in crisis because of natural disasters such as floods and fires, or because their homes are under threat of demolition. These are people in desperate need. Their immediate need can be met by relief short of housing which fulfils the requisite standards of durability, habitability and stability encompassed by the definition of housing development in the Act.”¹⁶¹

Characterizing the execution of the housing programme as “a major achievement”, the Court nevertheless had to answer the question whether the measures adopted were “reasonable within the meaning of section 26 of the Constitution”.¹⁶² In so doing, the Court found, in particular, *that* the allocation of responsibilities and functions had been “coherently and comprehensively addressed”; *that* the programme was “not haphazard” but represented “a systematic response to a pressing social need”; *that*, although problems of implementation existed in some areas, the evidence suggested that the State was “actively seeking to combat these difficulties”.¹⁶³

It remained to be decided, however, *whether the nationwide housing programme was “sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements”*. This had to be done “in the context of the scope of the housing problem” in Cape Metro, which was “acute”, “desperate” and “compounded by rampant unemployment and poverty”.¹⁶⁴ It was “common cause” that, except for the newly designed Cape Metro land programme, which did not exist when the *Grootboom* case was launched, there was “no provision in the nationwide housing programme as applied within Cape Metro for people in desperate need”.¹⁶⁵ The programme therefore also fell short of “obligations imposed upon national government to the extent that it [failed] to recognise that the state must provide for relief for those in desperate need”. As stated by the Court, such people “are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this, but the precise allocation is for national government to decide in the first instance.”¹⁶⁶

With regard to *the conduct of the appellants towards the respondents* in this case, the Court emphasized that “all levels of government must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution ... Every step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing.”¹⁶⁷ However, Section 26 of the Constitution was “not the only provision relevant to a decision as to whether state action at any particular level of government is reasonable and consistent with the Constitution”:

¹⁶¹Ibid., para. 52; emphasis added.

¹⁶²Ibid., paras. 53-54.

¹⁶³Ibid., para. 54.

¹⁶⁴Ibid., paras. 56, 58-59; emphasis added.

¹⁶⁵Ibid., para. 63.

¹⁶⁶Ibid., para. 66.

¹⁶⁷Ibid., para. 82.

“83. ... The proposition that rights are interrelated and are all equally important is not merely a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen.”¹⁶⁸

While the national legislature recognized this, consideration had to be given to “whether the state action (or inaction) in relation to the respondents met the required constitutional standard”.¹⁶⁹ The Court pointed out that “there was no suggestion however that the respondents’ circumstances before their move to New Rust was anything but desperate. There is nothing in the papers to indicate any plan by the municipality to deal with the occupation of vacant land if it occurred.”¹⁷⁰ Moreover, contrary to what could have been expected, the municipality had done nothing when the respondents began moving to New Rust “and the settlement grew by leaps and bounds”.¹⁷¹ As to the eviction itself, it was funded by the municipality and carried out without any evidence of effective mediation. “The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt.”¹⁷² Section 26(1) of the Constitution “burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation.”¹⁷³

Summarizing the case, the Court stated that it showed “the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.”¹⁷⁴ The Court was conscious that it was “an extremely difficult task for the state to meet these obligations” in the conditions prevailing in the country, but this was

¹⁶⁸Ibid., para. 83.

¹⁶⁹Ibid., paras. 84-85.

¹⁷⁰Ibid., para. 86.

¹⁷¹Ibid., para. 87.

¹⁷²Ibid., para. 88.

¹⁷³Ibid.

¹⁷⁴Ibid., para. 93.

an aspect that was recognized by the Constitution, which “expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately”.¹⁷⁵ It stressed nevertheless that “despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.”¹⁷⁶

The Court concluded that while Section 26 of the Constitution does not entitle the respondents “to claim shelter or housing immediately upon demand”, it does oblige the State “to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations”. However, the programme that was in force in the Cape Metro at the time that this application was brought, “fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.”¹⁷⁷

For all these reasons, the Court found it “necessary and appropriate to make a declaratory order” whereby the State was required “to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.”¹⁷⁸

The abovementioned work of the Committee on Economic, Social and Cultural Rights, the European Court of Human Rights and the South African Constitutional Court with regard to the right to adequate housing confirms several important aspects of States’ general legal obligations to enforce economic, social and cultural rights, namely:

- *that it is indispensable to consider the effective implementation of economic, social and cultural rights also in the light of the effective implementation of civil and political rights;*
- *that economic, social and cultural rights or at least some aspects of such rights are justiciable and consequently lend themselves to judicial adjudication;*
- *that legal terms are meant to have an effect and that, consequently:*
- *terms like “taking steps” to achieve “progressively” the full realization of rights impose immediate positive duties on Governments in terms of conduct, result and effect;*
- *that the reference to “all appropriate means” implies that there is a built-in flexibility that makes it possible in any given case to strike a fair balance between the legal duties of a given State and the means at its disposal.*

¹⁷⁵Ibid., para. 94.

¹⁷⁶Ibid., loc. cit.

¹⁷⁷Ibid., para. 95.

¹⁷⁸Ibid., para. 96.

8. Case-Study II: The Right to Health

The second right to be considered in some more detail in this chapter is the right to health. The analysis will be based on article 12 of the International Covenant on Economic, Social and Cultural Rights and it will also show how the right to health has been dealt with by the Supreme Courts of Canada and India. Contrary to the constitutional law of South Africa, neither Canadian nor Indian constitutional law expressly provides for the right to health.

8.1 International Covenant on Economic, Social and Cultural Rights: article 12

The right to health is recognized in article 12 of the Covenant, which reads:

- “1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - (b) The improvement of all aspects of environmental and industrial hygiene;
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

The Committee on Economic, Social and Cultural Rights has dealt with the right to health in several General Comments, which will be reviewed only in relatively broad terms in this section. For more details, readers are referred to the full text of General Comments Nos. 5, 6 and 14.¹⁷⁹

The right protected by article 12 of the Covenant is the right to enjoy “the highest attainable standard of physical and mental health”. In General Comment No. 14, the Committee deals at length with both the normative content of article 12 and the corresponding legal obligations of States parties.

The right to health is included in numerous other international instruments, such as:

- ❖ The Universal Declaration of Human Rights – article 25(1);
- ❖ The International Convention on the Elimination of All Forms of Racial Discrimination – article 5(e)(iv);

¹⁷⁹See, for example, *United Nations Compilation of General Comments by Human Rights Treaty Bodies*, pp. 28, 38 and 90 respectively.

- ❖ The Convention on the Elimination of All Forms of Discrimination against Women – article 11(1)(f);
- ❖ The Convention on the Rights of the Child – article 24;
- ❖ The African Charter on Human and Peoples’ Rights – article 16;
- ❖ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights – article 10;
- ❖ The European Social Charter (Revised) – article 11.

As a general point of departure, the Committee on Economic, Social and Cultural Rights emphasizes that health “is a fundamental human right indispensable for the exercise of other human rights” and that every human being is entitled to the enjoyment of “the highest attainable standard of health conducive to living a life in dignity”.¹⁸⁰ More particularly

“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.”¹⁸¹

In the Committee’s view, the reference to “the highest attainable standard of physical and mental health” is not confined to the right to health care but “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”.¹⁸²

Moreover, according to the Committee, the right to health includes certain components which are legally enforceable. “For example, the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions.”¹⁸³

8.1.1 The normative content of article 12(1)

First, the right to health as defined in article 12(1) “is not to be understood as a right to be *healthy*”. Second, it is a right that contains “both freedoms and entitlements”.¹⁸⁴ The Committee notes that “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

¹⁸⁰Ibid., General Comment No. 14, p. 90, para. 1.

¹⁸¹Ibid., p. 90, para. 3.

¹⁸²Ibid., pp. 90-91, para. 4; see also in further detail p. 92, para. 11.

¹⁸³Ibid. p. 90, para. 1, including the footnote on p. 106.

¹⁸⁴Ibid., p. 91, para. 8.

to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”¹⁸⁵

Moreover, “the notion of ‘the highest attainable standard of health’ ... takes into account both the individual’s biological and socio-economic preconditions and a State’s available resources.” As good health cannot for various reasons be ensured by a State, “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.*”¹⁸⁶

This means, more specifically, that “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”:

- ❖ **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;”
- ❖ **accessibility:** “Health facilities, goods and services have to be accessible to everyone ... within the jurisdiction of the State party.” The four dimensions of accessibility are the *principle of non-discrimination, physical accessibility, economic accessibility* and *information accessibility*, which includes the right to seek, receive and impart information and ideas concerning health issues;
- ❖ **acceptability:** “All health facilities, goods and services must be respectful of medical ethics and culturally appropriate;”
- ❖ **quality:** “As well as being culturally acceptable, health facilities, goods and services must ... be scientifically and medically appropriate and of good quality.”¹⁸⁷

8.1.2 The meaning of the provisions of article 12(2)

While article 12(1) provides a definition of the right to health, article 12(2), “enumerates illustrative, non-exhaustive examples of States parties’ obligations”.¹⁸⁸ These obligations may be summarized as follows:

- ❖ **“The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child” – article 12(2)(a):** According to the Committee, this provision “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, emergency obstetric services and access to information, as well as to resources necessary to act on that information”. In interpreting this provision it is necessary also to consider the terms of the Convention on the Rights of the Child.¹⁸⁹

¹⁸⁵Ibid., loc. cit.; emphasis added.

¹⁸⁶Ibid., p. 91, para. 9; emphasis added.

¹⁸⁷Ibid., pp. 92-93, para. 12; emphasis added; footnotes omitted.

¹⁸⁸Ibid., p. 91, para. 7.

¹⁸⁹Ibid., p. 93, para. 14, and pp. 95-96, para. 22; footnotes omitted.

- ❖ **“The improvement of all aspects of environmental and industrial hygiene” – article 12(2)(b):** This obligation 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”. The term “industrial hygiene” refers to “the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment”. Article 12.2(b) also embraces, inter alia, adequate housing and safe and hygienic working conditions.¹⁹⁰
- ❖ **“The prevention, treatment and control of epidemic, endemic, occupational and other diseases” – article 12(2)(c):** This provision “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, ... the implementation and enhancement of immunization programmes and other strategies of infectious disease control.”¹⁹¹
- ❖ **“The creation of conditions which would assure to all medical service and medical attention in event of sickness” – article 12(2)(d):** This provision relates to both physical and mental health and “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 of this obligation is the furtherance of popular participation in health services such as through the organization of the health sector and the insurance system.¹⁹²

In implementing article 12 of the Covenant, States parties naturally also have to consider their *legal duty not to discriminate between people in general or between men and women* (arts. 2(2) and 3 of the Covenant).¹⁹³ In order to eliminate discrimination against women in the health sector there is, in particular, “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.”¹⁹⁴

¹⁹⁰Ibid., pp. 93-94, para. 15.

¹⁹¹Ibid., p. 94, para. 16; emphasis added.

¹⁹²Ibid., p. 94, para. 17.

¹⁹³Ibid., pp. 94-95, paras. 18-19.

¹⁹⁴Ibid., p. 95, para. 21.

Further, *persons with disabilities and elderly persons* all have the right to health under article 12(1) of the Covenant and they have the right to be provided with the same level of medical care as other members of the society in which they live. Moreover, the right to physical and mental health implies, for instance, “the right to have access to, and to benefit from, those medical and social services – including orthopaedic devices – which enable persons with disabilities to become independent, prevent further disabilities and support their social integration”.¹⁹⁵ In the case of the elderly, prevention through regular check-ups suited to their needs “plays a decisive role” as does rehabilitation by maintaining the functional capacities of elderly persons, “with a resulting decrease in the cost of investments in health care and social services”.¹⁹⁶ *Indigenous peoples* also have a right under article 12 “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.”¹⁹⁷

The right to health as guaranteed by the International Covenant on Economic, Social and Cultural Rights means the right to enjoy facilities, goods and services, and conditions necessary for the realization of the highest attainable standard of health. The right includes freedom to control one’s own health and body and the right of access to a non-discriminatory system of health protection.

*The health facilities must be **available, accessible, acceptable and of good quality.***

Vulnerable groups such as persons with disabilities, women, elderly persons and indigenous peoples have the right to specific measures suited to their needs.

8.1.3 The obligations of States parties

The Committee on Economic, Social and Cultural Rights divides the legal obligations of States parties under the International Covenant on Economic, Social and Cultural Rights into the following four categories: general, specific, international and core obligations. Some of the main elements of the first three categories will be summarized in this sub-section, while the core obligations will be dealt with separately below.

- ❖ **General legal obligations:** “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*.” Thus, the right to health, as guaranteed by article 12, must be exercised “without discrimination of any kind” (art. 2(2)) and steps must be taken (art. 2(1)) towards its full realization. “Such steps must be *deliberate, concrete, and targeted*”

¹⁹⁵Ibid., p. 96, para. 26, read in conjunction with General Comment No. 5, p. 35, para. 34.

¹⁹⁶Ibid., General Comment No. 14, p. 96, para. 25, read in conjunction with General Comment No. 6, p. 45, para. 35.

¹⁹⁷Ibid., General Comment No. 14, pp. 96-97, para. 27.

towards the full realization of the right to health ... [P]rogressive 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.” Deliberately retrogressive measures, which are strongly presumed not to be permissible, have to be duly justified by reference to all rights guaranteed by the Covenant and the State party’s “maximum available resources”.¹⁹⁸

Lastly, States parties have the obligations “to *respect, protect, and fulfil* ... 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.”¹⁹⁹

- ❖ ***Specific legal obligations:*** The obligations to respect, protect and fulfil the right to health have been reviewed in greater detail by the Committee on Economic, Social and Cultural Rights in General Comment No. 14. The obligation to *respect* the right to health means, for instance, that States must refrain “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 States policy; and abstaining from imposing discriminatory practices relating to women’s health status and needs.” States must furthermore refrain, inter alia, “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”. They should also refrain “from limiting access to contraceptives and other means of maintaining sexual and reproductive health” and “from unlawfully polluting air, water and soil, e.g. through industrial waste”. Lastly, nuclear, biological or chemical weapons should not be used or tested “if such testing results in the release of substances harmful to human health”.²⁰⁰

The obligation to *protect* includes “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, foods 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,

¹⁹⁸Ibid., pp. 97-98, paras. 30-32; emphasis added.

¹⁹⁹Ibid., p. 98, para. 33.

²⁰⁰Ibid., p. 98, para. 34.

adolescents and older persons, in the light of gender-based expressions of violence.”²⁰¹

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 to all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions.” The obligations also include, for instance, “the provision of a public, private or mixed health insurance system which is affordable for all”. Lastly, the legal duty to *fulfil* also comprises specific obligations to *facilitate*, *provide*, and *promote* the right to health.²⁰²

- ❖ ***International obligations:*** States parties have the obligation “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, articles 12, 2(1) and (2), 22 and 23 of the Covenant 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.” States parties also “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 do so in accordance with international law. States parties have “a joint and individual responsibility” based both on the Charter of the United Nations and the resolutions adopted by the General Assembly and 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”. Lastly, 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”.²⁰³

8.1.4 The core obligations

The core obligations pertaining to the right to health are aimed at ensuring the satisfaction of minimum essential levels of this right. They are obligations that States parties must comply with at all times, since they are considered non-derogable.²⁰⁴ These core obligations have been defined by the Committee on the basis of article 12 read in conjunction with the Programme of Action of the International Conference on Population and Development and the Alma-Ata Declaration. In the Committee’s view, they include at least the following obligations:

²⁰¹Ibid., pp. 98-99, para. 35; emphasis added.

²⁰²Ibid., p. 99, paras. 36-37; see also p. 98, para. 98.

²⁰³Ibid., pp. 99-100, paras. 38-41.

²⁰⁴Ibid., p. 101, para. 43, and p. 102, para. 47.

- ❖ “To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups”;
- ❖ “To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone”;
- ❖ “To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water”;
- ❖ “To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs”;
- ❖ “To ensure equitable distribution of all health facilities, goods and services”;
- ❖ “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 [also] 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.”²⁰⁵

The Committee has also confirmed that “the following are obligations of comparable priority”:

- ❖ “To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care”;
- ❖ “To provide immunization against the major infectious diseases occurring in the community”;
- ❖ “To take measures to prevent, treat and control epidemic and endemic diseases”;
- ❖ “To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them”;
- ❖ “To provide appropriate training for health personnel, including education on health and human rights”.²⁰⁶

These eleven core obligations relating to the right to health provide helpful guidance to States parties in the implementation of their treaty obligations at the domestic level. It should be noted, in particular, that the right to shelter and housing is mentioned as a prerequisite for effectively guaranteeing the right to health. The essential importance of access to adequate housing for a person’s health has also been emphasized by the World Health Organization.

8.1.5 Violations of article 12

The following are just a few examples of State actions or omissions that would amount to a breach of the legal duties incurred under the International Covenant on Economic, Social and Cultural Rights with regard to the right to health:

²⁰⁵Ibid., p. 101, para. 43.

²⁰⁶Ibid., pp. 101-102, para. 44.

- ❖ “A State which is unwilling to use the maximum of its available resources for the realization of the right to health”. If a country is facing resource constraints, “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”;
- ❖ Actions or omissions violating the eleven core obligations described above, which must be complied with in all circumstances;
- ❖ “State actions, policies or laws that contravene the standards set out in article 12 ... and are likely to result in bodily harm, unnecessary morbidity and preventable morbidity. 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” (*violation of the obligation to respect*);
- ❖ 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 would include “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 protect women against violence or to prosecute perpetrators” (*violation of the obligation to protect*);
- ❖ 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-enjoyment 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” (*violation of the right to fulfil*).²⁰⁷

8.1.6 Implementation at the national level

The Committee admits that “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.”²⁰⁸ To this end, each State party must adopt a national strategy and formulate policies with the right to health indicators and benchmarks. National health strategies and plans of actions “should respect, *inter alia*, the principles of non-discrimination and people’s participation” and “should also be based on the principles of accountability, transparency and independence of the judiciary”.²⁰⁹ Lastly, “States should consider adopting a framework law to

²⁰⁷Ibid., pp. 102-103, paras. 46-52.

²⁰⁸Ibid., pp. 103-104, para. 53.

²⁰⁹Ibid., p. 104, paras. 54-55.

operationalize their right to health national strategy.” The law should create mechanisms for monitoring the implementation of the strategy and plan of action.²¹⁰

With regard to the question of **remedies and accountability**, the Committee holds that “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. 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.”²¹¹ In this connection, it encourages States parties to incorporate in their domestic legal order international instruments recognizing the right to health, since such incorporation “can significantly enhance the scope and effectiveness of remedial measures”. “Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.”²¹² The Committee further states that “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.”²¹³

States parties have a legal duty to take deliberate, concrete and targeted steps towards the full realization of the right to health. While some obligations can be implemented progressively, others are of immediate effect.

States parties have to respect, protect and fulfil their legal undertakings. The obligation to fulfil also implies that States parties have a legal duty to facilitate, provide and promote the right to health.

The States parties to the International Covenant have, at the very least, eleven core obligations which must be complied with at all times.

All alleged victims of violations of the right to health should have access to effective judicial or other appropriate remedies, inter alia at the national level, and the right to adequate reparation for violations of this right.

Judges and members of the legal professions in general should be encouraged to pay greater attention to violations of the right to health in the exercise of their responsibilities.

²¹⁰Ibid., p. 104, para. 56.

²¹¹Ibid., p. 105, para. 59.

²¹²Ibid., p. 105, para. 60.

²¹³Ibid., p. 105, para. 61.

Although the next two cases selected from domestic jurisdictions do not involve the interpretation of the International Covenant on Economic, Social and Cultural Rights, they are of considerable interest since the judges in both cases found ways of interpreting already existing domestic constitutional human rights provisions in an extensive manner, thereby paving the way for the introduction of the right to health in the wider context of the right to equality (Canada) and the right to life (India).

8.2 Relevant domestic case law I: The example of Canada

The case of *Eldridge v. British Columbia*, which was decided by the Supreme Court of Canada in 1997, concerned *equality of rights with regard to the provision of medical services to persons with physical disabilities*.²¹⁴ The analysis contained in this judgment is of considerable interest and therefore warrants examination in some depth. It was drafted by Justice La Forest on behalf of the unanimous Supreme Court.

The facts of the case:²¹⁵ The appellants were born deaf and their preferred means of communication was sign language. They therefore contended that the absence of interpreters impaired their ability to communicate with their doctors and other health care providers, increasing the risk of misdiagnosis and ineffective treatment. Medical care in British Columbia is delivered through two primary mechanisms, the Hospital Insurance Act, R.S.B.C. 1979, c. 180 (later renamed R.S.B.C. 1996, c. 204), which reimburses hospitals for the medically required services they provide to the public, and the Medical and Health Care Services Act, S.B.C. 1992, c. 76 (later renamed the Medicare Protection Act, R.S.B.C. 1996, c. 286). Neither of these programmes paid for sign language interpretation for the deaf. One physician testified before the court that communication without an interpreter “was inhibiting and frustrating” and another emphasized that adequate communication was “particularly critical for childbirth” to enable the patient to help with the delivery and thereby reduce the risk of complications.²¹⁶

The appellants filed an application in the Supreme Court of British Columbia seeking, in particular, “a declaration that the failure to provide sign language interpreters as an insured benefit under the Medical Services Plan” violated section 15(1) of the Canadian Charter of Rights and Freedoms,²¹⁷ according to which:

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

²¹⁴(1997) 3 S.C.R. *Eldridge v. British Columbia (Attorney General)* 624. The text used for this chapter can be found on the following web site: http://www.lexum.umontreal.ca/csc-scc/en/pub/1997/vol3/html/1997scr3_0624.html

²¹⁵*Ibid.* This summary is based on the facts as related in the judgment, paras. 2-7.

²¹⁶*Ibid.*, paras. 5 and 7.

²¹⁷*Ibid.*, para. 11.

The application was dismissed by the Court and, on appeal, the majority of the British Columbia Court of Appeal held that the lack of interpreting services in hospitals was not discriminatory “because the *Hospital Insurance Act* does not provide ‘any benefit of the law’ within the meaning of s. 15(1) of the *Charter*”.²¹⁸

Leave to appeal was granted to the Canadian Supreme Court, which found that neither the Medical and Health Care Services Act nor the Hospital Insurance Act was constitutionally suspect. ***The potential violation of Section 15(1) of the Charter rather flowed from the decision-making power delegated to the subordinate authority.*** In other words, the legislation itself did not “either expressly or by necessary implication” prohibit hospitals (Hospital Insurance Act) or the Medical Services Commission (Medical and Health Care Services Act) from respectively providing sign language interpreters and determining that such interpretation “is a ‘medically required’ service and hence a benefit”.²¹⁹

The Court rejected the respondents’ contention that the Charter on Rights and Freedoms was not applicable to hospitals. It found that there was “a ‘direct and ... precisely-defined connection’ between a specific government policy and the hospital’s impugned conduct”. The alleged discrimination, namely the failure to provide sign language interpretation, was “intimately connected to the medical service delivery system instituted by legislation”.²²⁰ The provision of these services was “an expression of government policy”, with hospitals acting “as agents for the government in providing the specific medical services set out in the [Hospital Insurance] Act. The Legislature [could not therefore] evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective.”²²¹ With regard to the Medical Services Commission set up under the Medical and Health Care Services Act, it was not contested that it had to conform to the *Charter* in the exercise of its power, delegated to it by the Government, to determine whether a service is a “benefit” pursuant to the Act and thus also a “medically required” service to be provided free of charge.²²²

The Court having concluded “that the *Charter* applies to the failure of hospitals and the Medical Services Commission to provide sign language interpreters,” it remained to be determined whether that failure infringed the appellants’ right to equality under Section 15(1) of the Charter. At the outset, the Court emphasized that, like other Charter rights, Section 15(1) “is to be generously and purposively interpreted” because a constitution incorporating a bill of rights calls for “a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism,’ suitable to give to individuals the full measure of the fundamental rights and freedoms referred to.”²²³

²¹⁸Ibid., para. 13.

²¹⁹Ibid., para. 29 (regarding the Medical and Health Care Services Act) and para. 34 (regarding the Hospital Insurance Act).

²²⁰Ibid., para. 51.

²²¹Ibid., loc. cit.

²²²Ibid., para. 52.

²²³Ibid., para. 53.

The Court further stated that Section 15(1) of the Charter serves the following “two distinct but related purposes. First, it expresses a commitment – deeply ingrained in our social, political and legal culture – to the equal worth and human dignity of all persons. ... Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups ‘suffering social, political and legal disadvantage in our society’.”²²⁴ With regard to the special situation of persons with disabilities, the Court stated:

“56. It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social integration and advancement, subjected to invidious stereotyping and relegated to institutions ... This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the ‘equal concern, respect and consideration’ that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms ... One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled. Statistics indicate that persons with disabilities, in comparison to non-disabled persons, have less education, are more likely to be outside the labour force, face much higher unemployment rates, and are concentrated at the lower end of the pay scale when employed.”²²⁵

The Court added that “deaf persons have not escaped this general predicament” and that “the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population.”²²⁶

With regard to the question whether the appellants had been afforded “equal benefit of the law without discrimination” in accordance with Section 15(1) of the Charter, the Court pointed out that the claim before it was “one of ‘adverse effects’ discrimination”, since “on its face, the medicare system in British Columbia applies equally to the deaf and hearing populations. It does not make an explicit ‘distinction’ based on disability by singling out deaf persons for different treatment.”²²⁷ The Court added that it had consistently held that “s. 15(1) of the *Charter* protects against this type of discrimination” since it was “intended to ensure a measure of substantive, and not merely formal equality”.²²⁸ A corollary to this principle was “that a discriminatory purpose or intention is not a necessary condition of a s. 15(1) violation ... It is sufficient if the *effect* of the legislation is to deny someone the equal protection or benefit of the law.”²²⁹

²²⁴Ibid., para. 54.

²²⁵Ibid., para. 56.

²²⁶Ibid., para. 57.

²²⁷Ibid., para. 60.

²²⁸Ibid., para. 61.

²²⁹Ibid., para. 62.

In the *Eldridge* case, the adverse effect suffered by the deaf persons stemmed “not from the imposition of a burden not faced by the mainstream population, but rather from a failure to ensure that deaf persons benefit equally from a service offered to everyone”.²³⁰ The Supreme Court therefore logically rejected the opinions of the lower courts, according to which sign language interpretation was “a discrete, non-medical ‘ancillary’ service” that did not deny the deaf persons a benefit available to the hearing population. In its view it was, on the contrary, “the means by which deaf persons may receive the same quality of medical care as the hearing population”.²³¹ In other words, whenever necessary for effective communication, “sign language interpretation should not ... be viewed as an ‘ancillary’ service”.²³²

In reply to the respondents’ suggestions “that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits,” the Court held that “this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court’s equality jurisprudence.”²³³

In the course of its in-depth analysis of the concept of equality and non-discrimination, the Court further stated that “the principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.” As emphasized by the Court, “it is also a cornerstone of human rights jurisprudence ... that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation,” which, in this context, “is generally equivalent to the concept of ‘reasonable limits’”.²³⁴

The Court therefore concluded that “the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons.”²³⁵ This ruling did not mean, however, “that sign language interpretation will have to be provided in every medical situation. The ‘effective communication’ standard is a flexible one, and will take into consideration such factors as the complexity and importance of the information to be communicated, the context in which the communications will take place and the number of people involved ... For deaf persons with limited literacy skills, however, it is probably fair to surmise that sign language interpretation will be required in most cases.”²³⁶

²³⁰Ibid., para. 66.

²³¹Ibid., paras. 68 and 71.

²³²Ibid., para. 71.

²³³Ibid., paras. 72-73.

²³⁴Ibid., paras. 78-79.

²³⁵Ibid., para. 80.

²³⁶Ibid., para. 82.

Lastly, the Court responded in the negative to the question whether there was any possible justification for this prima facie violation under Section 1 of the Charter, *according to which the right and freedoms guaranteed in the Charter can be “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”* (emphasis added). Justice La Forest’s summing up on this point is well worth quoting, since the thrust of his argument is equally relevant to other disadvantaged groups in our societies who may not benefit from equal medical care:

“94. In summary, I am of the view that the failure to fund sign language interpretation is not ‘minimal impairment’ of the s. 15(1) rights of deaf persons to equal benefit of the law without discrimination on the basis of their physical disability. The evidence clearly demonstrates that, as a class, deaf persons receive medical services that are inferior to those received by the hearing population. Given the central place of good health in the quality of life of all persons in our society, the provision of substandard medical services to the deaf necessarily diminishes the overall quality of their lives. The government has simply not demonstrated that this unpropitious state of affairs must be tolerated in order to achieve the objective of limiting health care expenditures. Stated differently, the government has not made a ‘reasonable accommodation’ of the appellants’ disability. In the language of this Courts’ [*sic*] human rights jurisprudence, it has not accommodated the appellants’ needs to the point of ‘undue hardship’.”²³⁷

8.3 Relevant domestic case law II: The example of India

The right to life in article 21 of the Constitution of India was given an extensive interpretation by the Supreme Court of India in the case of *Consumer Education & Research Centre and Others v. Union of India and Others*, which concerned occupational health hazards and diseases affecting workmen employed in asbestos industries.²³⁸ The Supreme Court concluded that the “right to health, medical aid to protect the health and vigour to a worker while in service or post-retirement is a fundamental right under Article 21, read with Articles 39(*e*), 41, 43, 48-A and all related articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person”.²³⁹

It may be noted, without going into the details of the case, that the petitioner sought “to fill in the yearning gaps and remedial measures for the protection of the health of the workers engaged in mines and asbestos industries with adequate mechanism for and diagnosis and control of the silent killer disease ‘asbestosis’.”²⁴⁰ The Court analysed at length the data on the danger of exposure to asbestos and concluded that it results in a “long tragic chain of adverse medical, legal and societal

²³⁷Ibid., para. 94.

²³⁸(1995) 3 Supreme Court Cases 42.

²³⁹Ibid., p. 70.

²⁴⁰Ibid., p. 47.

consequences”, thereby issuing a reminder of “the legal and social responsibility of the employer or the producer not to endanger the workmen or the community or the society”. It added that:

“He or it is not absolved of the inherent responsibility to the exposed workmen or the society at large. They have the responsibility – legal, moral and social to provide protective measures to the workmen and to the public or all those who are exposed to the harmful consequences of their products. Mere adoption of regulations for the enforcement has no real meaning and efficacy without professional, industrial and governmental resources and legal and moral determination to implement such regulations.”²⁴¹

The Court then examined the case, *inter alia*, in the light of the Preamble and of articles 38 and 21 of the Constitution of India. According to the first preambular paragraph, all citizens of India shall be secured “justice, social, economic and political”. Article 38, which forms part of the “Directive Principles of State Policy”, concerns the duty of the State to secure a social order for the promotion of welfare of the people. Article 21 protects the right to life.

With regard to the Preamble and article 38 of the Constitution, the Court stated, *inter alia*, that:

“18. ... the supreme law, envisions social justice as its arch to ensure life to be meaningful and liveable with human dignity ... Law is the ultimate aim of every civilised society, as a key system in a given era, to meet the needs and demands of its time ... The Constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy. Social justice, equality and dignity of person are cornerstones of social democracy ... Social justice is a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury to ward off distress and to make their life liveable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation. Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity; the State should provide facilities and opportunities to enable them to reach at least minimum standard of health, economic security and civilised living while sharing according to their capacity, social and cultural heritage.

²⁴¹Ibid., pp. 66-67.

19. In a developing country like ours steeped with unbridgeable and ever-widening gaps of inequality in status and of opportunity, law is a catalyst, rubicon to the poor etc. to reach the ladder of *social justice* ... What is due cannot be ascertained by absolute standard which keeps changing depending upon the time, place and circumstance. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor etc. are languishing and to secure dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets of human activity. The concept of social justice embeds equality to flavour and enliven practical content of 'life'. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results.”²⁴²

The Court then stated that, through article 1 of the Universal Declaration of Human Rights, the Charter of the United Nations “reinforces the faith in fundamental human rights and in the dignity and worth of human person envisaged in the Directive Principles of State Policy as part of the Constitution. The jurisprudence of personhood or philosophy of the right to life envisaged under Article 21, enlarges its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live a life with dignity and equality.”²⁴³ The Court added that:

“22. The expression 'life' assured in Article 21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure ... If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live, leave aside what makes life liveable. The right to life with human dignity encompasses within its fold, some of the finer facets of human civilisation which makes life worth living. The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned.”²⁴⁴

With regard to the right to health and the right to life of the worker, the Court specified that:

“24. The right to health to a worker is an integral facet of meaningful right to life, to have not only a meaningful existence but also robust health and vigour without which worker would lead life of misery. Lack of health denudes him of his livelihood. Compelling economic necessity to work in an industry exposed to health hazards due to indigence to bread-winning for himself and his dependants, should not be at the cost of the health and

²⁴²Ibid., pp. 67-68.

²⁴³Ibid., p. 68.

²⁴⁴Ibid., pp. 68-69.

vigour of the workman. Facilities and opportunities, as enjoined in Article 38, should be provided to protect the health of the workman. Provision for medical test and treatment invigorates the health of the worker for higher production or efficient service. Continued treatment, while in service or after retirement is a moral, legal and constitutional concomitant duty of the employer and the State. *Therefore, it must be held that the right to health and medical care is a fundamental right under Article 21 read in conjunction with Articles 39(e), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the health and strength of the worker and is a minimum requirement to enable a person to live with human dignity.*²⁴⁵

It therefore also followed that, since the health and strength of the worker are an integral facet of the right to life, “the State, be it Union or State Government or an industry, public or private, is enjoined to take all such actions which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness.”²⁴⁶

Among the various directives issued by the Court was the order to “all the factories whether covered by the Employees’ State Insurance Act or Workmen’s Compensation Act or otherwise ... to compulsorily insure health coverage to every worker”.²⁴⁷

The cases considered by the Supreme Courts of Canada and India show that, although the right to health may not as such be included in domestic law, the domestic judge is not necessarily deprived of legal tools to protect the right to health of vulnerable groups:

- *In Canada this was done by reference to the right to equal access to medical services, with the right to equality being given a dynamic, purposeful interpretation;*
- *In India it was done by an extensive interpretation of the right to life as understood in the light of other constitutional provisions concerning, inter alia, social justice.*

²⁴⁵Ibid., p. 70; emphasis added. Article 41 of the Constitution concerns the right to work, to education and to public assistance in certain cases; article 43 directs that the State shall “endeavour to secure to all workers, by suitable legislation or economic organisation or any other way to ensure decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workers”, p. 68.

²⁴⁶Ibid., p. 70.

²⁴⁷Ibid., p. 73.

9. The Role of Judges, Prosecutors and Lawyers in the Protection of Economic, Social and Cultural Rights: Lessons Learned

As this chapter shows, the legal professions have an essential role to play in promoting the protection of economic, social and cultural rights, a role that is particularly important for the most vulnerable groups in society. Although there are still countries in which the judiciary is reluctant to adjudicate alleged violations of these rights on the grounds that such issues fall within the power of the executive, such a reduced role for the judiciary in respect of societal problems appears not only increasingly anachronistic but particularly difficult to sustain in law. Without concluding that each and every issue relating to the exercise of economic, social and cultural rights lends itself to judicial determination, this chapter makes clear that many do and that unless there are efficient legal remedies at the disposal of, in particular, the poor and vulnerable, these persons or groups may have no option, in their despair and deprivation, but to take the law into their own hands in order to protect themselves, as in the South African case.

10. Concluding Remarks

The breadth and complexity of the subject of economic, social and cultural rights has by necessity limited the scope of this chapter, which has highlighted only a few important aspects of such rights. It has shown, in particular, that the view has been held ever since the drafting of the Charter of the United Nations that civil and political rights, on the one hand, and economic, social and cultural rights, on the other, are intrinsically interdependent for their true fulfilment. This integrated approach has also been emphasized by the Committee on Economic, Social and Cultural Rights and upheld in the domestic jurisprudence analysed in this chapter.

Through its General Comments, the Committee on Economic, Social and Cultural Rights has also provided detailed interpretations of the legal obligations of States parties in respect of several of the rights contained in the International Covenant on Economic, Social and Cultural Rights. This increased legal precision of the normative content of such rights provides a welcome and helpful tool not only for Governments but also for domestic judges, whether they are interpreting and applying the Covenant itself or other forms of legislation.

However, this improved definition of governmental legal obligations to protect economic, social and cultural rights must necessarily go hand in hand with a firm determination to uphold civil and political rights, because without effective protection of these rights based on the rule of law, economic, social and cultural rights are likely to remain empty promises.

.....Chapter 15
**PROTECTION AND REDRESS
FOR VICTIMS OF CRIME
AND HUMAN RIGHTS
VIOLATIONS**

Learning Objectives

- *To sensitize the participants to the effects that crime and human rights violations may have on the victims*
- *To familiarize the participants with existing international legal rules governing protection and redress for victims of crime and human rights violations*
- *To identify steps that States must take in order to provide redress and protection for victims of crime and human rights violations*
- *To increase the participants' awareness of their potential as judges, prosecutors and lawyers in protecting victims of crime and human rights violations*

Questions

- *What are the needs, problems and interests, in your view, of victims of ordinary crime?*
- *What types of legal protection and/or redress exist in your country for victims of ordinary crime? Give examples, such as cases of persons abused or maltreated by common criminals?*
- *Do victims of crime face any special problems in the country in which you are exercising your professional responsibilities?*
- *If so, what are they and what is being done to remedy the situation?*
- *Are there any particularly vulnerable groups of victims in your country, such as abused women and children?*
- *If so, what is done to protect them if they denounce the perpetrator of the abuse?*
- *What measures, if any, are taken in the country in which you work to help protect other witnesses, such as informers, whose lives may be in danger following their testimony?*

Questions (cont.d)

- *What types of legal protection and/ or redress exist in your country for, among others, the following categories of people in the event of human rights violations?*
 - *detainees who consider that they are arbitrarily detained;*
 - *detainees who are subjected to ill-treatment, and, in particular, women and children;*
 - *persons in incommunicado detention;*
 - *victims or their dependants in cases of abduction and extrajudicial killings;*
 - *offenders who have not enjoyed basic due process guarantees during their trial;*
 - *women and children who are subjected to State, community or domestic abuse, or threats of such abuse;*
 - *persons subjected to gender, racial or other kinds of discrimination;*
- *Do victims of human rights violations face any special problems in the country in which you are exercising your professional responsibilities?*
- *If so, what are they and what is being done to remedy the situation?*
- *Are there any particularly vulnerable groups in this regard in your country?*
- *If so, who are they, what are their problems, and what is being done to help them?*
- *How do you perceive your role as judges, prosecutors and/ or lawyers in ensuring effective protection and redress for victims of human rights violations?*
- *What are your views on amnesty or impunity laws, which imply that perpetrators of crimes and human rights violations will not be prosecuted for their unlawful acts?*

Relevant Legal Instruments

Universal Instruments

- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- Convention on the Rights of the Child, 1989

Relevant Legal Instruments (cont.d)

- United Nations Convention against Transnational Organized Crime, 2000, and Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention

- Universal Declaration of Human Rights, 1948
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985
- Vienna Declaration and Programme of Action, 1993

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 1994
- European Convention on Human Rights, 1950
- European Convention on the Compensation of Victims of Violent Crimes, 1983

- Committee of Ministers Recommendation No. R (85) 11 to the Members States of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure, 1985

1. Introduction

The present chapter will deal with two basically distinct, but also clearly related issues, namely protection and redress for victims of crime, on the one hand, and protection and redress for victims of human rights violations, on the other. Generally speaking, conventional crimes are committed by people in their private capacity against national penal law, and Governments are not, in principle, responsible for the illegal conduct involved. Acts constituting human rights violations are committed by organs or persons in the name of or on behalf of the State, for instance by the Government, parliament, the courts, prosecutors, police officers and other law enforcement officials. As will be seen below, however, Governments may also, in specific cases, be responsible for the acts of private individuals. These acts may constitute violations of the fundamental rights and freedoms of persons under international human rights law and/or under domestic constitutional or ordinary legislation. Admittedly, however, this

distinction between victims of crime and human rights violations is not always clear-cut, but it serves as a convenient point of departure for the presentation of the legal problems dealt with in this chapter.

That being said, it is important to bear in mind throughout this chapter that to some extent victims of crime and human rights violations have many interests and needs in common, such as a possible need for medical attention, including help for emotional problems, compensation for financial loss and various forms of special protection and/or assistance. The principles dealt with below in relation to victims of crime and human rights violations can thus be viewed as mutually reinforcing whenever an assessment must be made of the victim's needs and the adequate response by society to those needs.

It should further be noted that it is impossible, within such a limited framework, to provide a comprehensive account and analysis of the needs of victims of crime and human rights violations, and the response to the victims, including the establishment of victims' programmes. As increased attention has been focused on victims' rights in recent years, much research has been carried out that can provide help and stimulation to legal practitioners and to social workers and other professional groups who may be called upon to assist victims of crime and human rights violations in recovering from the negative effects of unlawful acts. For suggested reading on this issue, see **Handout No. 1**.

The *first* part of this chapter will deal with protection and redress for victims of crime. As will be seen, however, international law does not regulate in detail the question of protection and redress for victims of ordinary crime, although attempts have been made to increase the focus on the plight of victims so as to encourage Governments to provide them with adequate help and support. The chapter will review the limited rules that do exist in the hope that it may inspire further discussion of the problems facing victims of crime, the main purpose being to increase participants' awareness of the importance of paying due attention to their feelings, needs and interests at all stages of the judicial process.

It should furthermore be pointed out that conventional crimes cover not only more traditional crimes such as ill-treatment, murder, trafficking, sexual and other abuses, theft, burglary and so forth, but also various kinds of organized crime and corruption, as well as, for instance, the relatively new category of cybercrimes.¹ On the other hand, it will not be possible to deal in detail with the various interests that different categories of victims have or may have, and the chapter will therefore deal only, in relatively general terms, with the problems of victims of crime.

¹For an international treaty on this issue, see *Convention on Cybercrime* (ETS No. 185) signed in Budapest on 23 November 2001. The Convention is open for signature by the member States of the Council of Europe and non-member States that participated in its elaboration, and is open for accession by other non-member States. It requires 5 ratifications including at least 3 member States of the Council of Europe in order to enter into force. As of 23 June 2002, only Albania had ratified the Convention; see <http://conventions.coe.int>

The *second* part of this chapter will consider the international rules governing the legal duties of States to provide effective protection and redress to victims of human rights violations. In this regard, some relatively clear rules exist in international human rights law, which have been further clarified in the substantial case law of the international monitoring bodies. The chapter will analyse, in particular, States' general legal duty to *ensure* the effective protection of human rights, and their specific duties to *prevent* violations of human rights, to provide *effective domestic remedies* for alleged violations of a person's human rights, and to *investigate, prosecute* and *punish* such violations and provide *redress* to the victim concerned. The chapter will also discuss the question of *impunity* for human rights violations. Lastly, it will make recommendations regarding the role of the legal professions in providing protection and redress for victims of crime and human rights violations, and close with some concluding remarks.

2. Protection and Redress for Victims of Crime

2.1 Relevant legal provisions

2.1.1 The universal level

While there is no universal convention dealing with the rights of victims of conventional crimes, the United Nations General Assembly adopted, in 1985, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, the text of which had been approved by consensus by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.² To promote implementation, a *Guide for Practitioners Regarding the Implementation of the Declaration* was prepared,³ and the United Nations Economic and Social Council, by resolution 1990/22 of 24 May 1990, invited the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders to give wide distribution to the Guide.⁴

The Declaration defines the notion of victim of crime and abuse of power and specifies victims' rights of access to justice and fair treatment, restitution, compensation and assistance. Insofar as it deals with victims of abuse of power, it will be considered in section 3 *infra*.

²See UN doc. E/CN.15/1997/16, Use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, note by the Secretary-General, para. 1.

³UN doc. A/CONF.144/20, Annex, Guide for Practitioners Regarding the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (hereinafter referred to as UN doc. A/CONF.144/20, Annex, Guide for Practitioners).

⁴UN doc. A/CONF.144/20.

As pointed out in the Guide for Practitioners, the basic principles contained in the Declaration “apply, without discrimination, to all countries, at every stage of development and in every system, as well as to all victims”.⁵ They furthermore “place corresponding responsibilities on central and local government, on those charged with the administration of the criminal justice system and other agencies that come into contact with the victim, and on individual practitioners”.⁶ Paragraph 3 of the Declaration states expressly that:

“The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.”

Lastly, it is of interest to note that, although it was not in force on 24 June 2002, the *United Nations Convention against Transnational Organized Crime*, which was adopted by the General Assembly on 15 November 2000, contains specific provisions in article 25 concerning “Assistance to and protection of victims”. Article 6 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing that Convention, contains even more detailed rules regarding “Assistance to and protection of victims of trafficking in persons”. The text of these provisions may be found in **Handout No. 2**. However, as the Convention on Transnational Organized Crime had, as of 24 June 2002, only 15 out of the 40 ratifications required before it can enter into force, it will not be further dealt with in this chapter. By the same date, the Protocol had been ratified by 12 States.

2.1.2 The regional level

At the regional level, the member States of the Council of Europe concluded, in 1983, the *European Convention on the Compensation of Victims of Violent Crimes*, which entered into force on 1 February 1988. As of 23 June 2002, it had secured a total of fifteen ratifications and accessions.⁷ This treaty was drafted in response to an increased awareness that assistance to victims “must be a constant concern of crime policy, on a par with the penal treatment of offenders. Such assistance includes measures designed to alleviate psychological distress as well as to make reparation for the victim’s physical injuries.”⁸ It was also considered necessary to compensate the victim in order “to quell the social conflict caused by the offence and make it easier to apply rational, effective crime policy”.⁹

One of the concerns underlying the Convention was to provide a compensation scheme that would allow States to step in and compensate the victim or his or her dependants, who rarely obtained any compensation in practice because of the

⁵UN doc. A/CONF.144/20, Annex, Guide for Practitioners, p. 3, para. 1.

⁶Ibid., p. 3, para. 2.

⁷See ETS No. 116, at Treaty Office on <http://conventions.coe.int>

⁸See Explanatory Report on the European Convention on the Compensation of Victims of Violent Crimes, <http://conventions.coe.int/treaty/en/Reports/Html/116.htm> (Council of Europe web site), p. 1, para. 1 (hereinafter referred to as Explanatory Report). This Explanatory Report does not, however, “constitute an instrument providing an authoritative interpretation of the Convention although it might be of such a nature to facilitate the application of the provisions contained therein” p. 1, para II.

⁹Ibid., p. 3, para. 7.

offender's non-apprehension, disappearance or lack of means.¹⁰ Another concern was to give increased protection to foreigners moving between the member States of the Council of Europe.¹¹

The European Committee on Crime Problems of the Council of Europe is to be “kept informed regarding the application of the Convention” and the States parties are to transmit to the Secretary-General of the Council of Europe “any relevant information about its legislative or regulatory provisions concerning the matters covered by the Convention” (art. 13).

For more details of the principles laid down by this Convention, which are limited to **compensation**, see *infra*, subsections 2.2 and 2.4.3.

By virtue of **Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure**, the Committee of Ministers of the Council of Europe expanded on the need to protect victims of crime who may suffer physical, psychological, material and social harm and whose needs “should be taken into account to a greater degree, throughout all stages of the criminal justice process”.¹² The preamble to the Recommendation states that the operation of the criminal justice system “has sometimes tended to add to rather than to diminish the problems of the victim,” that “it must be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim” and that “it is also important to enhance the confidence of the victim in criminal justice and to encourage his co-operation, especially in his capacity as a witness.”¹³ Moreover, measures to help the victims “need not necessarily conflict with other objectives of criminal law and procedure, such as the reinforcement of social norms and the rehabilitation of offenders, but may in fact assist in their achievement and in an eventual reconciliation between the victim and the offender”.¹⁴ The member States of the Council of Europe were therefore asked to “review their legislation and practice” in accordance with the guidelines contained in the Recommendation and which relate to:

- ❖ the police level
- ❖ prosecution
- ❖ questioning of the victim
- ❖ court proceedings
- ❖ the enforcement stage
- ❖ the protection of privacy
- ❖ special protection of the victim
- ❖ conflict resolution schemes
- ❖ research

¹⁰Ibid., p. 1, para. 1.

¹¹Ibid., p. 2, para. 3.

¹²Fifth and seventh preambular paragraphs.

¹³Second, third and fourth preambular paragraphs.

¹⁴Sixth preambular paragraph.

The recommendations relating to the first seven of these stages of the administration of criminal justice will be dealt with in the appropriate context below. On the other hand, this chapter will not discuss conflict resolution and the promotion of further research in that area. It should be noted, however, that mediation between offender and victim may, especially in the case of relatively minor crimes, be an interesting way of pursuing justice and dealing with anti-social behaviour. However, the advantages and disadvantages of resorting to conflict resolution schemes in the field of criminal justice is a multi-dimensional discussion that lies beyond the scope of this chapter.

2.2 The notion of victim

According to paragraph 1 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the term “victims”

“means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power”.

This definition covers many categories of harm sustained by people as a consequence of criminal conduct, ranging from physical and psychological injury to financial or other forms of damage to their rights, irrespective of whether the injury or damage concerned was the result of positive conduct or a failure to act.

Quite importantly, according to paragraph 2 of the Declaration a person may be considered a victim “regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim”. According to the same article:

“The term ‘victim’ also includes, where appropriate, the immediate family or dependants of the direct victims and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”

Lastly, as pointed out in subsection 2.1.1 above, the provisions of the Declaration, in full consistency with the principle of equality and the prohibition of discrimination under international human rights law dealt with in Chapter 13 of this Manual, are, according to paragraph 3, applicable to all, without distinction of any kind on the grounds enumerated in the paragraph or on other grounds.

The European Convention on the Compensation of Victims of Violent Crimes contains no explicit definition of the notion of “victim” and, as made clear by the title, its framework is somewhat limited in that it obliges the State to provide compensation to victims of crime only when “compensation is not fully available from other sources”. Moreover, only the following two categories of victim may qualify for compensation:

- ❖ “those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence”, and
- ❖ “the dependents of persons who have died as a result of such crime” – article 2(1)(a) and (b).

However, a victim for the purposes of the Convention may be a person who has been injured or killed when trying to prevent an offence or when “helping the police to prevent the offence, apprehend the culprit or help the victim”.¹⁵

As made clear by article 2, the Convention does not provide a right to compensation in respect of criminal conduct in general but only in respect of violent crime, nor does it foresee other kinds of help and assistance for victimized persons. This somewhat restrictive framework seems to limit the impact that the Convention might have in terms of providing constructive support to victims of crime, support that should be available throughout the criminal justice system. However, the 1985 Recommendation of the Committee of Ministers on the Position of the Victim in the Framework of Criminal Law and Procedure, while not legally binding, adopts a more holistic approach to the problems faced by victims of crime, a victim-oriented approach that covers all stages of criminal proceedings, from the police level to the enforcement stage, and takes into account the possible need for special protection for the victim.

It is important for members of the legal professions to be aware that the impact on victims of crime is not necessarily limited to physical injury and loss of property, but may also include “loss of time in obtaining financial redress and replacing damaged goods”.¹⁶ Moreover, at the psychological level, victims may be afflicted by a sense of disbelief, a reaction that may be followed by a state of shock, disorientation or even fear and anger.¹⁷ Indeed, when seeking a reason for the crime, victims may experience guilt themselves for what occurred.¹⁸ Although people react differently to crime and do not all suffer serious or long-lasting effects, emotional reactions can affect everybody and a failure to respond or an inadequate response to such emotions on the part of the responsible authorities may exacerbate feelings of anger and fear.¹⁹ As noted in the Guide for Practitioners,

“A peaceful and orderly resolution of conflicts depends upon showing compassion and respect for the dignity of victims by meeting their expectations.”²⁰

¹⁵Explanatory Report, p. 6, para. 20.

¹⁶UN doc. A/ CONF.144/20, annex, Guide for Practitioners, p. 3, para. 5.

¹⁷Ibid., p. 3, para. 6.

¹⁸Ibid., loc. cit.

¹⁹Ibid., p. 4, paras. 7-8 and 11.

²⁰Ibid., p. 4, para. 9.

2.3 Treatment of victims in the administration of justice

Attempts to date at the international level to improve the position of victims in the administration of justice are an admission of the fact that national justice systems have often focused on the offender and his or her relationship with the State, to the exclusion of the rights, needs and interests of victims. Although international law is still rudimentary in this field, some useful guidelines have been developed and will be dealt with below in the logical order of their relevance to the practical workings of the administration of justice.

It may be said at the outset that the primary concern should, in general, be to ensure that persons whose rights have been violated in one way or another feel that justice has been done. It is therefore important always to bear in mind that, to avoid further disillusionment on the part of victims of crime, everybody working in the criminal justice system must show respect and understanding for their concerns, needs and interests. Thoughtlessness and lack of consideration might otherwise needlessly add to victims' pain and disappointment.²¹

To ensure justice for persons who suffer victimization, it is also vital to establish and strengthen judicial and administrative mechanisms. As stated in paragraph 5 of the Declaration of Basic Principles, victims of crime should be enabled "to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible". According to the same provision, victims "should be informed of their rights in seeking redress through such mechanisms". As will be seen below, this duty to inform constitutes an essential part of the responsibilities of various law enforcement authorities vis-à-vis victims of crime.

2.3.1 Treatment of victims by the police

After a criminal offence has been committed, the victim's first contact with the justice system is usually through the police, and this contact may continue for a considerable part of the judicial process. The response of the police during this first encounter may have a decisive impact on the victim's attitude to the criminal justice system as such. Their role is therefore crucial at this early stage of the criminal process.²²

The Declaration on Basic Principles provides little guidance on police conduct as such, although paragraph 4 makes the general statement that victims "should be treated with compassion and respect for their dignity", a rule that is equally valid for the police. The only explicit reference to the police is contained in paragraph 16, according to which police personnel constitute one of the groups that should receive training to sensitize them to the needs of victims and guidelines to ensure proper and prompt aid.

²¹Ibid., see p. 10, para. 31.

²²Ibid., p. 10, para. 36.

However, according to paragraph 6, which should be interpreted as applying also to police investigations of crime, “the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by”, inter alia,

- ❖ “Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information” – paragraph 6(a);
- ❖ “Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system” – paragraph 6(b);
- ❖ “Providing proper assistance to victims throughout the legal process” – paragraph 6(c).

According to the Council of Europe Recommendation on the Position of the Victim:

- ❖ “Police officers should be trained to deal with victims in a sympathetic, constructive and reassuring manner” – Part IA, paragraph 1;
- ❖ “The police should inform the victim about the possibilities of obtaining assistance, practical and legal advice, compensation from the offender and state compensation” – Part IA, paragraph 2;
- ❖ “The victim should be able to obtain information on the outcome of the police investigation” – Part IA, paragraph 3;
- ❖ “In any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim” – Part IA, paragraph 4.

It follows from these provisions that a *first* important aspect of the role of the police is to show due courtesy and respect. They must also ensure that the victim feels “that the offence is being considered individually and properly”. Consequently, to prevent a sense of frustration among victims or increased anger, fear and insecurity, police officers should avoid conveying the impression that the crime is trivial or otherwise not being taken seriously.²³ Respect, compassion and understanding for victims should thus be the hallmark of police conduct at this stage, including a willingness to speak to the victims in language that they understand, avoiding professional jargon to the extent possible.

Second, the police are particularly well placed to inform victims of crime of ways in which they can obtain assistance, compensation and other kinds of help. For instance, they can refer victims to specialized assistance agencies and should preferably provide the information in both oral and written form, since the victims may at this

²³Ibid., p. 11, para. 38.

stage be too upset to take on board all oral information given.²⁴ In this connection, the police may also wish to reassure victims by emphasizing that crime is not tolerated²⁵ and that they will do their best to investigate the victim's case.

A *third* important role for the police is as transmitter to victims of various kinds of essential information regarding the judicial process. The continuous sharing of information that is of relevance to victims and their needs and interests is of fundamental importance in ensuring that they feel involved in the criminal proceedings, an aspect that has long been neglected in the criminal justice system. In particular, victims need to be adequately informed about the role they might play in the proceedings.²⁶ Again, all such information should preferably be conveyed to the victim in both oral and written form. To this end, well-written guides could prove helpful.²⁷

On the question of information, it is important to reiterate that, according to the Council of Europe Recommendation on the Position of the Victim, the victim should be able to obtain information on the outcome of the police investigation and, lastly, that “in any report to the prosecuting authorities, the police should give as clear and complete a statement as possible of the injuries and losses suffered by the victim”. Both points are essential in reassuring the victim that his or her problems and needs are being given due consideration by the competent authorities. A failure to inform the victim about the result of the police investigation may undermine his or her confidence in the judicial criminal system and its capacity to deal with crime and the effects of crime. Furthermore, unless the prosecuting authorities are in possession of a detailed and adequate account of the effects of the crime on the victim or victims concerned, they may not be able adequately to assess the seriousness of the unlawful act, which, again, may cause the victim to feel neglected and lose confidence in the judicial process.

The police must at all times show respect for, and courtesy towards, victims of crime.

The police should provide victims of crime with information about available help, assistance and compensation for injuries and losses they have sustained as a result of the crime.

The police should share other relevant information with victims of crime, including information on the role that victims may play in the criminal proceedings.

The police should inform victims of the outcome of their investigation and provide the prosecution with detailed information as to the effect or effects that the relevant crime had and continues to have on the victims concerned.

By treating victims with respect and understanding, and by sharing relevant information with them, the police help to promote confidence in the criminal justice system.

²⁴Ibid., p. 11, paras. 39-41.

²⁵Ibid., see p. 11, para. 39.

²⁶Ibid., see p. 11, para. 41.

²⁷Ibid., loc. cit.

2.3.2 Treatment of victims by the prosecution

As in the case of the police, the Declaration of Basic Principles does not deal *expressis verbis* with the manner in which the prosecuting authorities should deal with victims of crime, but the same general principles are valid. Thus, the prosecution must also treat victims with “compassion and respect for their dignity” and keep them informed about their role, the scope, timing and progress of the proceedings and the outcome of the investigations. Moreover, for the same reasons as were stated above, it must allow victims to convey their views and concerns.

According to the Council of Europe Recommendation on the Position of Victims:

- ❖ “A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender” – Part. IB, paragraph 5;
- ❖ “The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information” – Part. IB, paragraph 6;
- ❖ “The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings” – Part IB, paragraph. 7.

As noted in the Guide for Practitioners, the criminal justice system differs from one country to another, and so does the role played by the victim. For instance, in some countries the victim can only serve as a prosecution witness, while in others he or she can also prosecute.²⁸ However, irrespective of the judicial system in force, the question of information for victims – as shown by both the Declaration of Principles and the Recommendation on the Position of Victims – remains of fundamental importance throughout the proceedings, also when the case is in the hands of the prosecution. In addition to any information of general value that the prosecutor’s office may distribute to victims, specific material should also be provided about a victim’s case. To enable victims to play a constructive role in the investigation, and to prevent disillusionment with the criminal justice system, the information imparted by the prosecuting authorities must be relevant and adequate.²⁹

It is particularly important “that victims should believe that their case has been fully and carefully considered, and that they have confidence in the decision that is made to prosecute or not”.³⁰ As recognized at the European level, it is also important for victims who are dissatisfied with the decision not to prosecute to have a right of review or the right to institute private proceedings. With regard to the right of review, different mechanisms have been adopted in practice such as review by superior

²⁸Ibid., p. 14, para. 51.

²⁹Ibid., see p. 14, para. 52.

³⁰Ibid., p. 15, para. 54.

prosecutors, by the courts or even by an ombudsman. Another possibility is that of private prosecution.³¹

The prosecuting authorities should at all times show respect for, and courtesy towards, victims of crime.

The prosecuting authorities should keep victims informed about their role in the investigations and about the scope, timing and progress of the proceedings.

The prosecuting authorities should inform the victim of the outcome of the investigation unless, at least at the European level, the victim has indicated that he or she does not wish to have this information.

Where the competent authority decides not to prosecute, the victim should be entitled to have the decision reviewed or should be able to bring a private prosecution.

2.3.3 Questioning of victims during criminal procedures

The duty to treat victims of crime “with compassion and respect for their dignity” (Principle 4 of the Declaration of Basic Principles) is particularly relevant in the context of the questioning of victims, whether the questioning is carried out by the police, a prosecutor or a judge in court. To give evidence in court may be a particularly intimidating experience, especially if the victim has had no earlier contact with the criminal justice system.³² Specific assistance for victims may be helpful “to ensure that the victim feels that he or she has been able to participate properly and that the court has the best evidence before it”.³³ Special assistance to victims who have to testify in court may be of particular value to victims of rape and child abuse. The use of trained counsellors, video-taped evidence or direct video links may be helpful in this respect, as may legal aid to victims so that they can have their own legal adviser. This is particularly important, inter alia, when the victim’s civil claim is heard at the same time as the criminal prosecution.³⁴

According to the Council of Europe Recommendation on the Position of Victims, the victim should, at all stages of the procedure, “be questioned in a manner which gives due consideration to his personal situation, his rights and his dignity. Whenever possible and appropriate, children and the mentally ill or handicapped should be questioned in the presence of their parents or guardians or other persons qualified to assist them” (Part IC, para. 8).

³¹Ibid., loc. cit.

³²Ibid., see p. 15, para. 55.

³³Ibid., loc. cit.

³⁴Ibid.

Apart from the abovementioned categories of crime victim, persons who may need particular help and support in connection with questioning include victims of trafficking, of racially motivated criminal acts or of terrorist acts. Whenever a victim is, for instance, a foreign national and does not speak the local language, particular attention has to be paid to ensuring that he or she is treated with dignity and that all relevant information is conveyed in a language that is understood. Special assistance may also be required to support and reassure crime victims belonging to minority groups.

Questioning by the police, a prosecutor or a judge of victims of crime must be carried out with compassion and respect for their dignity. Special assistance to victims testifying in court may be necessary to reassure the victims and ensure that they play a proper role in the proceedings.

Special assistance may be needed, inter alia, for victims of sex crimes, child abuse, trafficking or terrorist acts and for victims of foreign nationality, members of minority groups and persons with disabilities.

2.3.4 Victims and criminal court proceedings

Paragraph 6 of the Declaration of Principles also covers court proceedings, which means that victims should, for instance, be informed about the time and scope of the proceedings and the role they are expected to play. As noted in the previous subsection, it may be helpful to provide special assistance to victims at this stage too. Such assistance is envisaged in paragraph 6(c) of the Declaration. It is also important for victims that unnecessary delays in the disposition of the case be avoided (paragraph 6(e)).

According to the Council of Europe Recommendation on the Position of Victims, the victim should be informed of

- ❖ “the date and place of a hearing concerning an offence which caused him suffering ;
- ❖ his opportunities of obtaining restitution and compensation within the criminal justice process, legal assistance and advice ;
- ❖ how he can find out the outcome of the case” (Part ID, para. 9).

“It should be possible for a criminal court to order compensation by the offender to the victim” and “legislation should provide that compensation may either be a penal sanction, or a substitute for a penal sanction or be awarded in addition to a penal sanction” (Part ID, paras. 10-11).

To inspire confidence in the justice system, the presiding judge should make sure that victims are given due notice of the trial proceedings and that their views are adequately conveyed to the court. Victims should be duly notified of any delay in or adjournment of the proceedings and should be informed about how to obtain the judgment in the case. It is essential that the presiding judge ensures that victims have been adequately informed about any rights they may have to compensation and restitution so that they may, for instance, formulate their claims properly.

Victims of crime should be informed of the date and place of the court proceedings concerning the crime whose effects they are suffering and should also be informed of any delay or adjournment.

Victims of crime should be duly informed of any rights they have to obtain restitution or compensation for the crime concerned.

Victims of crime should be informed of how to obtain a copy of the judgment relating to the crime.

2.3.5 Victims' right to protection of their private life and their safety

According to paragraph 6(d) of the Declaration of Basic Principles, the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

“Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation”.

On this issue the Council of Europe Recommendation on the Position of Victims states that:

“Information and public relations policies in connection with the investigation and trial of offences should give due consideration to the need to protect the victim from any publicity which will unduly affect his private life or dignity. If the type of offence or the particular status or personal situation and safety of the victim make such special protection necessary, either the trial before the judgment should be held in camera or disclosure or publication of personal information should be restricted to whatever extent is appropriate” (Part IF, para. 15).

It is further recommended that, “whenever this appears necessary, and especially when organised crime is involved, the victim and his family should be given effective protection against intimidation and the risk of retaliation by the offender” (Part IG, para. 16).

While publicity may be important, inter alia, for educating both legal professionals and the public about the effects of victimization, it may also be so distressing to victims that their identity should be withheld.³⁵ Publicity may have a particularly devastating effect on victims in cases of sexual abuse, including child abuse, as well as in cases of organized crime and terrorism where disclosure of identity may place the victim's life in danger. As a rule, it is in any event advisable to obtain the victims' consent before they are identified in the mass media.³⁶

Whenever the life and safety of victims, witnesses and their family members are in danger as a consequence of retaliation, it may not be sufficient to withhold the person's identity. The judicial authorities may have to take additional measures, such as withholding other relevant information and providing other forms of special protection. In particularly serious cases, it may also be necessary to hold the court proceedings *in camera*, although international human rights law imposes specific restrictions on any such decision (see article 14(1) of the International Covenant on Civil and Political Rights, article 8(5) of the American Convention on Human Rights and article 6(1) of the European Convention on Human Rights). In extreme cases, it may even be necessary for the competent authorities to provide special police protection for the victims concerned, as well as for relatives and witnesses.

Whenever necessary, the competent authorities should protect the privacy of victims of crime and should also protect victims, their families and witnesses on their behalf from intimidation and retaliation.

Special protection of the right to privacy and of the safety of persons may be particularly indicated in cases of sexual abuse as well as in cases of organized crime and terrorism.

As a rule, it is always preferable to obtain the consent of the victim before his or her name is given to the mass media.

2.4 Restitution, compensation and assistance to victims of crime

2.4.1 General remarks

The questions of restitution, compensation and assistance to victims of crime will, of necessity, be addressed only in very general terms in this context, as the issues at stake are too complex for more in-depth analysis. This part is therefore limited to an outline of the general principles that should guide national judicial authorities in providing some sense of justice to crime victims, whose needs vary according to the nature of the crime committed, the place it was committed and the situation of the victims themselves.

³⁵Ibid., p. 15, paras. 56-57.

³⁶Ibid., p. 15, para. 57.

2.4.2 Restitution

According to paragraph 8 of the Declaration of Principles of Justice:

“Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.”

Paragraph 9 states that “Governments should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.”

The term “restitution” means in this context that the offender restores to the victim the rights that were breached by the criminal act. Restitution to victims is of course only possible when the property or money stolen is still available. Restitution is not, therefore, a viable solution in the case of violent crimes such as murder, where there can be no reinstatement of rights.

In addition to the restitution of property or payment for the harm and loss suffered, the victim may also claim reimbursement of certain expenses. Such claims may require a clear listing of expenses that the victim has incurred as a result of victimization.³⁷

Whenever appropriate, persons responsible for criminal offences should make fair restitution to the victims of their crimes for any harm or loss suffered. Through restitution, the offender restores to the victim the rights that were breached.

2.4.3 Compensation

Irrespective of whether compensation is available from the State, financial compensation from the offender for physical or psychological injuries or other harm sustained in connection with crime may be an important element for the victim in that such compensation “is seen to be a recognition of the hurt done to the victim by the offender”. When an order for such compensation is made by the court, “it is also a symbol of the State’s concern for the victim”.³⁸ This kind of recognition may have an important healing effect on the victim concerned and may also increase his or her confidence in the criminal justice system.

³⁷In cases where the criminal activities have caused “substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community” (paragraph 10 of the Declaration of Basic Principles). In such cases, restitution can be a powerful means of encouraging enterprises to use environmentally friendly means of production and to adopt measures to prevent or minimize the risk of ecological disaster. Another case in point is the transport of toxic substances or substances that may otherwise be harmful to the environment by means of transportation that do not comply with required safety measures. However, where multiple acts of arson by individual persons destroy large areas of forest and numerous dwellings, restitution by the offenders is illusory.

³⁸UN doc. A/ CONF.144/20, annex, Guide for Practitioners, p. 21, para. 83.

On this question, paragraph 12 of the Declaration on Basic Principles states that, “when compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

- (a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;
- (b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.”

Lastly, paragraph 13 of the Declaration states that: “The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.”

Under article 1 of the 1983 European Convention on the Compensation of Victims of Violent Crimes, States parties “undertake to take the necessary steps to give effect to the principles set out in Part I of this Convention”. This means that “when compensation is not fully available from other sources the State shall contribute to compensate:

- a. those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;
- b. the dependents of persons who have died as a result of such crime” (art. 2(1)).

From this provision it follows that, for a victim to qualify for State compensation, the offences must be

- ❖ “intentional”;
- ❖ “violent”;
- ❖ “the direct cause of serious bodily injury or damage to health”.³⁹

The reason for limiting the Convention to intentional offences is that “they are particularly serious and give rise to compensation less often than non-intentional offences, which include the huge range of road traffic offences and are in principle covered by other schemes” such as private insurance and social security.⁴⁰

The injury need not be physical, and compensation may also be payable “in cases of psychological violence (for example serious threats) causing injury or death”.⁴¹ The injury must, however, in all cases be “serious and directly attributable to the crime”. A causal relationship between the crime and the effects must, in other words, be proven.⁴²

³⁹Explanatory Report, p. 5, para. 16.

⁴⁰Ibid., p. 5, para. 17.

⁴¹Ibid., p. 5, para. 18.

⁴²Ibid., p. 5, para. 19.

It follows that the Convention neither covers “slight injury or injury not directly caused by the offence” nor “injury to other interests, notably property”. However, poisoning, rape and arson “are to be treated as intentional violence”.⁴³

According to article 2(2) of the Convention, compensation “shall be awarded in the above cases even if the offender cannot be prosecuted or punished”. For instance, minors or mentally ill people may not be subject to prosecution or may not be regarded as responsible for their acts, and an offender may even escape prosecution because he or she has acted by necessity as in cases of self-defence. It is of course essential that victims, in these cases too, should be able to obtain compensation from the State if it is not available from other sources.⁴⁴

Article 3 further specifies that “compensation shall be paid by the State on whose territory the crime was committed [both] to nationals of the States party to this Convention [and] to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.” The purpose of including the latter group of victims was to enhance the protection of migrant workers.⁴⁵ The Convention, which lays down minimum provisions, does not, of course, prevent States parties from enlarging the scope of the compensation available or from providing compensation to their nationals who are victims of violent crime abroad or to all foreigners.⁴⁶ It should be noted in this connection that paragraph 3 of the United Nations Declaration of Basic Principles prohibits distinctions based on nationality.

It is also noteworthy that, according to the 1985 Council of Europe Recommendation on the Position of the Victim, compensation as a penal sanction “should be collected in the same way as fines and take priority over any other financial sanction imposed on the offender. In all other cases, the victim should be assisted in the collection of the money as much as possible” (Part IE, para. 14).

Items compensated: Compensation in any given case under the Council of Europe Convention shall comprise “at least the following items”:

- ❖ loss of earnings;
- ❖ medical and hospitalization expenses;
- ❖ funeral expenses;
- ❖ as regards dependants, loss of maintenance (art. 4).

These are the *minimum* requirements for which “reasonable compensation” shall be paid, provided that the loss is verified in each case.⁴⁷ Depending on the terms of national legislation, other items that may be compensated include:

- ❖ “pain and suffering (*pretium doloris*);
- ❖ loss of expectation of life;
- ❖ additional expenses arising from disablement caused by an offence”.⁴⁸

⁴³Ibid., loc. cit.

⁴⁴Ibid., see p. 6, para. 21.

⁴⁵Ibid., p. 7, para. 25.

⁴⁶Ibid., p. 7, para. 27.

⁴⁷Ibid., p. 7, para. 28.

⁴⁸Ibid., loc. cit.

According to the Explanatory Report, “compensation of these items is to be calculated by the state paying the compensation according to the scales normally applied for social security or private insurance according to normal practice under civil law.”⁴⁹

Conditions for compensation: The Convention imposes various conditions on the granting of compensation. First, it allows the compensation scheme to set “an upper limit above which and a minimum threshold below which such compensation shall not be granted” (art. 5). Second, “the scheme may specify a period within which any application for compensation must be made” (art. 6).

An upper limit may be necessary because funds for compensation are not unlimited and a minimum threshold is considered justified by the principle of *de minimis non curat praetor*, that is to say minor damage that can be covered by victims themselves does not interest the judge.⁵⁰ The Convention does not set “rigidly quantified limits” for the simple reason that both financial resources and living standards vary from country to country.⁵¹

With regard to the time-limit for lodging a claim for compensation, it is important that such claims be made as soon as possible after the commission of the crime so that:

- ❖ “the victim may be assisted if in physical and psychological distress;
- ❖ the damage may be ascertained and assessed without untoward difficulty”.⁵²

Early professional care for crime victims may also increase the chances of a speedy recovery and thus reduce medical and other costs incurred for rehabilitation.

Third, compensation under the 1983 Convention may be reduced or refused “on account of the applicant’s financial situation” (art. 7). The idea is that, since compensation from public funds to a victim of crime “is an act of social solidarity, it may be unnecessary where the victim or his dependents are plainly comfortably off”. On the other hand, there is nothing in the Convention that prevents States from awarding compensation “regardless of the victim’s or his dependants’ financial position”.⁵³

Lastly, compensation may also be “reduced or refused”

- ❖ “on account of the victim’s or the applicant’s conduct before, during or after the crime, or in relation to the injury or death” – article 8(1);
- ❖ “on account of the victim’s or the applicant’s involvement in organised crime or his membership of an organisation which engages in crimes of violence” – article 8(2);
- ❖ “if an award or a full award would be contrary to a sense of justice or to public policy (*ordre public*)” – article 8(3).

⁴⁹Ibid., p. 8, para. 28.

⁵⁰Ibid., p. 8, para. 29.

⁵¹Ibid., p. 8, para. 30.

⁵²Ibid., p. 8, para. 31.

⁵³Ibid., pp. 8-9, para. 32.

The first of these grounds relates to improper behaviour by the victim in relation to the crime or to the damage suffered, and “refers to cases where the victim triggers the crime, for example by behaving exceptionally provocatively or aggressively, or causes worse violence through criminal retaliation, as well as to cases where the victim by his behaviour contributes to the causation or aggravation of the damage (for example by unreasonably refusing medical treatment)”. Another reason for reducing or withholding compensation on this ground may be the refusal of the victim “to report the offence to the police or to co-operate with the administration of justice”.⁵⁴

The second ground for reducing or even refusing compensation is where the victim “belongs to the world of organised crime (for example drug trafficking) or of organisations which commit acts of violence (for example terrorist organisations)”. The victim may in such a case “be regarded as forfeiting the sympathy or solidarity of society as a whole [and may] be refused compensation or be paid reduced compensation, even if the crime which caused the damage was not directly related to the foregoing activities”.⁵⁵

Lastly, States parties may reduce or refuse compensation to victims of crime when it would be repugnant to a sense of justice or contrary to public policy (*ordre public*). In such cases, they retain some discretion in awarding compensation and can refuse it “in certain cases where it is clear that a gesture of solidarity would be contrary to public feeling or interests or would be contrary to the basic principles of the legislation of the state concerned”. For example, “a known criminal who was the victim of a crime of violence could be refused compensation even if the crime in question was unrelated to his criminal activities.”⁵⁶

The abovementioned principles for reducing or refusing compensation to victims of crime are equally applicable to dependants of victims who died as a result of violent crime.⁵⁷

Other relevant issues: The Convention also contains provisions concerning the avoidance of double compensation and the subrogation of rights, and requires States parties to take appropriate steps “to ensure that information about the scheme is available to potential applicants” (arts. 9-11).

For instance, in order to avoid double compensation under article 9 of the Convention, “compensation already received from the offender or other sources may be deducted from the amount of compensation payable from public funds. It is for the Parties to specify which sums are so deductible.”⁵⁸ The States may require that compensation received by the victim from the offender *after* he or she has been compensated by public funds be repaid in full or in part, depending on the sums involved.⁵⁹ This situation can arise, for instance, “where a victim suffering hardship receives state compensation pending decision of an action brought against an offender or agency [or where] the offender, unknown at the time of compensation from public

⁵⁴Ibid., p. 9, para. 34.

⁵⁵Ibid., p. 9, para. 35.

⁵⁶Ibid., p. 9, para. 36.

⁵⁷Ibid., p. 9, para. 37.

⁵⁸Ibid., p. 9, para. 38.

⁵⁹Ibid., p. 10, para. 39.

funds, is subsequently traced and convicted, and has fully or partly made reparation to the victim”.⁶⁰

For public compensation schemes to be useful, the public must know about their existence. But studies have found that, because of public ignorance, such schemes are rarely used.⁶¹ To remedy this situation, article 11 of the Convention imposes a duty on States parties to see to it that information on public compensation schemes is available to potential victims of crime. According to the Explanatory Report, “the main responsibility for informing the victim of his compensation rights should lie with the authorities and agencies dealing with him immediately after the offence (the police, hospitals, the examining judge, the public prosecutor’s office, etc.). Information, specially published by the competent authorities, should be available to such agencies who should distribute this, whenever practicable, to the persons concerned.”⁶² The mass media also have a useful role to play in publicizing financial as well as other kinds of assistance available to victims of crime.⁶³

Compensation to victims of crime for physical or psychological harm suffered as a consequence of crime is an important recognition of concern for the victim.

When such compensation is not fully available from the offender or other sources such as private insurance, the State should provide it either to the victim or to his or her dependants, as the case may be.

At the European level, member States of the Council of Europe may have a treaty obligation to provide compensation to victims of violent crime when such compensation is not available from other sources.

Such compensation may, however, be reduced or refused, inter alia in the light of the victim’s conduct in relation to the commission of the criminal act or in cases where the victim is known to be involved in organized crime such as drug trafficking or terrorism.

2.4.4 Assistance

In addition to various financial needs, victims of violent crimes may also require immediate or even long-term medical care as well as other forms of assistance. These needs are recognized in paragraph 14 of the United Nations Declaration of Basic Principles, according to which:

“Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.”

⁶⁰Ibid., loc. cit.

⁶¹Ibid., p. 10, para. 42.

⁶²Ibid., loc. cit.

⁶³Ibid.

This provision envisages various forms of assistance not only from the State but also from the community and specialized associations. Much can be accomplished for victims of crimes by developing strong local associations or agencies with specialized personnel trained in the specific needs of crime victims.⁶⁴ The need for assistance can vary in terms of both the victim and the effects of victimization. Injured victims clearly require swift medical help. Such help is also essential in order to document the effects of the crime on the victim for the purpose of proving any criminal prosecution or civil claim against the offender.⁶⁵

Paragraph 17 of the Declaration of Basic Principles further emphasizes that “in providing services and assistance to victims, attention should be given to those who have special needs because of the nature of the harm inflicted” or because of factors such as discrimination on the grounds listed in paragraph 3 of the Declaration. Certain groups of victims, such as victims of sexual crimes, may indeed need specialized treatment, including long-term emotional support by medical personnel skilled in dealing, for example, with rape victims. Victims of serious sex crimes may also need medical follow-up over an extended period owing to the HIV/AIDS problem.⁶⁶ In many cases, victims of terrorist attacks need not only extensive medical treatment but also both immediate and long-term psychological assistance by specially trained professionals in order to help them come to terms with the traumatic experience. Major criminal events such as terrorist acts may also require specialized equipment such as temporary housing, mortuaries, feeding stations and so forth. States should be prepared to deal with this kind of situation by developing contingency plans at the national, regional and local levels and should keep regularly updated lists of equipment and qualified personnel.⁶⁷

Victims may also need various kinds of *practical* help after the commission of a crime. In cases of burglary, locks or other damaged property may have to be repaired, and victims of arson or domestic violence may need temporary accommodation.⁶⁸ Other victims may need social support services for some time after the crime, such as help with shopping or housekeeping and/or assistance in looking after small children.

For assistance schemes to work efficiently, information about their existence is, as emphasized throughout this chapter, essential. Paragraph 15 of the Declaration of Basic Principles provides that:

“Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.”

As noted above, the question of training for persons who deal with victims of crime is also important and, as specified in paragraph 16 of the Declaration:

⁶⁴See UN doc. A/ CONF.144/20, annex, Guide for Practitioners, p. 23, para. 92.

⁶⁵Ibid., p. 25, paras. 99-100.

⁶⁶Ibid., p. 25, paras. 101-102.

⁶⁷Ibid., see p. 26, para. 104.

⁶⁸Ibid., p. 26, para. 107.

“Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.”

It is particularly important that members of the police force and the legal professions, such as judges, prosecutors and lawyers, are trained to have a sound understanding of the traumatic impact that crime can have on human beings. They should also be fully conversant with the terms of the compensation and assistance schemes available to victims of crime so that they can ensure that such information is consistently and effectively conveyed to the victims concerned.

Apart from financial needs, victims of crime may have a variety of needs of a material, medical, psychological and social nature.

Such needs for assistance will vary according the situation of the victim and the nature of the crime. To be able to provide victims of crime with prompt and efficient help, all relevant professional groups, including judges, prosecutors and lawyers, must be sensitized to the needs of victims and available assistance schemes.

3. Protection and Redress for Victims of Human Rights Violations

The second part of this chapter will deal exclusively with victims of human rights violations. Contrary to the situation in respect of victims of ordinary crime, international human rights law lays down some clear legal rules regarding the responsibility of States vis-à-vis abuses of power that constitute violations of individual rights and freedoms. Moreover, these rules have been further developed in a large number of cases by the international monitoring bodies. However, only a brief survey is feasible in this context of States’ general legal duty to **ensure the effective protection of human rights** and of the most relevant specific legal obligations that this entails: the duty to **prevent** human rights violations; the duty to provide **domestic remedies**; and the duty to **investigate** alleged human rights violations, to **prosecute** those suspected of having committed them and to **punish** those found guilty. Lastly, the duty to provide **restitution or compensation** to victims of human rights violations and the problem of **impunity** for human rights violations will be examined.⁶⁹

⁶⁹The present chapter is based only on legal provisions interpreted by international monitoring bodies. The question of remedies for victims of human rights violations has, however, also been dealt with, inter alia, by the United Nations Commission on Human Rights; see, for example, UN doc. E/CN.4/2000/62, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni; see, in particular, the annex to this report containing draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law.

Before States' various duties to protect human rights are considered, the notion of "victim" will be analysed.

3.1 The notion of victim

According to paragraph 18 of the United Nations Declaration of Basic Principles:

"Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights."

This definition is somewhat peculiar in that, first, it seems to presume that violations of international human rights standards are limited to the field of criminal law. This is not, of course, the case. Such violations can also occur under civil law, such as family law and the law of succession. Other fields of law that may be relevant include press law, administrative law, labour law, social security law and environmental law.

Second, an act or omission may be contrary to national law and still constitute a violation of international human rights law. Notwithstanding national law, a State can in principle be held responsible at the international level for an act or omission that violates internationally recognized human rights standards until it has provided an effective remedy to the victim or victims of the violation.

Third, the reference to "substantial" impairment raises some difficulties of interpretation and cannot be adequately understood in the abstract. Indeed, an act or omission on the part of a State may violate international human rights standards although the impairment for the victim concerned has not been "substantial". The victim is still a "victim" as understood by international law, but the response to the violation will vary accordingly. Instead of awarding restitution or damages, the international monitoring body may, for instance, consider the very finding of a violation in a specific case to be a sufficient recognition of the harm incurred. In many cases, however, the violations are grave and therefore require, as will be shown below, a variety of measures in order to remedy or at least reduce the negative consequences of such violations for the victims or their next-of-kin.

It follows from the foregoing that, for the purposes of the second part of this chapter, a much simpler definition of a "victim" of human rights violations will have to be adopted:

A "victim" is a person whose nationally or internationally recognized human rights and fundamental freedoms have been violated as a consequence of governmental acts or omissions.

It is important to point out that a “victim” can also be a family member who is suffering hardship because of a disappearance and/or arbitrary killing. The Human Rights Committee and the Inter-American and European Courts of Human Rights have all accepted that mothers of victims of a human rights violation may also be considered to be victims. The profound sadness, stress and anguish that mothers suffer as a result of such serious human rights violations constitute per se a violation of their right not to be subjected to ill-treatment, as prohibited by international legal standards such as article 7 of the International Covenant on Civil and Political Rights, article 5(2) of the American Convention on Human Rights and article 3 of the European Convention on Human Rights.⁷⁰

A particularly serious aspect of abuses of power such as human rights violations is that they are committed by – or at least with the knowledge of – persons or authorities that are expected to *protect* the individual and his or her rights instead of violating them. In other words, the sense of trust that should have existed has been seriously betrayed. The situation becomes singularly alarming when violations of the right to life and the right to security and liberty of the person occur and are even widespread, as when abduction, involuntary disappearances and torture become part of a State’s administrative practice. Victimization then often has a much deeper adverse impact on the persons affected than where they are “simply” victims of ordinary crimes. For victims of State or State-sponsored violence, it is important, for purposes of rehabilitation, to obtain recognition by the State of the wrong committed and to receive various forms of help and assistance.

A “victim” is a person whose nationally or internationally recognized human rights and fundamental freedoms have been violated as a consequence of governmental acts or omissions.

Close relatives of disappeared, tortured and arbitrarily killed persons may be considered to be victims of violations of their own right not to be subjected to ill-treatment.

Human rights violations are a particularly serious form of abuse of power in that they are committed by – or with the knowledge of – persons or authorities whose duty it is to protect the individual and his or her rights.

Victims of human rights violations may require multiple forms of help and assistance to deal with the effects of victimization, including recognition by the State of the wrongs committed.

⁷⁰See Communication No. 107/1981. *Quinteros v. Uruguay* (Views adopted on 21 July 1983) in UN doc. GAOR, A/38/40, p. 224, para. 14; I-A Court HR, *Case of Villagrán Morales et al.*, judgment of November 19, 1999, Series C, No. 63, pp. 179-180, paras. 176-177; Eur. Court HR, *Case of Kurt v. Turkey*, judgment of 25 May 1998, Reports 1998-III, pp. 1187-1188, paras. 130-134.

3.2 The general legal duty to ensure the effective protection of human rights

This section will simply highlight some general considerations relating to States' legal duty effectively to protect human rights and fundamental freedoms. The provisions dealing specifically with questions of prevention, domestic remedies, investigations and so forth will be discussed in greater detail in the relevant subsections below.

3.2.1 The universal level

Under article 2(1) of the International Covenant on Civil and Political Rights, each State party “undertakes to *respect* and to *ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” (emphasis added). In interpreting article 2, the Human Rights Committee considers it necessary “to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the *respect* of human rights, but that States parties have also undertaken to *ensure* the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.”⁷¹ The obligation to ensure thus gives rise to *positive* State party obligations to secure the enjoyment of the guaranteed rights and freedoms to all persons within their jurisdiction. It follows from this basic and positive legal duty that States parties may also be required effectively to investigate, prosecute and punish violations of individual rights and freedoms.⁷²

3.2.2 The regional level

At the regional level, article 1 of the African Charter on Human and Peoples' Rights may at first sight seem to use somewhat less categorical language than the International Covenant when stating that States parties “shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them”. However, the reference to “other measures” suggests that this provision entails a clear obligation to take affirmative steps to comply with the obligations laid down by the Charter. This view has been confirmed by the African Commission on Human and Peoples' Rights, which has held that, under article 1 of the African Charter, States parties not only “recognise the rights, obligations and freedoms proclaimed in the Charter [but] they also commit themselves to respect them and take measures to give effect to them”.⁷³

⁷¹See General Comment No. 3 (Article 2 – Implementation at the national level), in UN doc. HRI/GEN/1/Rev.5, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies* (hereinafter referred to as *United Nations Compilation of General Comments*), p. 112, para. 1; emphasis added.

⁷²See, for example, Communication No. 821/1998, *Chongwe v. Zambia* (Views adopted on 25 October 2000), in *GAOR*, A/56/40 (vol. II), p. 143, paras. 7-8.

⁷³ACHPR, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, *Communication No.231/99 decision adopted during the 28th Ordinary session, 23 October – 6 November 2000*, para. 31 of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/231-99.html>

As a general rule it must be emphasized that, notwithstanding the fact that the legal obligations to “respect” and to “ensure” human rights are not included *expressis verbis* in the treaty concerned, States in any event have a legal duty to perform their treaty obligations in good faith. This basic rule of international law, also known as *pacta sunt servanda*, has been codified in article 26 of the Vienna Convention on the Law of Treaties and is, of course, equally applicable to human rights treaties as to other international treaties. By failing, for instance, to prevent or vigorously to investigate alleged human rights violations and, where need be, to follow up the investigation with a prosecution, a State undermines its treaty obligations and hence also incurs international responsibility for being in breach of the law.

Article 1 of the American Convention on Human Rights uses terms reminiscent of those in article 2 of the International Covenant in that the States parties “undertake to *respect* the rights and freedoms recognized herein and to *ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without any discrimination” (emphasis added).

These terms were interpreted by the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case, which concerned the disappearance and likely death of Mr. Velásquez at the hands of members of the Honduran National Office of Investigation and the Armed Forces. With regard to the obligation to “respect the rights and freedoms” recognized by the Convention, the Court emphasized that “the exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State.” This also means that “the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power.”⁷⁴

Moreover, the obligation to “ensure” the free and full exercise of the rights guaranteed by the Convention

“implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”⁷⁵

The Court added that:

“The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation – it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.”⁷⁶

⁷⁴I-A Court HR, *Velásquez Rodríguez Case*, judgment of July 29, 1988, Series C, No. 4, pp. 151-152, para. 165.

⁷⁵Ibid., p. 152, para. 166.

⁷⁶Ibid., p. 152, para. 167.

What is “decisive” in determining whether a right recognized by the Convention has been violated is, in the words of the Court, whether the violation has occurred “with the support of the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible”.⁷⁷

The States parties’ legal undertakings under article 1 of the American Convention thus form a clear web of preventive, investigative, punitive and reparative duties aimed at effective protection of the rights of the human person, all of which will be further detailed below.

Lastly, article 1 of the European Convention on Human Rights stipulates that “the High Contracting Parties shall *secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” (emphasis added). Rather than giving an independent interpretation of the term “secure” in article 1, the European Court of Human Rights has preferred to weave this term into the other substantive provisions of the Convention and its Protocols. For instance, when interpreting the right to life as guaranteed by article 2 of the Convention, the Court has held that the first sentence of article 2(1) “enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.”⁷⁸ In the words of the Court:

“This involves a primary duty on the State to *secure* the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at risk from the criminal acts of another individual.”⁷⁹

In the case of *McCann and Others v. the United Kingdom*, the Court held 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 [in article 2(1)], read in conjunction with the State’s general duty under Article 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.”⁸⁰

⁷⁷ *Ibid.*, p. 154, para. 173.

⁷⁸ *Eur. Court HR, Case of Mabmut Kaya v. Turkey, judgment of 28 March 2000*, para. 85 of the text of the judgment as published at: <http://echr.coe.int/>.

⁷⁹ *Ibid.*, loc. cit.; emphasis added.

⁸⁰ *Eur. Court HR, McCann and Others v. the United Kingdom, judgment of 27 September 1995, Series A, No. 324*, p. 49, para. 161.

In order to **secure** the right to life under article 2 of the Convention, the High Contracting Parties are thus under an obligation to resort to effective measures of prevention, investigation, suppression and punishment of violations of this right. It is noteworthy that the obligation to prevent offences against the person is not necessarily complied with by the implementation of general preventive policy measures but may, in individual cases, also imply a duty to take positive measures of an operational nature (see *infra*, subsection 3.3).

The positive obligations that may be “inherent in an effective respect of the rights concerned”⁸¹ under the European Convention are not limited to article 2 and the right to life but may also have implications for the protection of other rights and freedoms such as the right to freedom from torture in article 3,⁸² the right to respect for one’s family life in article 8,⁸³ the right to freedom of expression in article 10⁸⁴ and the right to freedom of peaceful assembly and to freedom of association in article 11.⁸⁵ The nature and extent of such obligations depend, however, on the right at issue and the facts of the case considered.

Lastly, it should be noted that the duty to **secure** the rights and freedoms laid down in the European Convention and its Protocols may also entail a legal duty for the Contracting States to take positive action to ensure respect for those rights and freedoms *between private citizens*.⁸⁶

Irrespective of the terms used in international human rights treaties, States parties are duty bound to provide effective protection for the rights and freedoms recognized therein to all persons within their jurisdiction.

*These legal obligations comprise the duty effectively to **prevent, investigate, prosecute, punish** and **redress** human rights violations.*

Positive obligations may be inherent in the effective protection of a human right recognized by international law.

⁸¹ Eur. Court HR, *Case of Ozgur Gundem v. Turkey*, judgment of 16 March 2000, para. 42 of the text of the judgment as published at: <http://echr.coe.int/>.

⁸² Eur. Court HR, *Case of Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Reports 1998-VIII, p. 3290, para. 102.

⁸³ Eur. Court HR, *Case of Gaskin v. the United Kingdom*, judgment of 7 July 1989, Series A, No. 160, pp. 16-20, paras. 41-49.

⁸⁴ See, for example, Eur. Court HR, *Case of Ozgur Gundem v. Turkey*, judgment of 16 March 2000, para. 43, as published at <http://echr.coe.int/>.

⁸⁵ Eur. Court HR, *Case of the Plattform “Ärzte für das Leben” v. Austria*, judgment of 21 June 1988, Series A, No. 139, p. 12, para. 32.

⁸⁶ Eur. Court HR, *Case of X and Y v. the Netherlands*, judgment of 26 March 1985, Series A, No. 91: in this case the Government had a positive legal duty to ensure an effective right to respect for the private life of a mentally handicapped girl who had been raped but who was legally unable to institute criminal proceedings against the alleged perpetrator of the crime; this gap in domestic law constituted a violation of article 8 of the European Convention, p. 14, para. 30. See also Eur. Court HR, *A. v. the United Kingdom*, judgment of 23 September 1998, Reports 1998-VI: in this case domestic law did not provide adequate protection for a child who had been beaten by his stepfather; “the failure to provide adequate protection” constituted a violation of article 3 of the European Convention, p. 2700, para. 24.

3.3 The duty to prevent human rights violations

Prevention is the alpha and omega of the effective protection of the rights and freedoms of the human person, and it is thus the ultimate purpose of international human rights law as well as a key to the creation of a national and international society in which all persons can live in freedom, peace and security. Prevention, the importance of which has been emphasized by all international monitoring bodies, begins with the incorporation of international human rights obligations in the domestic legal system.⁸⁷ Domestic law must then be consistently and fearlessly applied by all competent authorities, for instance in full independence from the Executive, because a law, no matter how well and elegantly drafted, only has a preventive impact if potential offenders know that they will be pursued in the courts for their trespasses and crimes. Indeed, the second part of this chapter illustrates some of the essential components of prevention, namely the existence of effective domestic remedies and the prompt, vigorous and impartial investigation of alleged human rights violations.

However, in many cases effective prevention also requires social, administrative, educational and other measures such as international and cross-border cooperation,⁸⁸ depending on the needs, problems and circumstances of the country involved. Some examples are given below of references to prevention by the international monitoring bodies relating to arbitrary killings, disappearances and torture.

3.3.1 The universal level

Although the Human Rights Committee has not elaborated its views on States parties' duty to prevent human rights violations in general, it has often emphasized the need for prevention with regard to specific issues. Thus, States parties should inform the Committee in their periodic reports about "the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture" and other forms of ill-treatment in conformity with the provisions of the International Covenant on Civil and Political Rights.⁸⁹ More specifically, it recommended that Uzbekistan "should institute an independent system of monitoring and checking all places of detention and penal institutions on a regular basis, with the purpose of preventing torture and other abuses of power by law enforcement officials".⁹⁰

The Committee has also stated that:

"3. The protection against arbitrary deprivation of life which is explicitly required by ... article 6(1) is of paramount importance. The Committee considers 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 own security forces. The deprivation of life by the

⁸⁷On the preventive role of legislation criminalizing ideas based on racial superiority, see the Committee on the Elimination of Racial Discrimination, in UN doc. *GAOR*, A/56/18, p. 59, para. 349.

⁸⁸On the importance of international and cross-border cooperation for the purpose of preventing trafficking in women, see the Committee on the Elimination of Discrimination against Women, in UN doc. *GAOR*, A/55/38, p. 38, para. 372.

⁸⁹General Comment No. 20 (Article 7), in *United Nations Compilation of General Comments*, p. 140, para. 8.

⁹⁰UN doc. *GAOR*, A/56/40 (vol. I), p. 60, para. 7.

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.”⁹¹

In the Committee’s view, “States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life.”⁹²

Lastly, when the Committee concludes that a State party has violated its obligations under the Covenant in a communication brought under the Optional Protocol to the Covenant, it consistently informs the State party concerned that it is under an obligation to prevent such violations from occurring in the future.⁹³

3.3.2 The regional level

The notion of prevention was analysed in somewhat more detail by the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case, in which it ruled that a State party to the American Convention on Human Rights “has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation”.⁹⁴ Importantly, the Court added that:

“175. This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victim for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case.”⁹⁵

In the *Street Children* case, the Court also referred to the abovementioned statement by the Human Rights Committee regarding protection against the arbitrary deprivation of life, emphasizing “the particular gravity” of the case, which involved the abduction, torture and killing of several children and which also violated the State’s “obligation to adopt special measures of protection and assistance for the children within its jurisdiction”.⁹⁶

⁹¹General Comment No. 6 (art. 6), in *United Nations Compilation of General Comments*, p. 115, para. 3.

⁹²*Ibid.*, p. 115, para. 4.

⁹³Communication No. 687/1996, *Rojas García v. Colombia* (Views adopted on 3 April 2001) in UN doc. *GAOR, A/56/40* (vol. II), p. 54, para. 12, and Communication No. 821/1998, *Chongwe v. Zambia* (Views adopted on 25 October 2000), p. 143, para. 7.

⁹⁴*I-A Court HR, Velásquez Rodríguez Case, judgment of July 29, 1988, Series C, No. 4*, p. 155, para. 174.

⁹⁵*Ibid.*, p. 155, para. 175.

⁹⁶*I-A Court HR, Villagrán Morales et al. Case (the “Street Children” case), judgment of November 19, 1999, Series C, No. 63*, pp. 170-171, paras. 145-146.

The use of effective domestic remedies for purposes of prevention has also been underlined by the Inter-American Court, in particular with regard to the writ of *habeas corpus*, the aim of which “is not only to ensure respect for the right to personal liberty and physical integrity, but also to prevent the persons’s disappearance or the keeping of his whereabouts secret and, ultimately, to ensure his right to life”.⁹⁷

In the case of *Kaya v. Turkey*, which concerned the disappearance and subsequent death following torture of the victim, the European Court of Human Rights made the following finding with regard to Turkey’s obligations under article 1 of the European Convention on Human Rights, read in conjunction with the prohibition of torture in article 3:

“115. The obligation imposed on High Contracting Parties under article 1... to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals ... State responsibility may therefore be engaged where the framework of law fails to provide adequate protection ... or where the authorities fail to take reasonable steps to avoid a risk of ill-treatment which they knew or ought to have known ...

116. The Court finds that the authorities knew or ought to have known that Hasan Kaya was at risk of targeting as he was suspected of giving assistance to wounded members of the PKK. The failure to protect his life through specific measures and through the general failings in the criminal law framework placed him in danger not only of extra-judicial execution but also of ill-treatment from persons who were unaccountable for their actions. It follows that the Government is responsible for ill-treatment suffered by Hasan Kaya after his disappearance and prior to his death.”⁹⁸

An important conclusion of this judgment is that the duty to prevent human rights violations comprises measures to protect people from being tortured not only by State officials but also by private persons. In simple terms, States must not put a person in a situation where he or she runs the risk of being subjected to treatment contrary to article 3 of the Convention.

While the foregoing references and cases relating to the prevention of human rights violations mainly concern particularly serious crimes such as torture, abduction and arbitrary deprivation of life, the obligation to prevent violations is equally applicable to all basic rights and freedoms recognized by national and international law.

⁹⁷ I-A Court HR, *Suárez Rosero Case*, judgment of November 12, 1997, Series C, No. 35, p. 75, para. 65.

⁹⁸ Eur. Court HR, *Case of Mahmut Kaya v. Turkey*, judgment of 28 March 2000, paras. 115-116 of the text of the judgment as published at <http://echr.coe.int/>

The duty to prevent violations of human rights is inherent in the legal duty to ensure their effective protection.

Preventive measures may be of a legal, administrative, political, cultural, social, educational, remedial or other nature, depending on the problem and the country involved.

The duty to prevent human rights violations entails a duty not to place a person in circumstances where he or she is at risk of disappearing, being tortured or arbitrarily killed, even if such illegal acts are committed by private individuals.

3.4 The duty to provide domestic remedies

As seen above, the legal duty to provide domestic remedies for alleged victims is inherent in the general duty to provide effective human rights protection. Practice has consistently and convincingly shown that, unless an individual has an effective right to have recourse to independent and impartial courts or administrative authorities at the national level for the purpose of remedying an alleged human rights violation, the true enjoyment of human rights will remain illusory. From the point of view of States, the existence of effective domestic remedies has the advantage of allowing them to remedy a wrong, thus avoiding international responsibility and a possible rebuke from an international monitoring body.

In this section, selected statements and decisions will provide a general idea of the importance that international monitoring bodies attach to the availability of effective remedies for violations of human rights at the national level.

3.4.1 The universal level

At the universal level, the right to domestic remedies was first included in article 8 of the Universal Declaration of Human Rights, which states that everyone “has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”. It was also incorporated in article 2(3) of the International Covenant on Civil and Political Rights, pursuant to which each State party to the Covenant undertakes:

“(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.”

It follows from the clear terms of this provision that the remedies available must be *effective* and that their enforcement must be *ensured* by the competent authorities. The remedies may be, for instance, judicial or administrative, although a reading of article 2(3)(b) *in fine* suggests that the drafters of the Covenant had a preference for judicial remedies. It is noteworthy that, for the purpose of complying with the exhaustion of domestic remedies rule laid down in article 5(2)(b) of the Optional Protocol to the Covenant, the Human Rights Committee holds that an alleged victim is required to resort only to such remedies as have “a reasonable prospect” of being “effective”. Moreover, it is for the Government alleging the availability of remedies to prove their effectiveness.⁹⁹

Although remedies must be available for all alleged violations of the rights guaranteed by the Covenant, the need for available, effective, independent and impartial remedies is particularly urgent for people deprived of their liberty. The Human Rights Committee has therefore emphasized the need for effective guarantees and remedies for detained persons in respect of all acts prohibited by article 7 of the Covenant, namely torture and cruel, inhuman and degrading treatment and punishment. In their periodic reports States parties should, for instance, “indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress”.¹⁰⁰ In the Committee’s view, the right to bring complaints against ill-treatment, as prohibited by article 7, “must be recognized in the domestic law” and the complaints

“must be investigated promptly and impartially by competent authorities so as to make the remedy effective”.¹⁰¹

The reports of States parties “should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with”.¹⁰²

The Committee was “deeply concerned at the reports of torture and excessive use of force” by law enforcement officials in Venezuela, at the State party’s “apparent delay in responding to such occurrences [and at] the absence of independent mechanisms to investigate the reports in question. The right to recourse to the courts is not a substitute for such mechanisms. The State party should establish an independent body empowered to receive and investigate all reports of excessive use of force and other abuses of authority by the police and other security forces, to be followed, where appropriate, by prosecution of those who appear to be responsible for them.”¹⁰³

⁹⁹See, for example, Communication No. R.1/4, *W. Torres Ramírez v. Uruguay* (Views adopted on 23 July 1980), in UN doc. GAOR, A/35/40, pp. 122-123, para. 5.

¹⁰⁰General Comment No. 20 (Article 7), in *United Nations Compilation of General Comments*, p. 141, para. 14.

¹⁰¹*Ibid.*, loc. cit.

¹⁰²*Ibid.*

¹⁰³UN doc. GAOR, A/56/40 (vol. I), p. 50, para. 8.

The Committee also expressed concern in the case of Trinidad and Tobago “at the lack of remedies under domestic legislation, including the Constitution, for victims of discrimination within the full ambit of articles 2.3 and 26 of the Covenant. The State party should ensure that remedies are available for the full range of discriminatory situations falling within the protection given by those articles.”¹⁰⁴

Article 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires each State party to ensure

“that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

The Committee against Torture recommended in this regard that China establish a “comprehensive system ... to review, investigate and effectively deal with complaints of maltreatment, by those in custody of every sort”.¹⁰⁵ It also recommended that Jordan “further strengthen measures to protect the right of detainees, especially their access to judges, lawyers and doctors of their choice”.¹⁰⁶ Access to the legal profession is, of course, also essential in order to enable people in detention to vindicate their rights. The Committee thus welcomed the establishment by the Panamanian Public Prosecutor’s Department “of a ‘prison mailbox’ system to facilitate the exercise by prisoners of their right to lodge complaints and petitions”.¹⁰⁷

Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination also imposes a duty on States parties to provide “effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate [a person’s] human rights and fundamental freedoms contrary to this Convention”. On this point, the Committee on the Elimination of Racial Discrimination recommended that Sudan “continue its efforts to establish a domestic legal order giving full effect to [articles 4, 5 and 6] of the Convention and to ensure effective and equal access to remedies through the competent national tribunals and other State institutions against any acts of racial discrimination and related tolerance”.¹⁰⁸ With regard to article 6, it also recommended that France “reinforce the effectiveness of the remedies available to victims of racial discrimination”.¹⁰⁹ The same Committee has also begun to take into account “the

¹⁰⁴Ibid., p. 32, para. 10.

¹⁰⁵UN doc. GAOR, A/51/44, p. 24, para. 150(b).

¹⁰⁶UN doc. GAOR, A/50/44, p. 24, para. 174.

¹⁰⁷UN doc. GAOR, A/53/44, p. 22, para. 215.

¹⁰⁸UN doc. GAOR, A/56/18, p. 41, para. 210.

¹⁰⁹UN doc. GAOR, A/55/18, p. 27, para. 103.

gender-related dimensions of racial discrimination”. In so doing, it will give “particular consideration”, inter alia, to the “availability and accessibility of remedies and complaint mechanisms for racial discrimination”.¹¹⁰

Under article 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women, the States parties undertake “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”. The Committee on the Elimination of Discrimination against Women urged Belarus “to create adequate remedies for women to obtain easy redress from direct or indirect discrimination especially in the area of employment [and] to improve women’s access to such remedies, including access to courts, by facilitating legal aid to women and embarking on legal literacy campaigns”.¹¹¹ The Committee also recommended that Cameroon “provide access to legal remedies” for women subjected to various forms of violence.¹¹²

Lastly, it is interesting to note in this context that the question of effective remedies for human rights violations was also dealt with in Part I, paragraph 27, of the Vienna Declaration and Programme of Action, in which the participating States agreed by consensus that:

“Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.”¹¹³

3.4.2 The regional level

The right to a domestic remedy is, of course, also guaranteed by the regional human rights treaties. Article 7(1)(a) of the African Charter on Human and Peoples’ Rights stipulates that every individual shall have “the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”. This provision was violated, inter alia, in a case against Zambia, in which one of the victims had been denied the opportunity to appeal his deportation order. In the view of the African Commission on Human and Peoples’ Rights, this deprivation of the right to a fair

¹¹⁰General Recommendation No. XXV (Gender-related dimensions of racial discrimination), in *United Nations Compilation of General Comments*, p. 195, para. 5(d).

¹¹¹UN doc. GAOR, A/55/38, p. 37, para. 360.

¹¹²*Ibid.*, p. 55, para. 50.

¹¹³See UN doc. A/CONF.157/53.

hearing violated both Zambian law and international human rights law, including article 7(1)a) of the African Charter.¹¹⁴ The right to be heard, as guaranteed by article 7(1)(a), was also violated in a case against Nigeria, in which the courts were prevented by a government decree from entertaining any complaints concerning a number of decrees regarding, *inter alia*, the proscription of newspapers. The African Commission on Human and Peoples' Rights did not accept the Government's argument that it was "in the nature of military regimes" to provide for such "ouster clauses" in order to avoid excessive litigation. According to the Commission:

"A government that governs truly in the best interest of the people ... should have no fears of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society. For a government to oust the jurisdiction of the courts on a broad scale reflects a lack of confidence in the justifiability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and rule of law."¹¹⁵

The Commission therefore decided that the ouster of the courts' jurisdiction violated the right to have one's cause heard under article 7(1) of the Charter.¹¹⁶

Article 25 of the American Convention on Human Rights on the right to judicial protection reads as follows:

"1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- (b) to develop the possibilities of judicial remedy; and
- (c) to ensure that the competent authorities shall enforce such remedies when granted."

¹¹⁴ ACHPR, *Amnesty International (on behalf of W. S. Banda and J. L. Chinula) v. Zambia*, Communication No. 212/98, decision adopted on 5 May 1999, paras. 60-61 of the text of the decision as published at: <http://www1.umn.edu/humanrts/africa/comcases/212-98.html>

¹¹⁵ ACHPR, *Media Rights Agenda and Others v. Nigeria*, Communications Nos. 105/93, 128/94, 130/94 and 152/96, decision adopted on 31 October 1998, paras. 78 and 81 of the text of the decision as published at: http://www1.umn.edu/humanrts/africa/comcases/105-93_128-94_130-94_152-96.html

¹¹⁶ *Ibid.*, para. 82.

The Inter-American Court has stated that the right to judicial protection, as guaranteed by article 25(1), “incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights”.¹¹⁷ This means, in particular, that:

“Under the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1).”¹¹⁸

According to this principle, moreover,

“the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather that it must be truly effective in establishing whether there has been a violation of human right and in providing redress. A remedy which provides illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.”¹¹⁹

In “normal circumstances” these conclusions “are generally valid with respect to all the rights recognized by the Convention”.¹²⁰ For specific information regarding the requirement of effective domestic remedies in public emergencies, see Chapter 16 of this Manual.

Article 25 of the American Convention has been interpreted by the Inter-American Court of Human Rights in the case of *Castillo-Páez v. Peru* concerning the abduction and subsequent disappearance of Mr. Castillo-Páez. The Court concluded “that the remedy filed by Mr. Castillo-Páez’ next-of-kin against his detention (habeas corpus) was obstructed by State agents through the adulteration of the logs of entry of detainees, which made it impossible to locate the victim”. It had therefore been proven “that the remedy of habeas corpus was ineffective for securing the release of Ernesto Rafael Castillo-Páez and, perhaps, for saving his life”.¹²¹ On this important issue the Court added that:

¹¹⁷I-A Court HR, *Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, Series A, No. 9, p. 32, para. 24.

¹¹⁸I-A Court HR, *Godínez Cruz Case, Preliminary Objections, judgment of June 26, 1987, Series C, No. 3, p. 78, para. 93.*

¹¹⁹I-A Court HR, *Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, Series A, No. 9, p. 33, para. 24.

¹²⁰*Ibid.*, pp. 33-34, para. 25.

¹²¹I-A Court HR, *Castillo-Páez Case v. Peru, judgment of November 3, 1997*, OAS doc. OAS/Ser.L/V/III.39, doc. 5, 1997 *Annual Report I-A Court HR*, p. 266, paras. 81-82.

“82. ... The fact that the ineffectiveness of habeas corpus was due to forced disappearance does not exclude the violation of article 25 of the American Convention. This provision on the right to effective recourse to a competent national court or tribunal is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention.

83. Article 25 is closely linked to the general obligation contained in article 1(1) of the American Convention, in that it assigns duties of protection to the States Parties through their domestic legislation. The purpose of habeas corpus is not only to guarantee personal liberty and humane treatment, but also to prevent disappearance or failure to determine the place of detention, and, ultimately, to ensure the right to life.”¹²²

In this case the Court found it proven that Mr. Castillo-Páez had been detained by the members of the Peruvian police force, who hid him so that he could not be located. The ineffectiveness of the remedy of *habeas corpus* was therefore “imputable to the State” and constituted a violation of article 25 of the Convention.¹²³

However, where the relatives of a disappeared person failed to initiate a judicial action to try to secure the freedom of the person concerned, the Court was unable to find a violation of article 25, since the requirement for its application had not been met.¹²⁴

Quite importantly, article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, also spells out States parties’s duties to provide help and remedies for women subjected to violence, for instance the establishment of “fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures” (art. 7(f)). It further imposes an obligation on States parties to establish “the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies” (art. 7(g)).

Lastly, article 13 of the European Convention on Human Rights stipulates that:

“Everyone whose rights and freedoms as set forth in this 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.”

¹²²Ibid., pp. 266-267, paras. 82-83.

¹²³Ibid., p. 267, para. 84.

¹²⁴I-A Court HR, *the Case of Blake v. Guatemala, judgment of January 24, 1998*, in OAS doc. OAS/Ser.L/V/III.43, doc. 11, 1998 *Annual Report I-A Court HR*, p. 100, para. 104.

This article has been interpreted on numerous occasions and violations, particularly with regard to protection of the right to life, have been found in an increasing number of cases. An analysis of the jurisprudence of the European Court of Human Rights shows that the following general principles are of relevance in the interpretation of article 13 of the European Convention:

First, as the Court stated in the case of *Boyle and Rice v. the United Kingdom*, “notwithstanding the terms of Article 13 read literally, the existence of an actual breach of another provision of the Convention (a ‘substantive’ provision) is not a prerequisite for the application of the Article [which] guarantees the availability of a remedy at national level to enforce – and hence to allege non-compliance with – the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order.”¹²⁵

Second, it follows that “where an individual has an *arguable* claim to be the victim of a violation of the rights set forth in the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress.”¹²⁶ This means more precisely that “the grievance must be an arguable one in terms of the Convention”, and that a person cannot claim the benefit of the protection of article 13 for “any supposed grievance under the Convention ... no matter how unmeritorious his complaint may be”.¹²⁷

Third, the Court has concluded that the authority referred to in article 13 “may not necessarily be a judicial authority but, if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective”.¹²⁸

Fourth, the Court has held that “although no single remedy may itself entirely satisfy the requirements of article 13, the aggregate of remedies provided for under domestic law may do so.”¹²⁹

Fifth, although “the scope of the obligation under article 13 varies depending on the nature of the applicant’s complaints under the Convention”, the remedy required by that article “must be ‘effective’ in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State”.¹³⁰

Sixth, neither article 13 nor the Convention itself lays down the manner in which the Contracting States should ensure “within their internal law the effective implementation of any of the provisions of the Convention – for example, by incorporating the Convention into domestic law”. It therefore follows that the application of article 13 in a given case will depend upon the manner in which the Contracting State concerned has chosen to discharge its obligation under article 1

¹²⁵*Eur. Court HR, Case of Boyle and Rice v. the United Kingdom, judgment of 27 April 1988, Series A, No. 131, p. 23, para. 52.*

¹²⁶*Eur. Court HR, Case of Silver and Others, judgment of 25 March 1983, Series A, No. 61, p. 42, para. 113(a); emphasis added.*

¹²⁷*Eur. Court HR, Case of Boyle and Rice v. the United Kingdom, judgment of 27 April 1988, Series A, No. 131, p. 23, para. 52.*

¹²⁸*Eur. Court HR, Case of Silver and Others, judgment of 25 March 1983, Series A, No. 61, p. 42, para. 113(b), p. 42, para. 113(b).*

¹²⁹*Ibid.*, p. 42, para. 113(c).

¹³⁰*Eur. Court HR, Case of Mahmut Kaya v. Turkey, judgment of 28 March 2000, para. 124 of the text published at: <http://echr.coe.int/>.*

directly to secure to everyone within its jurisdiction the rights and freedoms set out in the Convention and its Protocols.¹³¹

Lastly, it follows from the preceding principle that article 13 does not guarantee “a remedy allowing a Contracting State’s law as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic legal norms”.¹³²

However, the question of remedies may be examined not only within the framework of article 13 of the Convention but also under other articles, such as articles 6 and 8. If, for instance, the Court has found a violation of article 6(1) as a consequence of lack of access to the courts, it will not, in principle, find it necessary to examine the matter also under article 13, since “the requirements of that provision are less strict than, and are ... absorbed by, those of Article 6, para. 1”.¹³³ In the case of *X and Y v. the Netherlands*, the Court likewise did not consider it necessary to examine the question of remedies under article 13, since it had already concluded that article 8 of the Convention had been violated, inter alia, by the fact that no “adequate means of obtaining a remedy” was available to one of the applicants.¹³⁴

Conversely, if the requirements under other articles, such as article 2, are less strict than article 13, the Court will pursue its examination of grievances also under the latter article. For instance, it found a violation of article 13 after concluding that the lack of an effective investigation into the death of a person constituted a violation of article 2 of the Convention.¹³⁵ The reason was that the requirements of article 13 “are broader than the obligation to investigate” imposed by article 2.¹³⁶ In this case the Court stated that:

“Given the fundamental importance of the right to protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and including effective access for the complainant to the investigation procedure.”¹³⁷

As such an effective investigation was not conducted into the circumstances of the death of the applicant’s brother, the applicant had no effective remedy in respect of his brother’s death as required by article 13, which had therefore been violated.¹³⁸

¹³¹ *Eur. Court HR, Case of Silver and Others, judgment of 25 March 1983, Series A, No. 61, p. 42, para. 113(d).*

¹³² *Eur. Court HR, Case of James and Others, judgment of 21 February 1986, Series A, No. 98, p. 47, para. 85.*

¹³³ *Eur. Court HR, Case of Hentrich v. France, judgment of 22 September 1994, Series A, No. 296-A, p. 24, para. 65 and, similarly, Eur. Court HR, Case of Pudas v. Sweden, judgment of 27 October 1987, Series A, No. 125-A, p. 17, para. 43.*

¹³⁴ *Eur. Court HR, Case of Y and Y v. the Netherlands, judgment of 26 March 1985, Series A, No. 91, p. 15, para. 36.*

¹³⁵ Among several cases see, for example, *Eur. Court HR, Case of Mahmut Kaya v. Turkey, judgment of 28 March 2000, para. 126.*

¹³⁶ *Ibid.*, loc. cit.

¹³⁷ *Ibid.*, para. 124.

¹³⁸ *Ibid.*, para. 126. For cases involving a violation of article 13 relating to the right to life or freedom from torture, see also *Eur. Court HR, Case of Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI, pp. 2286-2287, paras. 95-100, and Eur. Court HR, Case of Avsar v. Turkey, judgment of 10 July 2001, paras. 421-431; for the text of the decision see <http://echr.coe.int>*

The legal duty under international law to provide effective human rights protection comprises the obligation to ensure that effective domestic remedies are available to victims of human rights violations.

This means that it is not sufficient for a remedy to be available under a country's constitution or other legislation. It must exist in practice and be allowed to function freely.

To be able to provide effective remedies, the authorities concerned, including the courts and the legal professions in general, must therefore be competent, independent and impartial.

*States should endeavour to develop **judicial** remedies for alleged violations of human rights.*

In order to be effective, the exercise of a remedy must not be hindered by acts or omissions of the State concerned.

While effective remedies must exist for all violations of human rights, their prompt and unhindered exercise is particularly important in the case of grievances suffered by persons deprived of their liberty, whose life and personal health and security must be protected at all times.

To deprive a detained person of his or her right to bring complaints regarding, for example, unlawful deprivation of liberty or torture or other forms of ill-treatment amounts to placing the person concerned in a legal vacuum where he or she has no possibility of redress. Such a situation is a manifest violation of a State's legal obligations under international human rights law.

Effective domestic remedies must also be ensured for complaints of discrimination such as alleged racial and gender-based discrimination, including acts of violence arising either in the domestic or in the public sphere.

It is the professional responsibility of all judges, prosecutors and lawyers to ensure that claims of human rights violations are addressed effectively and with due diligence.

3.5 The duty to investigate, prosecute and punish

As previously noted, the duty to *investigate, prosecute* and *punish* human rights violations is also inherent in States' general responsibility to ensure effective human rights protection and it is a duty that has been consistently emphasized by the international monitoring bodies. As this duty is not always expressly defined in the treaties concerned, it will be analysed below principally in the light of a selection of the many comments and judgments of these bodies that invoke the obligation to investigate, prosecute and punish violations of the rights and freedoms of the individual.

3.5.1 The universal level

In General Comment No. 20 on article 7 of the International Covenant on Civil and Political Rights, the Committee noted, in general, “that it is not sufficient for the implementation of article 7 to prohibit such treatment or to make it a crime. States parties should inform the Committee of the legislative, administrative, judicial and other measures that they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.”¹³⁹

In the *Chongwe* case, a Zambian police officer had shot “and barely missed killing” the author who was not formally deprived of his liberty. According to the Human Rights Committee, the State party “refused to carry out independent investigations, and the investigations initiated by the Zambian police [had] still not been concluded and made public, more than three years after the incident”.¹⁴⁰ Furthermore, no criminal proceedings had been initiated and the author’s claim for compensation appeared to have been rejected. The author’s right to security under article 9(1) of the Covenant had therefore been violated.¹⁴¹

With regard to Zambia’s obligations under article 2(3)(a) of the Covenant, the Committee concluded that:

“the State party is under the obligation to provide Mr Chongwe with an effective remedy and to take adequate measures to protect his personal security and life from threats of any kind. The Committee urges the State party to carry out independent investigations of the shooting incident, and to expedite criminal proceedings against the persons responsible for the shooting. If the outcome of the criminal proceedings reveals that persons acting in an official capacity were responsible for the shooting and hurting of the author, the remedy should include damages to Mr Chongwe. The State party is under an obligation to ensure that similar violations do not occur in the future.”¹⁴²

The Human Rights Committee also expressed concern “at the lack of action” by Venezuela to deal with disappearances that occurred in 1989, noting that the statement to the effect that investigations of the disappearances were “being pursued” was unsatisfactory.¹⁴³ “Taking into account the provisions of articles 6, 7 and 9 of the Covenant, the State party should give special priority to rapid and effective investigations designed to determine the whereabouts of the disappeared persons and those responsible for disappearances. The State party should also take all necessary measures to prevent disappearances, including adoption of the legislation described in article 45 of the Constitution.”¹⁴⁴ The Committee was also “gravely concerned at the many reports of extrajudicial executions” in Venezuela and the failure of the State party to deal with them. “The State party should conduct investigations to identify those

¹³⁹ *United Nations Compilation of General Comments*, p. 140, para. 8.

¹⁴⁰ Communication No. 821/1998, *R. Chongwe v. Zambia*, (Views adopted on 25 October 2000), in UN doc. *GAOR*, A/56/40 (vol. II), p. 142, para. 5.3.

¹⁴¹ *Ibid.*, loc. cit.

¹⁴² *Ibid.*, p. 143, para. 7.

¹⁴³ UN doc. *GAOR*, A/56/40 (vol. I), p. 49, para. 6.

¹⁴⁴ *Ibid.*, loc. cit.

responsible for extrajudicial executions and bring them to justice. It should also take the necessary measures to prevent the occurrence of such violations of article 6 of the Covenant.”¹⁴⁵

Similarly, the Committee expressed concern about reports of extrajudicial executions of prisoners in the Dominican Republic “and of deaths at the hands of the National Police, the Armed Forces and the National Drug Control Office owing to the excessive use of force and the apparent impunity that they enjoy”. The State party should therefore

“take urgent steps to ensure respect for article 6 of the Covenant, to have those responsible for violations of the right to life guaranteed thereunder prosecuted and punished, and to make redress”.¹⁴⁶

The Committee also noted with concern that torture was widespread in the Dominican Republic and that “no independent body exists to investigate the many complaints of torture and cruel, inhuman or degrading treatment . . . The State party should take prompt action to comply fully with article 7 of the Covenant and to have violations thereof investigated so that the culprits may be tried and punished by ordinary courts and redress provided.”¹⁴⁷

Commenting on the Amnesty Law passed in Argentina to grant immunity for human rights violations committed during the military regime, the Committee recommended that gross violations of civil and political rights during that regime “should be prosecutable for as long as necessary, with applicability as far back in time as necessary, to bring to justice their perpetrators” (see further *infra* subsection 3.7.1).¹⁴⁸

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains specifically defined State obligations relating to the penalization of acts of torture and to investigations and complaints procedures. Pursuant to article 4(1) of the Convention, States parties are required to ensure that all acts of torture, attempts to commit torture, as well as complicity or participation in torture, are offences under their criminal law. Article 4(2) stipulates that the States parties “shall make these offences punishable by appropriate penalties which take into account their grave nature”. And article 12 of the Convention states that:

“Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”

Lastly, as already noted *supra* in subsection 3.4.1, article 13 obliges States parties to provide victims of torture with the right to bring complaints and to have their cases “promptly and impartially” examined by the competent authorities.

¹⁴⁵Ibid., pp. 49-50, para. 7.

¹⁴⁶Ibid., p. 55, para. 8.

¹⁴⁷Ibid., pp. 55-56, para. 9.

¹⁴⁸UN doc. GAOR, A/56/40 (vol. I), p. 39, para. 9.

In connection with its examination of the third periodic report of Belarus, the Committee against Torture expressed concern about the “pattern of failure of officials to conduct prompt, impartial and full investigations into the many allegations of torture reported to the authorities, as well as a failure to prosecute alleged perpetrators, which are not in conformity with articles 12 and 13 of the Convention”.¹⁴⁹ The Committee therefore recommended that:

- ❖ “Urgent and effective steps be taken to establish a fully independent complaints mechanism, to ensure prompt, impartial and full investigations into the many allegations of torture reported to the authorities and the prosecution and punishment, as appropriate, of the alleged perpetrators”;
- ❖ “The State party consider establishing an independent and impartial governmental and non-governmental national human rights commission with effective powers to, *inter alia*, promote human rights and investigate all complaints of human rights violations, in particular those pertaining to the implementation of the Convention.”¹⁵⁰

Another of the many similar examples from the proceedings of the Committee against Torture relates to Guatemala, in respect of which the Committee expressed concern at “the continuing existence of impunity for offences in general and for human rights violations in particular, as a result of repeated dereliction of duty by the government bodies responsible for preventing, investigating and punishing such offences”. It also expressed concern about the “lack of an independent commission with wide powers and extensive resources to investigate the circumstances of the kidnapping of disappeared persons on a case-by-case basis and to locate their remains. Uncertainty about these circumstances causes the families of disappeared persons serious and continuous suffering.”¹⁵¹ The Committee recommended that:

“An independent commission should be established to investigate the circumstances of the kidnapping of disappeared persons and to determine what happened to them and where their remains are located. The Government has an obligation to spare no effort to find out what really happened in such cases and thus give effect to the legitimate right of the families concerned, provide compensation for the loss or injury caused and prosecute the persons responsible.”¹⁵²

Lastly, when examining the initial report of Bolivia, the Committee recommended that the Government adopt “the necessary measures to ensure effective compliance by government procurators with their duty to conduct criminal investigations into any complaint of torture and cruel, inhuman or degrading treatment in a prompt and impartial manner; during these investigations, the accused officials should be suspended from their duties.”¹⁵³ It was recommended that the State party

¹⁴⁹UN doc. GAOR, A/56/44, p. 21, para. 45(e).

¹⁵⁰Ibid., p. 21, para. 46(b) and (c).

¹⁵¹Ibid., p. 33, para. 73(b) and (e).

¹⁵²Ibid., p. 35, para. 76(e).

¹⁵³Ibid., p. 42, para. 97(d).

“set up a centralized public register of complaints of torture and ill-treatment and of the results of the investigations”.¹⁵⁴

Article 2(b) and (c) of the Convention on the Elimination of All Forms of Discrimination against Women requires the States parties “to adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women” and “to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”. Although these provisions are applicable to all forms of gender-based discrimination, they assume special importance in the case of all forms of violence against and abuse of women.

On this issue the Committee on the Elimination of Discrimination against Women recommends that the States parties to the Convention take

“Effective legal measures, including penal sanctions, civil remedies compensatory provisions to protect women against all kinds of violence, including, *inter alia*, violence and abuse in the family, sexual assault and sexual harassment in the workplace”.¹⁵⁵

Commenting on the situation in the Republic of Moldova, the Committee emphasized that violence against women, “including domestic violence, constitutes a violation of the human rights of women under the Convention”. It called on the Government “to ensure that such violence constitutes a crime punishable under criminal law, that it is prosecuted and punished with the required severity and speed”.¹⁵⁶ It urged Uzbekistan to ensure that women and girls who are victims of violence, including domestic violence, “have immediate means of redress and protection”.¹⁵⁷

3.5.2 The regional level

The Inter-American Court of Human Rights held in the *Street Children* case that it is clear from article 1(1) of the American Convention on Human Rights “that the State is obliged to investigate and punish any violation of the rights embodied in the Convention in order to guarantee such rights”.¹⁵⁸ In the earlier *Velásquez Rodríguez* case, the Court had set forth at some length its views on States parties’ duty to investigate human rights violations, which in that case involved the abduction and subsequent disappearance of Mr. Velásquez. The Court held that:

¹⁵⁴Ibid., p. 43, para. 97(e).

¹⁵⁵General Recommendation No. 19 (Violence against women) *United Nations Compilation of General Comments*, p. 221, para. 24(t)(i).

¹⁵⁶UN doc. GAOR A/55/38, p. 59, para. 102.

¹⁵⁷UN doc. GAOR, A/56/38, p. 21, para. 177.

¹⁵⁸*I-A Court HR, Villagrán Morales et al. Case (The “Street Children” Case), judgment of November 19, 1999, Series C, No. 63*, pp. 194-195, para. 225.

“176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victims’ full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows *private* persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

177. In certain circumstances, it may be difficult to investigate acts that violate an individual’s rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. *Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.* This is true regardless of what agent is eventually found responsible for the violation. Where the acts of *private* parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.”¹⁵⁹

In the same case, the Court concluded that the procedures available in Honduras were “theoretically adequate” but that the evidence showed “a complete inability” of the procedures to carry out an investigation into the disappearance of Manfredo Velásquez and to fulfil the State’s duty to pay compensation and punish those responsible, as set out in article 1(1) of the Convention.¹⁶⁰ For instance, the courts did not process one single writ of *habeas corpus*, no judge had access to the places of detention where Mr. Velásquez might have been held, and the criminal complaint was dismissed.¹⁶¹ The Court also pointed out that “the duty to investigate facts of this type continues *as long as there is uncertainty about the fate of the person who has disappeared*”.¹⁶²

In the *Velásquez* case, the Court unanimously decided that Honduras had violated articles 4, 5 and 7 read in conjunction with article 1(1) of the Convention.¹⁶³

Although a Government may conduct various judicial proceedings relating to the facts, it may still be in violation of its duty under article 1(1) of the American Convention to investigate crime. This was the situation in the *Street Children* case, in which the persons responsible for the abduction and killing of the children had not been punished because they had “not been identified or penalized by judicial decisions

¹⁵⁹I-A Court HR, *Velásquez Rodríguez Case*, judgment of July 29, 1988, Series C, No. 4, pp. 155-156, paras. 176-177; emphasis added.

¹⁶⁰Ibid., p. 156, para. 178.

¹⁶¹Ibid., p. 156, para. 179.

¹⁶²Ibid., p. 157, para. 181; emphasis added.

¹⁶³Ibid., pp. 162-163.

that [had] been executed”. This consideration alone was sufficient for the Court to conclude that Guatemala had violated article 1(1) of the Convention.¹⁶⁴

The duty to investigate, prosecute and punish human rights violations is, of course, equally valid for the Contracting States to the European Convention on Human Rights. In numerous cases, for example, the European Court of Human Rights has emphasized the obligation to investigate in relation to the right to life. Its jurisprudence on this important issue was well summarized in the *Avsar* case, in which it held:

“393. The obligation to protect the right to life under article 2 of the Convention, read in conjunction with the State’s general duty under article 1 of the Convention to ‘secure to everyone within (its) jurisdiction the rights and freedoms defined in (the) Convention’, also 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 ... The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents and bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge formal complaint or to take responsibility for the conduct of any investigatory procedures ...

394. For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events ... The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... and to the identification and punishment of those responsible ... This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence, and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death ... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

395. There must also be a requirement of promptness and reasonable expedition implicit in this context ... It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in

¹⁶⁴*I-A Court HR, Villagrán Morales et al. Case (The “Street Children” Case), judgment of November 19, 1999, Series C, No. 63, p. 195, para. 228.*

maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”¹⁶⁵

Moreover, as pointed out by the Court in the *Avsar* case, in which unlawful killings were allegedly “carried out under the auspices of the security forces with the knowledge and acquiescence of the State authorities”, the situation raised “serious concerns about the State’s compliance with the rule of law and its respect in particular for the right to life”. It followed that, in such circumstances, the procedural obligation under article 2 of the European Convention with regard to the right to life “must be regarded as requiring a wider examination”.¹⁶⁶

In this case, the victim had been taken from his house by seven persons, namely village guards, MM (the person who confessed) and one security guard. He was taken to the gendarmerie from where he was later removed and killed. The Court concluded that article 2 of the Convention had been violated because “the investigation by the gendarmes, public prosecutor and before the criminal court did not provide a prompt or adequate investigation of the circumstances surrounding the killing of Mehmet Serif Avsat”. There had therefore been a “breach of the State’s *procedural obligation* to protect the right to life”.¹⁶⁷ The Court concluded, moreover, that the Government was responsible for Mr. Avsat’s death, a finding that resulted in a violation of its *substantive obligation* to ensure the right to life under article 2 of the European Convention.¹⁶⁸ It is noteworthy that the village guards and the confessor were prosecuted and convicted in this case but not the seventh person, the security official. These circumstances “rendered recourse to civil remedies ... ineffective in the circumstances [and] did not provide sufficient redress for the applicant’s complaints concerning the authorities’ responsibility for his brother’s death”. He could therefore continue to claim to be a victim of a violation of article 2 on behalf of his brother.¹⁶⁹

3.5.3 The role of victims during investigations and court proceedings

The role of victims or their next-of-kin is essential during investigations into, and court proceedings regarding, human rights violations, and is of course particularly important in inquiries into killings, torture and other forms of violence, including gender-based violence, whether committed by private persons or State officials. Judges, prosecutors and lawyers must therefore at all times ensure that the affected persons are heard at all appropriate times during the investigations, as well as in connection with any ensuing court proceedings. They must also be particularly sensitive and understanding in cases concerning, for instance, disappearances. The trauma felt by the family members of disappeared persons is profound. Their anguish at not knowing the fate of their beloved ones is deep and has a marked and lasting impact on their lives. The legal professions should therefore show courtesy and understanding for the

¹⁶⁵*Eur. Court HR, Case of Avsar v. Turkey, judgment of 10 July 2001*, paras. 393-395 of the decision as published at: <http://echr.coe.int>

¹⁶⁶*Ibid.*, para. 404.

¹⁶⁷*Ibid.*, para. 408; emphasis added.

¹⁶⁸*Ibid.*, para. 416.

¹⁶⁹*Ibid.*, paras. 408 and 415.

feelings and reactions of persons facing such human tragedy and their need to know what happened to their disappeared family members.

In the *Street Children* case, the Inter-American Court of Human Rights emphasized with regard to the duty to investigate that

“it is evident from article 8 of the (American) Convention (on Human Rights) that the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.”¹⁷⁰

Failure to process private denunciations, writs of *habeas corpus* or civil and other claims, and failure to initiate investigations into alleged human rights violations and, whenever appropriate, to bring criminal or other proceedings against those responsible for them clearly make it impossible for the victims or their next-of-kin “to be heard and to have their accusations discussed by an independent and impartial tribunal”.¹⁷¹ Such failure undermines not only the victim’s right to an effective remedy but also the confidence that individuals and the public at large should have in their justice system and in the rule of law in general.

*Inherent in the general duty to provide effective protection for human rights is the specific legal duty to **investigate, prosecute and punish** violations of the individual’s fundamental rights and freedoms.*

The ultimate purpose of this duty is to ensure the swift restoration of the victim’s rights and freedoms

To fulfil their duty, States must conduct prompt and effective investigations into all alleged violations of human rights. This duty is of particular importance when the allegations concern the right to life and the right not to be subjected to torture or other forms of ill-treatment, including gender-based violence as well as violence originating in other forms of discrimination.

The duty to investigate is one of means and not of ends and it implies inter alia that:

- *the investigation must be carried out by an independent body, namely by a body other than that implicated in the alleged violations;*
- *the investigation must be carried out impartially, speedily, fully and effectively so as to facilitate the identification of the person or persons responsible for the alleged human rights violations for the purpose of their subsequent prosecution and eventual punishment;*

¹⁷⁰I-A Court HR, *Villagrán Morales et al. Case (The “Street Children” Case)*, judgment of November 19, 1999, Series C, No. 63, p. 195, para. 227.

¹⁷¹*Ibid.*, p. 196, para. 229.

- *the investigation must be initiated by the State once it has knowledge of the alleged facts, and it does not therefore depend on steps taken, or proof tendered, by the victim or his or her next-of-kin;*
- *formal investigations not intended to establish the truth fall foul of the duty to investigate human rights violations effectively;*
- *examples of steps necessary to ensure the effective investigation of alleged arbitrary killings are the taking of eyewitness testimony and forensic evidence and an autopsy involving an objective analysis of the clinical findings, including the cause of death;*
- *in the case of grave human rights violations, such as disappearances, the duty to investigate and prosecute lasts for as long as it takes to dispel uncertainty about what happened to the victims.*

The victim of human rights violations or his or her next-of-kin plays an essential role in investigations and during court proceedings relating to the violation concerned. He or she should have ample opportunity to be heard and to play an active part in the criminal justice process.

Judges, prosecutors and lawyers must show courtesy to and understanding for victims of human rights violations and must be particularly sensitive to the trauma caused by disappearances and other serious human rights abuses.

The failure to investigate human rights violations promptly and effectively jeopardizes the victim's right to redress for his or her grievances and undermines the rule of law, including public confidence in the rule of law.

3.6 The duty to provide redress for human rights violations

3.6.1 Restitution and compensation

In most cases, the international human rights treaties do not specify how a breach of a legal obligation should be remedied. In a sense, this is logical inasmuch as the States parties to a human rights treaty are free to decide how to enforce the rights and freedoms concerned. However, article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment specifies that States parties have a duty to ensure that victims of torture obtain redress and that they have “an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”. In the event of the death of the victim as a result of the torture, his or her dependants “shall be entitled to compensation”. As previously noted, article 7 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women also imposes a duty on States parties to establish, inter alia, “the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies”.

As in the case of victims of ordinary crime, victims of human rights violations should, to the extent possible, have their rights restituted. In the *Blazek* case, which concerned the confiscation of property in the Czech Republic, the Human Rights Committee expressed the view that, pursuant to article 2(3)(a) of the International Covenant on Civil and Political Rights, the State party was “under an obligation to provide the authors with an effective remedy, including an opportunity to file a new claim for restitution or compensation” for an act of discrimination contrary to article 26 of the Covenant.¹⁷² In this case, which concerned property, restitution may thus be possible. However, as made abundantly clear in the present chapter, this is often not the case, especially where the persons concerned have been killed or subjected to violence and the options are limited, by and large, to compensation and rehabilitation.

The examples selected below will illustrate how the regional human rights courts deal with the question of compensation. However, it should be pointed out that the obligation to indemnify is derived in these cases from an international obligation linked to a proven violation of an international human rights treaty and is thus not based in national law.¹⁷³ On the other hand, the judgments concerned help to clarify the kinds of damage that may be compensated, although the actual compensation will always depend on the facts of the case.

The European Court of Human Rights has regularly awarded compensation, inter alia to victims of torture and to the next-of-kin of victims of killings. Depending on the circumstances, compensation may be granted for *pecuniary damage* and also for *non-pecuniary or moral damage* which cannot be considered to be compensated by the sole findings of the international monitoring body concerned.¹⁷⁴ Such compensation may be granted not only to the victim himself or herself but also to the victim’s next-of-kin.¹⁷⁵ Compensation for *costs and expenses* may also be awarded.¹⁷⁶ However, in a case in which the next-of-kin was not dependent on his brother’s earnings prior to his death and the claims related to alleged losses incurred subsequent to his death, the Court did not “find it appropriate” to award compensation for pecuniary damages.¹⁷⁷

At the American level, the question of what would constitute “fair compensation” to Mr. Velásquez’s next-of-kin arose in the *Velásquez Rodríguez* case. The Inter-American Court concluded that, since the disappearance of Mr. Velásquez was not an accidental death but “the result of serious acts imputable to Honduras”, the amount of compensation could not “be based upon guidelines such as life insurance,

¹⁷²Communication No. 857/1999, *Blazek et al. v. the Czech Republic* (Views adopted on 12 July 2001), in UN doc. GAOR, A/56/40 (vol. II), p. 173, para. 7.

¹⁷³Cf. I-A Court HR, *Velásquez Rodríguez Case, Compensatory damages, judgment of July 21, 1989, Series C, No. 7*, p. 57, para. 54.

¹⁷⁴See, for example, among numerous cases: Eur. Court HR, *Case of Mahmut Kaya v. Turkey, judgment of 28 March 2000*, paras. 133-139 of the text as published as at <http://echr.coe.int> and Eur. Court HR, *Case of Price v. the United Kingdom, judgment of 19 June 2001*, para. 34 of the text as published as at <http://echr.coe.int>

¹⁷⁵Eur. Court HR, *Case of Mahmut Kaya v. Turkey, judgment of 28 March 2000*, paras. 133-139 of the text as published at <http://echr.coe.int>

¹⁷⁶Ibid., paras. 140-142.

¹⁷⁷Ibid., para. 135.

but must be calculated as a loss of earnings based upon the income the victim would have received up to the time of his possible natural death”.¹⁷⁸ However, the Court distinguished between two situations: on the one hand, the situation of a victim who was “totally and permanently disabled”, in which case “the compensation should include all he failed to receive, together with appropriate adjustments based upon his probable life expectancy”,¹⁷⁹ and, on the other, a situation in which the beneficiaries are family members who have, in principle, “an actual or future possibility of working or receiving income on their own”.¹⁸⁰ In the latter situation it would not be correct “to adhere to rigid criteria ... but rather to arrive at a prudent estimate of the damages, given the circumstances of the case”.¹⁸¹

On the question of indemnification of the moral damages suffered by Mr. Velásquez’s family members, the Court found that these damages were “primarily the result of the psychological impact suffered by the family”, especially as a result of “the dramatic characteristics of the involuntary disappearance of persons”.¹⁸² The moral damages were demonstrated by “expert documentary evidence” and the testimony of a psychiatrist and professor of psychology. On that basis, the Court found that the disappearance of Mr. Velásquez “produced harmful psychological impacts among his immediate family which should be indemnified as moral damages”.¹⁸³ The Government was therefore ordered to pay compensation.

As the status of the *universal* monitoring bodies is not strictly judicial, they have no competence, as such, to award compensation for damages. In the Views it adopts under the Optional Protocol to the International Covenant on Civil and Political Rights, the Human Rights Committee is therefore limited to urging Governments responsible for human rights violations, in general terms, to pay compensation for the wrongs suffered without specifying the amount to be paid.¹⁸⁴

3.6.2 Rehabilitation

In many cases, such as when a person has been the victim of torture or other forms of ill-treatment or gender-based violence, there may be a need, in addition to financial compensation, for rehabilitative measures of both a physical and psychological nature. As noted in the preceding subsection, article 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly imposes a duty on States parties to provide redress for torture victims “including the means for as full rehabilitation as possible”.

¹⁷⁸I-A Court HR, *Velásquez Rodríguez Case*, *Compensatory damages*, judgment of July 21, 1989, Series C, No. 7, p. 54, para. 46.

¹⁷⁹Ibid., pp. 54-55, para. 47.

¹⁸⁰Ibid., p. 55, para. 48.

¹⁸¹Ibid., loc. cit.

¹⁸²Ibid., p. 55, para. 50.

¹⁸³Ibid., p. 56, para. 51.

¹⁸⁴See, for example, Communication No. 107/1981, *Quinteros v. Uruguay* (Views adopted on 21 July 1983), in UN doc. GAOR, A/38/40, p. 224, para. 16.

The Committee against Torture expressed concern, with regard to Cameroon, at the “absence of legislative provisions for the compensation and rehabilitation of victims of torture, contrary to the provisions of article 14 of the Convention”. It therefore recommended that the State party introduce “a mechanism into its legislation for the fullest possible compensation and rehabilitation of the victims of torture”.¹⁸⁵ The Committee also recommended, with regard to Brazil, that measures should be taken “to regulate and institutionalize the right of victims of torture to fair and adequate compensation payable by the State, and to establish programmes for their fullest possible physical and mental rehabilitation”.¹⁸⁶

Rehabilitation for victims of abuse is also foreseen by article 39 of the Convention on the Rights of the Child, according to which

“States Parties shall take all appropriate measures to promote physical and psychological recovery and social integration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

On the basis of this article, the Committee on the Rights of the Child recommended that the former Yugoslav Republic of Macedonia “urgently establish appropriate programmes to provide for the physical and psychological recovery and reintegration” of children who have been victims of crime.¹⁸⁷ The Committee emphasized that rehabilitative measures for children are particularly important in times of war.¹⁸⁸

Women who have been subjected to trafficking constitute another group of victims of human rights violations who may need rehabilitation. The Human Rights Committee recommended that Venezuela should set up rehabilitation programmes for victims of trafficking.¹⁸⁹ The Committee on the Elimination of Discrimination against Women has also recommended that States take “protective measures, including refuges, counselling, rehabilitation and support services for women who are the victims of violence or who are at risk of violence”.¹⁹⁰

At the regional level, the need for rehabilitative measures for women subjected to violence is recognized in article 8 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, under which the States Parties “agree to undertake progressively specific measures ... to provide women who are subjected to violence access to effective readjustment and training programmes to enable them to fully participate in public, private and social life”.

¹⁸⁵UN doc. *GAOR*, A/56/44, p. 29, para. 65(e), and p. 30, para. 66(a).

¹⁸⁶*Ibid.*, p. 51, para. 120(f).

¹⁸⁷UN doc. *CRC/C/94*, Committee on the Rights of the Child: Report on the twenty-third session (2000), paras. 286-287.

¹⁸⁸*Ibid.*, see with regard to Sierra Leone, paras. 185-190.

¹⁸⁹UN doc. *GAOR*, A/56/40 (vol. I), p. 52, para. 16.

¹⁹⁰General Recommendation No. 19 (Violence against women), in *United Nations Compilation of General Comments*, p. 221, para. 24(t)(iii).

Victims of human rights violations, or their next-of-kin, have the right to effective redress for wrongs committed.

Wherever possible, such redress should be in the form of restitution of rights. If restitution is not possible, fair compensation for pecuniary and/or moral damages must be awarded.

Redress in the form of rehabilitation should be envisaged, when necessary, for victims of violence, such as torture or other forms of ill-treatment or racial, gender-based or other forms of discrimination.

3.7 The problem of impunity for human rights violations

3.7.1 Impunity from a legal perspective

Impunity for human rights violations is one of the most serious threats to the full enjoyment of the rights and freedoms of the individual, and constitutes a violation of a State's legal duty to ensure the effective protection of these rights and freedoms. Non-prosecution of criminal acts such as torture, abduction, disappearances and the arbitrary taking of human life have a particularly devastating impact on the victims and their next-of-kin, as well as on society as a whole. A culture of impunity also "widens a gap between those close to the power structures and others, who are vulnerable to human rights abuses. The increasing difficulties in securing justice drive people to take the law into their own hands, resulting in a further deterioration of the justice system and new outbursts of violence."¹⁹¹ Impunity for human rights violations can exist in any country, but it is particularly common where amnesty laws are adopted in the aftermath of military or civilian dictatorships or internal armed conflicts, such laws being an allegedly indispensable element in the process of national reconciliation.

The international monitoring bodies have consistently denounced impunity for serious human rights violations. In the *Rodríguez* case, for instance, the Human Rights Committee concluded that the 1986 Uruguayan law No. 15,848, the Limitations Act or Law of Expiry (*Ley de Caducidad de la Pretensión Punitiva del Estado*) violated article 7 read in conjunction with article 2(3) of the International Covenant on Civil and Political Rights. This law, which was adopted in 1986, ended the possibility of bringing judicial proceedings against the State for alleged human rights violations during the years of military rule. The author of the communication had been detained and tortured in 1983 during the military dictatorship but, owing to the amnesty law, was unable to sue the State for compensation. In its Views, the Committee reaffirmed its position

“that amnesties for gross violations of human rights and legislation such as No. 15,848, Ley de Caducidad de la Pretensión Punitiva del Estado, are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law

¹⁹¹See UN doc. E/CN.4/2000/3, Extrajudicial, summary or arbitrary executions, Report of the Special Rapporteur, Ms. Asma Jahangir, p. 30, para. 87.

effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses. Moreover, the Committee is concerned that, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.”¹⁹²

With regard to Argentina, the Committee expressed concern “at the atmosphere of impunity for those responsible for gross human rights violations under military rule”. Noting that many persons covered by the Argentine amnesty laws continued “to serve in the military or in public office, with some having enjoyed promotions on the ensuing years”, the Committee recommended that:

“Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary, to bring to justice their perpetrators. The Committee recommends that rigorous efforts continue to be made in this area, and that measures be taken to ensure that persons involved in gross human rights violations are removed from military or public service”.¹⁹³

The Committee also expressed concern about the Croatian Amnesty Law. Although this law does not grant amnesty to those guilty of war crimes, it fails to define such crimes. The Committee therefore recommended that the State party “should ensure that in practice the Amnesty Law is not applied or utilized for granting impunity to persons accused of serious human rights violations”.¹⁹⁴

The Committee against Torture expressed concern about the continuing existence in Guatemala

“of impunity for offences in general and for human rights violations in particular, as a result of repeated dereliction of duty by the government bodies responsible for preventing, investigating and punishing such offences. Impunity exists for most of the violations committed during the internal armed conflict and those committed after the Peace Agreements were signed.”¹⁹⁵

In order to improve the situation, the Committee made various recommendations to the State party involving, inter alia, the strengthening of the autonomy and independence of the judiciary and the Public Prosecutor’s Office and the prohibition of involvement of the army in public security and crime prevention.¹⁹⁶

¹⁹²Communication No. 322/1988, *H Rodríguez v. Uruguay* (Views adopted on 19 July 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 10, para. 12.4.

¹⁹³UN doc. GAOR, A/56/40 (vol. I), p. 39, para. 9.

¹⁹⁴*Ibid.*, p. 67, para. 11.

¹⁹⁵UN doc. GAOR, A/56/44, p. 33, para. 73(b).

¹⁹⁶*Ibid.*, see pp. 34-35, paras. 74-76.

The Committee on the Elimination of Racial Discrimination noted the efforts made by Rwanda “to prevent impunity for perpetrators of genocide and other human rights violations and to bring those most responsible for such acts to justice”. The Committee remained concerned, however, that impunity prevailed in the country “notably in some cases involving unlawful acts committed by members of the security forces”. It therefore urged the State party “to make additional efforts to respond adequately to and prevent unlawful acts committed by members of the military or civilian authorities”.¹⁹⁷

It is further clear from regional jurisprudence that impunity cannot be allowed for human rights violations committed by private persons. The duty of States to investigate, prosecute, punish and redress human rights violations also extends to violations committed by private persons, at least whenever the Government concerned knew or should have known about the unlawful acts.

The Inter-American Court of Human Rights has thus made it clear that a State party to the American Convention on Human Rights “is obligated to investigate every situation involving a violation of the rights protected by the Convention” and that, when it does not do so, “the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction”. In the Court’s view,

“The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.”¹⁹⁸

The abovementioned case of *Mahmut Kaya v. Turkey* shows that the European Court of Human Rights may hold Governments responsible for human rights violations committed by private persons, at least to the extent that the authorities were aware of such acts or “ought to have been aware of the possibility” that such acts might be carried out by persons or groups of persons “acting with the knowledge or acquiescence of elements in the security forces”.¹⁹⁹

As may be seen from these selected cases and statements, impunity for serious violations of human rights such as arbitrary killings, abduction, disappearances, torture and other forms of inhuman treatment is strictly illegal under international human rights law. This chapter has made it clear that States have a legal duty effectively to ensure the protection of everyone’s human rights including, in particular, the right to life and liberty and to security. States that fail to comply with this duty at the domestic level may have to assume international responsibility before the international monitoring bodies.

¹⁹⁷UN doc. GAOR, A/55/18, p. 32, paras. 141 and 144.

¹⁹⁸I-A Court HR, *Velásquez Rodríguez Case*, judgment of July 29, 1989, Series C, No. 4, pp. 155-156, para. 176.

¹⁹⁹Eur. Court HR, *Case of Mahmut Kaya v. Turkey*, judgment of 28 March 2000, para. 91 of the text as published at <http://echr.coe.int>

3.7.2 Justice, impunity and reconciliation

As noted above, the question of impunity for perpetrators of human rights violations is frequently a subject of intense debate when a country is emerging from a period of oppression or armed conflict and wants to move into an era of peace, security and democracy. In these circumstances, victims of human rights violations, war crimes and crimes against humanity yearn for recognition of their hardship and for ultimate justice for the wrongs committed. In particular, many victims whose close family members disappeared and/or were arbitrarily deprived of their life would have strong and persistent feelings of anxiety and a need to know the truth about what happened to their loved ones. On the other hand, perpetrators of human rights violations and other wrongs generally insist on obtaining amnesty or pardon for the acts committed. But in the midst of these apparent tensions, society needs to find a *modus vivendi* in order to move forward for the good of all.

This is not the place to seek to resolve the many and often very complex issues of guilt, admission of guilt, chastisement, reparation, rehabilitation and reconciliation that arise in such situations. It may, however, be said in the light of this chapter that, as a bare minimum, amnesties and pardons cannot in any circumstances be granted for violations of the right to life and the right to liberty and security of the person, including the right to freedom from torture and other forms of ill-treatment. As will be shown in the next chapter, these are some of the rights that cannot be derogated from in any circumstances, not even in times of public emergency. The principle of justice for everyone demands that victims' rights and sufferings be recognized and remedied, that the perpetrators be punished and that the States involved act effectively to prevent similar acts from occurring in the future. A society is unlikely to be able to heal its wounds and raise itself from the ruins of oppression in a constructive way unless these minimum legal requirements that derive from human dignity are effectively met. In other words, although some form of national reconciliation will ultimately have to be reached through negotiations between the parties concerned, a lasting and prosperous reconciliation must, out of respect for the victims, be based on such elementary justice.

Impunity for human rights violations is contrary to States' legal duty to ensure the effective protection of such rights under international law.

De facto failure to prosecute human rights violations as well as laws that grant impunity for such violations amount to breaches of international law.

The requirement that States prohibit impunity is also applicable to acts carried out by private individuals.

Impunity for serious human rights violations such as arbitrary killings, disappearances and torture creates particular hardship for victims and their next-of-kin and must be prevented.

Respect for the dignity of the human person demands that such violations be recognized, punished and redressed.

Sustainable national reconciliation is likely to prove unattainable in a situation where the basic interests of victims of serious human rights abuses are not acknowledged.

4. The Role of Judges, Prosecutors and Lawyers in Ensuring Justice for Victims of Crime and Human Rights Violations

Whether a person is a victim of crime or human rights violations, this chapter has shown the essential role of judges, prosecutors and lawyers in responding effectively to the problems, needs and rights of the victim concerned. Members of the legal professions must not only be courteous and show understanding; they must also have a sound knowledge of human rights law and be prepared at all times to act impartially and independently in the pursuit of justice. Indeed, without an independent and impartial judiciary, as well as independent prosecutors and independent lawyers who are given the liberty to act promptly, vigorously and effectively in response to alleged human rights violations, human rights will largely remain a dead letter. It is for all States to grant the legal professions this independence and impartiality, and for the members of the legal professions to take the lead in enforcing human rights law by vigorously investigating and prosecuting acts that violate individual rights and freedoms.

5. Concluding Remarks

This chapter has focused in the first place on protection and redress for victims of crime and, secondly, on protection and redress for victims of human rights violations. While international law is somewhat lacking in legal provisions relating to the rights of victims of ordinary crime, the opposite is true in the case of victims of human rights violations. In this area, numerous legal provisions and a comprehensive jurisprudence provide a rich source of knowledge and inspiration for the legal professions.

States' legal duty to prevent, protect, investigate, prosecute, punish and redress human rights violations has been given ample coverage in this chapter. Although there has been a tendency to focus on the right to life and the right to freedom from torture and other forms of ill-treatment and violence, the same obligations exist with regard to the whole spectrum of human rights. As rights are interdependent, their effective protection cannot be examined in isolation. Torture victims, for instance, must be able to speak freely in order to vindicate their rights and must enjoy respect for their correspondence in order to be able to communicate with legal counsel and so forth. This intrinsic relationship among rights becomes particularly relevant to the enjoyment in crisis situations of those rights that cannot be derogated from in any circumstances and others that can, in principle, be derogated from. This will form part of our analysis in the last chapter of this Manual.

.....Chapter 16
**THE ADMINISTRATION
OF JUSTICE DURING
STATES OF EMERGENCY**

Learning Objectives

- *To familiarize course participants with the specific legal rules that States are required to follow in derogating from international human rights obligations*
- *To provide details of non-derogable rights and obligations*
- *To familiarize the participants with the basic principles that apply to derogable rights*
- *To create awareness among the participating judges, prosecutors and lawyers of their essential role as pillars of enforcement of the rule of law, including the protection of human rights, also in states of emergency*
- *To stimulate discussion on, and awareness of, alternative conflict resolution measures*

Questions

- *Is it possible in the legal system within which you work to derogate from, or suspend, the full enjoyment of human rights and fundamental freedoms?*
- *If your answer is in the affirmative:*
 - *In what circumstances can this be done?*
 - *Which body decides?*
 - *Which rights can be affected by a decision to derogate from, or suspend, the full enjoyment thereof?*
- *If a state of emergency/ state of exception/ martial law, etc. is declared in the country in which you work, what remedies are available*
 - *to challenge the decision to declare the state of emergency/ state of exception/ state of alarm/ state of siege/ martial law, etc.?*
 - *to challenge the decision to derogate from, or suspend, the full enjoyment of specific human rights?*
 - *to examine the full enjoyment of non-derogable rights?*
 - *to challenge the necessity of an emergency measure as applied in a specific case (e.g. extrajudicial deprivation of liberty for a suspected terrorist)?*

Questions (cont.d)

- *In your view, what is, or should be, the purpose of the declaration of a state of emergency and the derogation from human rights obligations?*
- *In your view, why could it be necessary to suspend the full enjoyment of human rights and fundamental freedoms in order to deal with a severe crisis situation?*
- *Could there, in your view, be any reason why it might be counterproductive for a Government to suspend the full enjoyment of some human rights in order to deal with a severe crisis situation?*
- *In your view, are there any human rights that might be particularly vulnerable in a crisis situation?*
- *Might there, in your view, be means other than derogations from human rights obligations whereby States could deal constructively with a severe crisis situation?*

Relevant Legal Instruments

Universal Instruments

- International Covenant on Civil and Political Rights, 1966
- International Covenant on Economic, Social, and Cultural Rights, 1966
- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention on the Rights of the Child, 1989

Regional Instruments

- African Charter on Human and Peoples' Rights, 1981
- American Convention on Human Rights, 1969
- Inter-American Convention to Prevent and Punish Torture, 1985
- Inter-American Convention on Forced Disappearance of Persons, 1994
- European Convention on Human Rights, 1950
- European Social Charter, 1961, and European Social Charter (Revised) 1996

1. Introduction

1.1 General introductory remarks

The present chapter will provide some basic information about the main legal principles in international human rights law that govern the right of States to take measures derogating from their legal obligations in emergency situations.

It is an undeniable fact of life that many States will at some stage be confronted with serious crisis situations, such as wars or other kinds of serious societal upheavals, and that in such situations they may consider it necessary, in order to restore peace and order, to limit the enjoyment of individual rights and freedoms and possibly even to suspend their enjoyment altogether. The result may be disastrous not only for the persons affected by the restrictions but also for peace and justice in general.

The drafters of the International Covenant on Civil and Political Rights, who had learned their lessons during a long and devastating war, knew all too well that recognition of human rights for all “is the foundation of freedom, justice and peace in the world”.¹ However, they were not, of course, oblivious to the serious problems that may develop in a country and may endanger its very survival. They therefore included, after much debate – and *only after including protections against abuse* – a provision allowing States parties to resort to derogatory measures on certain strict conditions (art. 4). Similar provisions were included in the American Convention on Human Rights (art. 27) and the European Convention on Human Rights (art. 15). Contrary to the International Covenant on Economic, Social and Cultural Rights, which contains only a general limitation provision inspired by article 29 of the Universal Declaration of Human Rights, the European Social Charter envisages the possibility of derogation both in its original version (art. 30) and in its revised version (Part V, art. F).

States may apply various terms to the special legal order introduced in crisis situations such as “state of exception”, “state of emergency”, “state of alarm”, “state of siege”, “martial law” and so forth. These exceptional situations often involve the introduction of special powers of arrest and detention, military tribunals and, for instance, the enactment of criminal laws that are applied retroactively and limit the right to freedom of expression, association and assembly. Worse, in many situations of upheaval, States have recourse to torture and other forms of ill-treatment to extract confessions and may also, with or without the help of private or semi-private groups, resort to abduction and extrajudicial killings. Furthermore, the right to have recourse to domestic remedies such as the writ of *habeas corpus* may be suspended, so that, for instance, victims of arbitrary arrest and detention are left without legal protection, with devastating results.

This abusive use of extraordinary powers is not lawful under the aforementioned treaties. These treaties provide States parties with limited but flexible

¹First preambular paragraph of the Covenant, which is identical to that of the International Covenant on Economic, Social and Cultural Rights.

and well-balanced exceptional powers designed to restore a constitutional order in which human rights can again be fully ensured.

The purpose of this chapter is therefore to explain the various conditions that the international treaties impose on States parties' right to resort to derogations. Following a general survey of the *travaux préparatoires* relating to the relevant provisions, the notion of public emergency threatening the life of the nation will be examined. The rights and obligations that may not in any circumstances be derogated from will then be dealt with in some detail. This will be followed by an analysis of the concept of strict necessity and a brief description of the condition of consistency with other international legal obligations, as well as the prohibition of discrimination. The chapter will close with a number of suggestions regarding the role to be played by the legal professions in emergency situations, followed by some concluding remarks.

1.2 Introductory remarks on limitations and derogations in the field of human rights

Before going into the subject of derogations in detail, it may be useful to consider briefly the nature of derogations from human rights obligations as compared with limitations on the exercise of human rights under normal circumstances. As seen in Chapter 12 of this Manual, States may impose limitations on the enjoyment of many rights such as the right to freedom of expression, association and assembly for certain legitimate purposes. Such limitations are often called “ordinary” limitations since they can be imposed permanently in normal times. So-called derogations, on the other hand, are designed for particularly serious crisis situations that require the introduction of extraordinary measures.

Derogations have therefore also been called “extraordinary limitations” on the exercise of human rights. Indeed, on closer examination, it will be seen that ordinary limitations on the exercise of human rights and extraordinary limitations in the form of derogations “are closely linked and ... rather than being two distinct categories of limitations, they form a legal *continuum*”.² This link between ordinary and extraordinary limitations on human rights is made even more evident by the fact that, as will be shown *infra* in subsection 2.3.2, while some rights may be subjected to further strict limitations in emergency situations, such limitations must not annihilate the substance of the rights inherent in the human person. There must, in other words, at all times be a continuum in respect of the legally protected substance of a right. This is an important fact for all members of the legal professions to bear in mind when they have to deal with questions of emergency powers that may interfere with the effective enjoyment of human rights and fundamental freedoms.

²See Anna-Lena Svensson-McCarthy, *International Law of Human Rights and States of Exception - With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs* (The Hague/Boston/London, Martinus Nijhoff Publishers, 1998) (International Studies in Human Rights, vol. 54), pp. 49 and 721 (hereinafter referred to as Svensson-McCarthy, *The International Law of Human Rights and States of Exception*).

2. The Notion of Public Emergency in International Human Rights Law

2.1 Relevant legal provisions

Article 4(1) of the International Covenant on Civil and Political Rights provides that:

“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”

Article 27(1) of the American Convention on Human Rights reads as follows:

“In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.”

Article 15(1) of the European Convention on Human Rights stipulates that:

“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 this 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.”

Lastly, article 30 of the 1961 European Social Charter states that:

“In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter 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.”

The wording of article F of the 1996 European Social Charter as revised is in substance identical with this provision.

2.1.1 Derogations and the African Charter on Human and Peoples' Rights

In contrast to the American and European Conventions on Human Rights, the African Charter on Human and Peoples' Rights contains no derogation provision. In the view of the African Commission on Human and Peoples' Rights, this means that the Charter “does not allow for states parties to derogate from their treaty obligations during emergency situations”.³ In other words, even a civil war cannot “be used as an excuse by the state (for) violating or permitting violations of rights in the African Charter”.⁴ In a communication brought against Chad, the Commission stated that the Government concerned had “failed to provide security and stability in the country, thereby allowing serious or massive violations of human rights”. The national armed forces were “participants in the civil war” and there had been several instances in which the Government had “failed to intervene to prevent the assassination and killing of specific individuals”. Even where it could not “be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders”.⁵ The civil war could not therefore be used as a legal shield for failure to fulfil the legal obligations under the African Charter, and Chad was held to have violated articles 4, 5, 6, 7 and 9.⁶

2.2. Derogations from legal obligations: A dilemma for the drafters

As may be seen from the preceding provisions, the notion of emergency in article 4(1) of the International Covenant is very similar to that in article 15 of the European Convention on Human Rights. This resemblance is due to the fact that the drafting of the two treaties was at first carried out simultaneously, albeit within the framework of two different organizations, the United Nations and the Council of Europe. However, while the European Convention was adopted on 4 November 1950, work on the Covenant continued. Article 4 therefore underwent changes until it was given its final form – in terms of substance – by the United Nations Commission on Human Rights in 1952.⁷

The introduction of a derogation provision into the Covenant was first proposed by the United Kingdom in a Drafting Committee of the United Nations Commission on Human Rights in June 1947. The provision was contained in article 4 of the United Kingdom draft International Bill of Human Rights, and it envisaged possible derogations from all obligations enumerated in article 2 of the draft “to the

³ACHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Communication No. 74/92, decision adopted during the 18th Ordinary session, October 1995, para. 40 of the text of the decision as published at: <http://www.up.ac.za/chr/>

⁴*Ibid.*, loc. cit.

⁵*Ibid.*, para. 41.

⁶*Ibid.*, paras. 41-54.

⁷For the text of article 4(1) (then article 3(1)) as adopted, see UN doc. E/2256 (E/CN.4/669), Report of the eighth session of the Commission on Human Rights 1952, annex I, p. 47. For a fuller historic account of the elaboration of the notion of emergency in article 4 of the Covenant, see Svensson-McCarthy, *The International Law of Human Rights and States of Exception*, pp. 200-217.

extent strictly limited by the exigencies of the situation”. This implied that States would also have been able to derogate from the obligation to provide effective remedies for human rights violations, remedies that should “be enforceable by a judiciary whose independence [was] secured”.⁸ A slightly modified version of the proposed derogation provision was subsequently rejected by a Working Group, although subsequently narrowly approved by the Commission itself. Prior to the vote, the United Kingdom expressed the view that “if such a provision were not included, in time of war it might leave the way open for a State to suspend the provisions of the Convention.” It was “most important that steps should be taken to guard against such an eventuality”.⁹

The arguments for and against the advisability of a derogation provision continued during the subsequent sessions of the Commission on Human Rights. The United States, for instance, was against such a provision and favoured a general limitation clause, while the Netherlands feared that it might “imperil the success of the work of the Commission”, emphasizing that “the circumstances under which a Party may evade its obligations should be defined as precisely as possible”.¹⁰ Although later abandoning the idea of a general limitation provision, the United States was still against the derogation provision.¹¹ The USSR was “in favour of the least possible limitation” and therefore proposed to limit the scope of the derogation article by adding the phrase “directed against the interests of the people” after “in time of war or other public emergency”.¹²

Although it had previously opposed the derogation article “fearing the arbitrary suppression of human rights on the plea of a national emergency,”¹³ France expressed the view during the fifth session of the Commission in 1949 that article 4 “should neither be deleted nor limited to time of war”. It considered that there “were cases when States could be in extraordinary peril or in a state of crisis, not in time of war, when such derogations were essential”. In the view of France, the following principles should be recognized:

- ❖ “that limitations on human rights were permissible in time of war or other emergency”;
- ❖ “that certain rights were not subject to limitation under any conditions”; and
- ❖ “that derogation from the Covenant must be subject to a specified procedure and that such derogation, undertaken under exceptional circumstances, must accordingly be given exceptional publicity”.¹⁴

⁸See UN doc. E/CN.4/AC.1/4, annex 1, p. 7 (art. 4) and p. 6 (art. 2). Article 4(1) of the proposal read: “In time of war or other national emergency, a state may take measures derogating from its obligations under Article 2 above to the extent strictly limited by the exigencies of the situation.”

⁹UN docs. E/CN.4/AC.3/SR.8, p. 11 (Working Group), and E/CN.4/SR.42, p. 5 (Commission, statement by United Kingdom representative and vote).

¹⁰UN doc. E/CN.4/82/Rev.1, Comments from Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the question of implementation, p. 22 (United States of America), and p. 5 (Netherlands).

¹¹UN doc. E/CN.4/SR.126, p. 3.

¹²Ibid., p. 6.

¹³UN doc. E/CN.4/SR.127, p. 7.

¹⁴UN doc. E/CN.4/SR.126, p. 8

France considered that the principle of non-derogability of certain rights “was a sound and permanent safeguard” and that there was, in addition, “an essential distinction between the restriction of certain rights and the suspension of the Covenant’s application”.¹⁵

During the same session, India, Egypt and Chile accepted the principles contained in the draft derogation provision, but the United States and the Philippines were still against it.¹⁶ Lebanon was likewise against the derogation provision, fearing that, if the term “war” was deleted – as many delegates wanted – it would “be difficult to determine the cases in which derogations were permissible on the basis of so elastic a term as ‘public emergency’.” Compared to the term “war”, the meaning of the concept of a “public emergency” was, according to Lebanon, “very hazy [and] might give rise to interpretations more far-reaching than ... intended”.¹⁷

During the Commission’s sixth session in 1950, Uruguay expressed support for the derogation provision “in spite of the serious problems it raised”, because it “set forth a new principle in international law – that of responsibility of States towards the members of the community of nations for any measures derogating from human rights and fundamental freedoms”. This principle was, moreover, “established in most national legislations under which the executive power was responsible for its measures suspending constitutional guarantees”.¹⁸ Chile now withdrew its previously declared support for article 4 and proposed its deletion since it was “drafted in such indefinite terms that it would permit every kind of abuse”. In the opinion of Chile, concepts such as “national security” and “public order” as contained in some articles “sufficiently covered all cases which might arise in time of war or other calamity”.¹⁹ France disagreed, pleading for the retention of the derogation provision since it was “essential for the covenant to include a list of articles from which there could never be any derogation”. Such a list was necessary “to prevent abuses by dictatorial regimes”.²⁰ France now also proposed the insertion of “the clause concerning the official proclamation” of the public emergency aimed at preventing States “from derogating arbitrarily from their obligations under the covenant when such an action was not warranted by events”.²¹

At the same session, the Commission eventually decided to retain article 4 in the draft Covenant and further decided to replace the terms “In time of war or other public emergency threatening the interests of the people” by “In the case of a state of emergency officially proclaimed by the authorities or in the case of public disaster”.²²

¹⁵UN doc. E/CN.4/SR.127, p. 7.

¹⁶UN docs. E/CN.4/SR.126, p. 8 (India), E/CN.4/SR.127, p. 6 (Egypt), p. 3 (Chile), p. 3 (United States of America) and p. 5 (Philippines).

¹⁷UN doc. E/CN.4/SR.126, pp. 6 and 8.

¹⁸UN doc. E/CN.4/SR.195, p. 11, para. 52.

¹⁹Ibid., p. 13, paras. 63-64.

²⁰Ibid., p. 14, para. 69.

²¹Ibid., p. 16, para. 82.

²²Ibid., p. 18, para. 97, compared with UN doc. E/CN.4/365, p. 20. For the full text, see UN doc. E/1681 (E/CN.4/507), Report of the sixth session of the Commission on Human Rights, 27 March – 19 May 1950, annexes, p. 15 (the derogation article was then contained in article 2).

The Commission's last substantive discussion on the derogation provision took place at its eighth session in 1952 when, as suggested by the United Kingdom, it was decided to change the terms of the first paragraph which were now to read "In time of public emergency threatening the life of the nation". At the suggestion of France, it was further decided to add the requirement of official proclamation so as to avoid "arbitrary action and abuse". This clause had been absent from the United Kingdom amendment.²³ Chile also importantly pointed out that "it was difficult to give a precise legal definition of the life of the nation [but it] was significant that the text did not relate to the life of the government or of the state."²⁴

These glimpses into the drafting history of the emergency notion contained in article 4(1) of the Covenant provide an idea of the dilemma facing the drafters, who had to live up to the expectations of a world avid for peace, justice and respect for the basic rights of the human person. At the same time, they could not leave out of consideration the complex realities that confront many countries in times of crisis. The fear of an abusive use of the right to derogation was real and evident, and it resulted in the drafting of an article that imposes strict conditions on the exercise of that right, controls that were almost totally absent from the original draft. The discussions thus had a wholesome effect on the theoretical protection of the individual in emergency situations, in that the freedom of action of States in the field of human rights was limited by:

- ❖ the principle of exceptional threat;
- ❖ the principle of official proclamation;
- ❖ the principle of non-derogability of certain rights;
- ❖ the principle of strict necessity;
- ❖ the principle of compatibility with other international legal obligations;
- ❖ the principle of non-discrimination; and
- ❖ the principle of international notification.

Generally speaking, the discussions were less difficult at the regional level and the divisions more easily overcome.

The emergency concept contained in article 27(1) of the American Convention on Human Rights is worded differently from its universal and European counterparts. Rather than referring to a threat to "the life of the nation", it authorizes derogations "in time of war, public danger, or other emergency that threatens the independence or security of a State party". The draft derogation article submitted to the Specialized Inter-American Conference on Human Rights held in San José, Costa Rica, in 1969 contained no reference to "public danger".²⁵ During the Conference, however,

²³See UN docs. E/CN.4/L.211 (French amendment) and E/CN.4/SR.330, p. 7.

²⁴UN doc. E/CN.4/SR.330, p. 4.

²⁵OAS doc. OEA/Ser.K/XVI/1.2, *Conferencia Especializada Interamericana sobre Derechos Humanos*, San José, Costa Rica, 7-22 de noviembre de 1969, *Actas y Documentos*, OAS, Washington D.C., p. 22.

El Salvador proposed to amend the text so as to have the terms “or other public calamity” (“*u otra calamidad pública*”) inserted because, in its view, it was “a situation that was not necessarily a threat to internal or external security, but which could nevertheless arise”.²⁶ The amendment was adopted although the text was subsequently modified to “of public danger” (“*de peligro público*”).²⁷ During the Conference, Mexico proposed to delete the reference to the principle of consistency with other international obligations, the principle of non-discrimination and the principle of non-derogable rights. The Mexican proposal was defeated.²⁸

The only differences between the emergency concept contained in article 15(1) of the European Convention and that in article 4(1) of the International Covenant are that the former also refers to “war” and that the verb is in the gerund (“threatening”) rather than the simple present tense (“which threatens”). To judge from the *travaux préparatoires*, the elaboration and final adoption of article 15 were relatively uneventful. As with the Covenant, the United Kingdom proposed that a derogation provision be inserted in the draft Convention.²⁹ The early draft prepared by the Consultative Assembly of the Council of Europe contained no derogation provision but only a general limitation provision.³⁰ The Committee of Experts that had been entrusted with the task of elaborating a convention subsequently submitted two alternatives to the Committee of Ministers of the Council of Europe. One alternative contained a simple enumeration of rights to be protected, while the second defined the rights in some detail, attaching specific limitation provisions to each relevant right. A derogation provision had, however, been inserted in both alternatives.³¹ There is no record of any criticism of the inclusion of a derogation provision in the version that was finally adopted, namely the version that defined rather than simply enumerated the rights to be protected. However, France and Italy disapproved of the derogation provision in the version containing a simple enumeration of rights, since it would be “contrary to the system”. Other members of the Committee of Experts considered it important to retain the relevant provision also in that context

“since it had the advantage of excluding, even in the case of war or threat to the life of the nation, any derogation of certain fundamental rights, and because the procedure laid down in paragraph 3 could prove to be useful for the protection of human rights in exceptional circumstances”.³²

²⁶Ibid., p. 264; translation from Spanish original.

²⁷Ibid., p. 319.

²⁸Ibid., pp. 264-265.

²⁹Council of Europe, *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights*, vol. III, Committee of Experts, 2 February - 10 March 1950, pp. 190, 280 and 282.

³⁰Council of Europe, *Consultative Assembly*, First Ordinary Session, 10 August - 8 September 1949, *TEXTS ADOPTED*, Strasbourg, 1949, Recommendation 38 (Doc. 108), p. 50 (art. 6).

³¹Council of Europe, *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights*, vol. IV, Committee of Experts - Committee of Ministers Conference of Senior Officials, 30 March - June 1950; see, for example, p. 56 (Alternatives A and A/2) and pp. 56 and 58 (Alternatives B and B/2).

³²Ibid., p. 30.

As at the universal level, it was accepted in the Americas and Europe that States might need to have wider powers to manage particularly serious crisis situations, but on condition that the exercise of emergency powers be accompanied by *strict* limits on and *international accountability* for the acts taken. The years of human injustice that had led to a global cataclysm made it imperative for the drafters not to give Governments a free hand in managing crisis situations. The derogation provisions, in other words, strike a carefully weighed balance between, on the one hand, the needs of the State and, on the other, the right of individuals to have most of their rights and freedoms effectively protected in public emergencies, and to have guarantees that the exercise of other rights will not be subjected to undue limitations. Although some differences exist between the three relevant provisions, this basic tenet is equally valid for all.

Some of the major international human rights treaties allow States parties to derogate from some of their obligations under these treaties in exceptional crisis situations.

The right to derogate is a flexible instrument designed to help Governments to overcome exceptional crisis situations.

The right to derogate does not mean that the derogating State can escape its treaty obligations at will. It is a right that is circumscribed by several conditions such as the principle of non-derogability of certain rights, the principle of strict necessity and the principle of international notification.

It is clear from the travaux préparatoires that the right to derogate was not intended to be used by authoritarian regimes seeking to eliminate human rights and that it cannot be used to save a specific Government.

2.3 The interpretation of the international monitoring bodies

2.3.1 Article 4(1) of the International Covenant on Civil and Political Rights

In General Comment No. 29 adopted in July 2001, which replaces General Comment No. 5 of 1981, the Human Rights Committee confirms that “article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards”.³³ With regard to the *purpose* of derogation, the Committee states that:

“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.”³⁴

³³UN doc. GAOR, A/56/40 (vol. I), p. 202, para. 1.

³⁴Ibid., loc. cit.

This means that, whenever the purpose of the derogation is alien to the restoration of a constitutional order respectful of human rights, it is unlawful under article 4(1) of the Convention and the actions of the State concerned have to be judged in the light of its ordinary treaty obligations.

As noted by the Committee, a State party must comply with “two fundamental conditions” before invoking article 4(1) of the Covenant, namely (1) “the situation must amount to a public emergency which threatens the life of the nation” and (2) “the State party must have officially proclaimed a state of emergency”.³⁵ The latter requirement, according to the Committee,

“is essential for the maintenance of the principles of legality and the 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 that the laws in question enable and secure compliance with article 4.”³⁶

With regard to the *condition of exceptional threat*, it is evident that “not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation” within the meaning of article 4(1).³⁷ In this regard, the Committee states that:

“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 why such a measure is necessary and legitimate in the circumstances.”³⁸

The Committee here makes it clear that, irrespective of whether article 4(1) is invoked in an armed conflict or some other kind of crisis, the situation must be so serious as to constitute “a threat to the life of the nation”.

As further emphasized by the Committee, “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 derogatory measures 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

³⁵Ibid., p. 202, para. 2.

³⁶Ibid., loc. cit.

³⁷Ibid., p. 202, para. 3.

³⁸Ibid., loc. cit.

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.”³⁹ In other words, there is a presumption against allowing derogations from articles 12 and 21 in response to *natural catastrophes*, *mass demonstrations* and *major industrial accidents*, and States parties would have to submit strong evidence to rebut this presumption.

When considering the reports of States parties, the Committee has on “a number of occasions ... 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”.⁴⁰ The Committee thus, inter alia, expressed concern in the case of the United Republic of Tanzania “that the grounds for declaring a state of emergency are too broad and that the extraordinary powers of the President in an emergency are too sweeping”. It therefore suggested “that a thorough review be undertaken of provisions relating to states of emergency with a view to ensuring their full compatibility with article 4”.⁴¹ The Committee expressed similar concern regarding the Dominican Republic, where “the grounds for declaring a state of emergency are too broad”. It recommended in general “that the State party should undertake a major initiative aimed at harmonizing its domestic legislation with the provisions of the Covenant”.⁴²

The Committee further expressed concern at the constitutional provisions “relating to the declaration of a state of emergency” in Uruguay, which “are too broad”. It recommended “that the State party restrict its provisions relating to the possibilities of declaring a state of emergency”.⁴³ The Committee was also concerned that Bolivia’s legislation “in respect of the state of siege does not comply with the provisions of the Covenant” and that the expression “*conmoción interior*” (internal disturbance) is much too wide to fall within the scope of article 4.⁴⁴

The proposals for constitutional reform in Colombia caused “deep concern” to the Committee because, if adopted, they “would raise serious difficulties with regard to article 4”. The impugned proposals were aimed at “suppressing time limits on states of emergency, eliminating the powers of the Constitutional Court to review the declaration of a state of emergency, conceding functions of the judicial police to military authorities, adding new circumstances under which a state of emergency may be declared, and reducing the powers of the Attorney-General’s Office and the Public Prosecutor’s Office to investigate human rights abuses and the conduct of members of the paramilitary, respectively”. The Committee therefore recommended that the

³⁹Ibid., p. 203, para. 5.

⁴⁰Ibid., pp. 202-203, para. 3.

⁴¹UN doc. GAOR, A/48/40 (vol. I), p. 43, para. 184, and p. 44, para. 188.

⁴²Ibid., p. 101, para. 459.

⁴³UN doc. GAOR, A/53/40 (vol. I), p. 39, para. 241.

⁴⁴UN doc. GAOR, A/52/40 (vol. I), p. 36, para. 204.

proposals be withdrawn.⁴⁵ It also recommended that Trinidad and Tobago comply “with the categorization of an emergency that it must threaten the ‘life of the nation’”.⁴⁶

A State party may, of course, only derogate from article 4 of the Covenant for as long as it is genuinely confronted with a “public emergency which threatens the life of the nation”. Emergency legislation cannot therefore remain in force for so long that it becomes institutionalized so that it is the rule rather than the exception. In this regard, the Committee expressed “its deep concern at the continued state of emergency prevailing in Israel, which has been in effect since independence”. It recommended “that the Government review the necessity for the continued renewal of the state of emergency with a view to limiting as far as possible its scope and territorial applicability and the associated derogation of rights”.⁴⁷ The Committee expressed a similar concern in the case of the Syrian Arab Republic, where “Legislative Decree No. 51 of 9 March 1963 declaring a state of emergency has remained in force ever since that date, placing the territory of the ... Republic under a quasi-permanent state of emergency, thereby jeopardizing the guarantees of article 4”. It therefore recommended that the state of emergency “be formally lifted as soon as possible”.⁴⁸

The Committee recommended to the United Kingdom in 1995 that “further concrete steps be taken so as to permit the early withdrawal of the derogation made pursuant to article 4 and to dismantle the apparatus of laws infringing civil liberties which were designed for periods of emergency”. “Given the significant decline in terrorist violence in the United Kingdom since the cease-fire came into effect in Northern Ireland and the peace process was initiated, the Committee [urged] the Government to keep under the closest review whether a situation of ‘public emergency’ within the terms of article 4, paragraph 1, still [existed] and whether it would be appropriate for the United Kingdom to withdraw the notice of derogation which it issued on 17 May 1976.”⁴⁹

In communications brought under the Optional Protocol, the Committee has made it clear that it is for the State party to substantiate the allegation that it is indeed facing exceptional circumstances that may justify a derogation under article 4(1). It is not sufficient for the country concerned simply to invoke “the existence of exceptional circumstances”.⁵⁰ Rather it is “duty bound” in proceedings under the Optional Protocol “to give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in article 4 (1) ... exists in the country concerned”.⁵¹ As stated by the Committee in the case of *Landinelli Silva and Others v. Uruguay*,

“In order to discharge its function and to assess whether a situation of the kind described in article 4 (1) of the Covenant exists in the country concerned, it needs full and comprehensive information. If the respondent

⁴⁵Ibid., pp. 46-47, para. 286, and p. 48, para. 299.

⁴⁶UN doc. GAOR, A/56/40 (vol. I), p. 32, para. 9(a).

⁴⁷UN doc. GAOR, A/53/40 (vol. I), p. 47, para. 307.

⁴⁸UN doc. GAOR, A/56/40 (vol. I), p. 71, para. 6.

⁴⁹UN doc. GAOR, A/50/40 (vol. I), p. 69, paras. 429-430.

⁵⁰Communication No. R. 8/34, *J. Landinelli Silva and Others v. Uruguay* (Views adopted on 8 April 1981) in UN doc. GAOR, A/36/40, p. 132, para. 8.3.

⁵¹Communication No. R. 15/64, *C. Salgar de Montejó v. Colombia* (Views adopted on 24 March 1982), UN doc. GAOR, A/37/40, p. 173, para. 10.3

Government does not furnish the required justification itself, as it is required to do under article 4(2) of the Optional Protocol and article 4 (3) of the Covenant, the Human Rights Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal régime prescribed by the Covenant.”⁵²

From these comments and recommendations it is clear *in the first place* that, in order to be consistent with article 4(1), domestic law must authorize derogations from human rights obligations only in genuine emergency situations that are so serious as to actually constitute a threat to the life of the nation. Whether or not the crisis situation is caused by an armed conflict, it is the survival of the very nation that must be in jeopardy. It follows that no one crisis situation automatically justifies the declaration of a public emergency and derogations from a State’s obligations under the Covenant. In the light of the Committee’s statements, it appears clear that situations such as simple riots or internal disturbances do not, per se, justify the resort to derogations under article 4(1) of the Covenant.

Second, the state of emergency with ensuing limitations on the enjoyment of human rights can only lawfully remain in force for as long as the situation so warrants. As soon as the situation ceases to constitute a threat to the life of the nation, the derogations must be terminated. In other words, states of emergency and derogations from international human rights obligations cannot lawfully be maintained for so long that they become a permanent or quasi-permanent part of a country’s internal legal system.

Third, States parties continue to be bound by the principle of legality and the rule of law throughout any “public emergency which threatens the life of the nation”.

2.3.2 Article 27(1) of the American Convention on Human Rights

To interpret article 27 of the American Convention on Human Rights, it must first be determined what is meant by the term “suspension of guarantees”, which is the title of the article and recurs in the opinions and judgments of the Inter-American Court of Human Rights. The term “suspension” is also found in article 27(2) and (3), while the expression “measures derogating from” is used in article 27(1). The Inter-American Court has answered this question as follows:

“18. ... An analysis of the terms of the Convention in their context leads to the conclusion that we are not here dealing with a ‘suspension of guarantees’ in an absolute sense, nor with the ‘suspension of ... (rights),’ for the rights protected by these provisions are inherent to man. It follows therefrom that what may only be suspended or limited is their full and effective exercise.”⁵³

⁵²Communication No. R. 8/34, *J. Landinelli Silva and Others v. Uruguay* (Views adopted on 8 April 1981), in UN doc. GAOR, A/36/40, p. 133, para. 8.3.

⁵³I-A Court HR, *Advisory Opinion OC-8-87, January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Series A, No. 8, p. 37, para. 18.

Although made in the context of article 27 of the American Convention on Human Rights, this statement is of relevance to international human rights law in general, which derives from a recognition of the unique nature and “inherent dignity”⁵⁴ of the human person. In the preambles to the Universal Declaration of Human Rights and the two International Covenants, human rights are described as “the equal and inalienable rights of all members of the human family”, the recognition of which “is the foundation of freedom, justice and peace in the world”.

In its groundbreaking advisory opinion on *Habeas Corpus in Emergency Situations*, the Inter-American Court of Human Rights described in the following terms the function of article 27, which “is a provision for exceptional situations only”:

“20. It cannot be denied that under certain circumstances the suspension of guarantees may be the only way to deal with emergency situations and, thereby, to preserve the highest values of a democratic society. The Court cannot, however, ignore the fact that abuses may result from the application of emergency measures not objectively justified in the light of the requirements prescribed in Article 27 and the principles contained in other here relevant international instruments. This has, in fact, been the experience of our hemisphere. Therefore, given the principles upon which the inter-American system is founded, the Court must emphasize that the suspension of guarantees cannot be disassociated from the ‘effective exercise of representative democracy’ referred to in Article 3 of the OAS Charter. The soundness of this conclusion gains special validity given the context of the Convention, whose Preamble reaffirms the intention (of the American States) ‘to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.’ The suspension of guarantees lacks all legitimacy whenever it is resorted to for the purpose of undermining the democratic system. That system establishes limits that may not be transgressed, thus ensuring that certain fundamental human rights remain permanently protected.

21. It is clear that no right guaranteed in the Convention may be suspended unless very strict conditions – those laid down in Article 27(1) – are met. Moreover, even when these conditions are satisfied, Article 27(2) provides that certain categories of rights may not be suspended under any circumstances. Hence, rather than adopting a philosophy that favors the suspension of rights, the Convention establishes the contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, and that some rights may never be suspended, however serious the emergency.”⁵⁵

In its opinion the Court held, moreover, that:

⁵⁴See the preambles to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

⁵⁵*I-A Court HR, Advisory Opinion OC-8-87, January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Series A, No. 8, pp. 38-39, paras. 20-21.*

“24. The suspension of guarantees also constitutes an emergency situation in which it is lawful for a government to subject rights and freedoms to certain restrictive measures that, under normal circumstances, would be prohibited or more strictly controlled. This does not mean, however, that the suspension of guarantees implies a temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. When guarantees are suspended, some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These restraints may not be considered to be non-existent, however, nor can the government be deemed thereby to have acquired absolute powers that go beyond the exceptional circumstances justifying the grant of such exceptional legal measures. The Court has already noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law.”⁵⁶

While each State has, of course, the legal duty effectively to protect the rights and freedoms of the individual, the State also has, according to the Inter-American Court of Human Rights, not only the right but the *duty* to guarantee its security.⁵⁷ The Court stresses, however, that:

“regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.”⁵⁸

These excerpts from the opinions and judgments of the Inter-American Court of Human Rights show that article 27 of the American Convention is intended to be used in truly exceptional situations when the State party concerned has no other means available to defend the independence and security of its democratic constitutional order. Conversely, derogations on the basis of article 27 can in no circumstances be invoked to install an authoritarian regime. In addition to the principle of democracy, States parties are also at all times bound by the principle of legality and the rule of law. While the exercise of some human rights may be subjected to special limitations in an emergency, such limitations must never go so far as to annihilate the substance of the rights inherent in the human person.

2.3.3 Article 15(1) of the European Convention on Human Rights

The interpretation by the European Court of Human Rights of article 15 of the Convention provides some guidance as to what constitutes a threat to the life of the nation. As the cases are complex and the legal reasoning detailed, only the most important aspects of the jurisprudence will be highlighted in this context.

⁵⁶Ibid., p. 40, para. 24.

⁵⁷I-A Court HR, *Velásquez Rodríguez Case*, judgment of July 29, 1988, Series C, No. 4, p. 146, para. 154.

⁵⁸Ibid., p. 147, para. 154.

Right of review/the role of the Court: It falls, of course, “in the first place 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”.⁵⁹ According to the Court:

“By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 leaves those authorities a wide margin of appreciation.”⁶⁰

“Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which is responsible for ensuring the observance of the States’ engagements (Article 19) is empowered to rule on whether 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.”⁶¹ In later cases the Court specified that, in exercising this supervision, it must give appropriate weight to

“such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation”.⁶²

The existence of a public emergency threatening the life of the nation: In the *Lawless* case, the Court held that “the natural and customary meaning of the words ‘other public emergency threatening the life of the nation’ is sufficiently clear considering that”

“they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed.”⁶³

According to the French version of the judgment, which is the authentic text, the natural and customary meaning of the emergency concept in article 15(1) indicates:

“en effet, une situation de crise ou de danger exceptionnel et imminent qui affecte l’ensemble de la population et constitue une menace pour la vie organisée de la communauté composant l’État”.⁶⁴

The addition of the term “imminent” means that the exceptional situation of danger or crisis must be a reality or be about to happen and that article 15 cannot be invoked to justify derogations in the event of a remote or hypothetical crisis in or danger to the life of the nation.

On the basis of this definition, the Court went on to determine whether the Government was justified in declaring that there was a public emergency in the

⁵⁹ Eur. Court HR, *Case of Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A, No. 25, pp. 78-79, para. 207.

⁶⁰ Ibid., p. 79, para. 207.

⁶¹ Ibid., loc. cit.

⁶² Eur. Court HR, *Case of Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1996, Series A, No. 258-B, p. 49, para. 43 at p. 50 and Eur. Court HR, *Case of Demir and Others v. Turkey*, judgment of 23 September 1998, Reports 1998-VI, p. 2654, para. 43.

⁶³ Eur. Court HR, *Lawless Case (Merits)*, judgment of 1 July 1961, Series A, No. 3, p. 56, para. 28.

⁶⁴ Ibid., loc. cit.

Republic of Ireland in July 1957 that threatened the life of the nation, thereby justifying the derogation under article 15(1).⁶⁵ The situation concerned the activities of the IRA and related groups in Ireland, and the derogation authorized the Minister of Justice to resort to extrajudicial detention of persons suspected of engaging in activities prejudicial to the State. The Court concluded that “the existence at the time of a ‘public emergency threatening the life of the nation’, was reasonably deduced by the Irish Government from a combination of several factors, namely”:

- ❖ the existence in its territory “of a secret army engaged in unconstitutional activities and using violence to attain its purpose”;
- ❖ “the fact that this army was also operating outside the territory of the State, thus seriously jeopardising the relations of the Republic of Ireland with its neighbour”; and
- ❖ “the steady and alarming increase in terrorist activities from the autumn 1956 and throughout the first half of 1957”.⁶⁶

The Court admitted thereafter that “the Government had succeeded, by using means available under ordinary legislation, in keeping public institutions functioning more or less normally”. But “the homicidal ambush” carried out in early July 1957 in Northern Ireland close to the border with the Republic “had brought to light ... the imminent danger to the nation caused by the continuance of unlawful activities in Northern Ireland by the IRA and various associated groups, operating from the territory of the Republic of Ireland”.⁶⁷

Seventeen years later, the Court was called upon to consider article 15 in the case of *Ireland v. the United Kingdom*, which concerned, inter alia, the terrorist legislation used by the United Kingdom in Northern Ireland. The existence of an emergency “threatening the life of the nation” was, in the view of the Court, “perfectly clear from the facts” of the case and had not been challenged by the parties before it.⁶⁸ The Court simply referred to its summary of the facts which showed, inter alia, that, at the relevant time in Northern Ireland, “over 1,100 people had been killed, over 11,500 injured and more than £140,000,000 worth of property destroyed. This violence found its expression in part in civil disorders, in part in terrorism, that is organised violence for political ends.”⁶⁹

In the case of *Brannigan and McBride v. the United Kingdom*, which ended in a judgment in 1993, the Court once more concluded, after “making its own assessment, in the light of all the material before it as to the extent and impact of terrorist violence in Northern Ireland and elsewhere in the United Kingdom”, that “there can be no doubt that such a public emergency existed at the relevant time”.⁷⁰

⁶⁵Ibid.

⁶⁶Ibid.

⁶⁷Ibid., p. 56, para. 29. While the Court arrived at its decision unanimously, the case had previously been examined by the European Commission of Human Rights, in which a majority of nine members to five were satisfied that there was, at the time, a public emergency threatening the life of the nation. For the majority and minority opinions of the Commission, see *Eur. Court HR, Lawless Case, Series B 1960-1961*, pp. 81-102.

⁶⁸*Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25*, p. 78, para. 205.

⁶⁹Ibid., p. 10, para. 12. For further details concerning the facts, see pp. 14-30, paras. 29-75.

⁷⁰*Eur. Court HR, Case of Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, Series A, No. 258-B*, p. 50, para. 47.

The situation obtaining in Northern Ireland in 1998 was considered in the case of *Marshall v. the United Kingdom*, which was very similar to the *Brannigan and McBride* case, but was dismissed at the stage of admissibility in July 2001. The applicant argued that “the security situation had changed beyond recognition” so that “any public emergency which might have existed in Northern Ireland was effectively over by the time of his unlawful detention”. In his view, moreover, “the Government should not be permitted under the Convention to impose a permanent state of emergency on the province with the pernicious consequences which that would entail for respect for the rule of law.”⁷¹ For its part the Government argued that “at the material time the security situation in Northern Ireland could still be described with justification as a public emergency threatening the life of the nation”. It noted that “in the seven-week period leading up to the applicant’s arrest ... thirteen murders had taken place in the province”. There had also been numerous bombing incidents.⁷²

The Court accepted the Government’s argument, noting that “the authorities continued to be confronted with the threat of terrorist violence notwithstanding a reduction in its incidence”. Referring to the “outbreak of deadly violence” in the weeks preceding the applicant’s detention, the Court stated that:

“This of itself confirms that there had been no return to normality since the date of the *Brannigan and McBride* judgment such as to lead the Court to controvert the authorities’ assessment of the situation in the province in terms of threats which organised violence posed for the life of the community and the search for a peaceful settlement.”⁷³

With regard to the situation in South East Turkey, the Court concluded in the *Aksoy* case that “the particular extent and impact of the PKK terrorist activity [had] undoubtedly created, in the region concerned, a ‘public emergency threatening the life of the nation’.”⁷⁴ However, in the case of *Sakik and Others*, the Court importantly stated that it would be “working against the object and purpose of [article 15] if, when assessing the territorial scope of the derogation concerned, it were to extend its effects to a part of Turkish territory not explicitly named in the notice of derogation” submitted under article 15(3) to the Secretary-General of the Council of Europe.⁷⁵ As the legislative decrees challenged in this case were applicable only to the region where a state of emergency had been proclaimed, which did not, according to the derogation notice, include Ankara, the derogation was “inapplicable *ratione loci* to the facts of the case”.⁷⁶

⁷¹ Eur. Court HR, *Case of Marshall v. the United Kingdom*, decision of 10 July 2001 on the admissibility, see p. 7 of the unedited version of the decision on the Court’s web site: <http://hudoc.echr.coe.int>

⁷² Ibid., p. 6.

⁷³ Ibid., p. 9.

⁷⁴ Eur. Court HR, *Case of Aksoy v. Turkey*, judgment of 18 December 1996, Reports 1996-VI, p. 2281, para. 70.

⁷⁵ Eur. Court HR, *Case of Sakik and Others v. Turkey*, judgment of 26 November 1997, Reports 1997-VII, p. 2622, para. 39.

⁷⁶ Ibid., loc. cit.

It is for the State party invoking the right to derogate to prove that it is faced with a public emergency as defined in the relevant treaty.

The ultimate purpose of derogations under international law is to enable the States parties concerned to return to normalcy, i.e., to restore a constitutional order in which human rights can again be fully guaranteed.

It is the right and duty of international monitoring bodies, in the cases brought before them, to make an independent assessment of crisis situations in the light of the relevant treaty provisions.

At the European level, however, a wide margin of appreciation is granted to the Contracting States in deciding on the presence within their borders of a “public emergency threatening the life of the nation”.

The crisis situation justifying the derogation must be so serious as to actually constitute a threat to the life of the nation (universal and European levels) or its independence or security (the Americas). This excludes, for instance, minor riots, disturbances and mass demonstrations.

National law must carefully define the situations in which a state of emergency can be declared.

The exceptional nature of derogations mean that they must be limited in time and space to what is strictly required by the exigencies of the situation.

States parties cannot lawfully extend their exceptional powers beyond the territories mentioned in their derogation notices.

*Derogations under international human rights law must not adversely affect the **substance** of rights, since these rights are inherent in the human person. Derogations can only lawfully limit their full and effective exercise.*

3. Non-Derogable Rights and Obligations in International Human Rights Law

3.1 Introductory remarks

The structure of derogation provisions may lead to the belief that the only rights from which no derogations can be made are those enumerated in article 4(2) of the International Covenant, article 27(2) of the American Convention and article 15(2) of the European Convention. However, the legal situation is more complex and the field of non-derogability also covers, for instance, rights and obligations that are

inherent in international human rights law as a whole or guaranteed under international humanitarian law. In view of the complexity and evolving nature of this subject, only its most salient features will be considered below.

In spite of their non-derogability, human rights such as the right to life and the right to freedom from torture and other forms of ill-treatment are frequently violated. Moreover, as repeatedly noted with concern by the Human Rights Committee, the domestic law of the States parties to the International Covenant on Civil and Political Rights does not always meet the requirements of article 4(2) and thus fails to provide absolute legal protection for some human rights in times of crisis.⁷⁷

3.2 Relevant legal provisions

Article 4(2) of the International Covenant stipulates that:

“No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”

The articles enumerated in this provision protect the following rights:

- ❖ the right to life – article 6;
- ❖ the right to freedom from torture, cruel, inhuman and degrading treatment or punishment, and medical or scientific experimentation without one’s free consent – article 7;
- ❖ the right to freedom from slavery, the slave trade and servitude – article 8;
- ❖ the right not to be imprisoned on the ground of inability to fulfil a contractual obligation – article 11;
- ❖ the right not to be subjected to retroactive legislation (ex post facto laws) – article 15;
- ❖ the right to recognition as a person before the law – article 16;
- ❖ the right to freedom of thought, conscience and religion – article 18; and
- ❖ the right not to be subjected to the death penalty – article 6 of the Second Optional Protocol.

Article 27(2) of the American Convention on Human Rights reads:

“The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to a Nationality), and Article 23 (Right to Participate in

⁷⁷See, for example, the Committee’s comments in UN docs.: *GAOR*, A/48/40 (vol. I), p. 43, para. 184 (Tanzania); p. 101, para. 459 (Dominican Republic); *GAOR*, A/53/40 (vol. I), p. 39, para. 241 (Uruguay); *GAOR*, A/56/40 (vol. I), p. 32, para. 9(b) (Trinidad and Tobago).

Government) or of the judicial guarantees essential for the protection of such rights.”

Article 15(2) of the European Convention states:

“No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.”

Furthermore, article 3 of Protocol No. 6 to the Convention relating to the abolition of the death penalty stipulates that there shall be no derogation from the provisions of this Protocol under article 15 of the Convention. Lastly, the principle of *ne bis in idem*, as proclaimed in article 4 of Protocol No. 7 to the Convention, is likewise non-derogable under article 4(3) thereof.

The non-derogable rights under the European Convention are therefore:

- ❖ the right to life – article 2;
- ❖ the right to freedom from torture and from inhuman or degrading treatment or punishment – article 3;
- ❖ the right to freedom from slavery and servitude – article 4(1);
- ❖ the right not to be subjected to retroactive penal legislation – article 7;
- ❖ the right not to be subjected to the death penalty – article 3 of Protocol No. 6;
- ❖ the principle of *ne bis in idem* or double jeopardy – article 4 of Protocol No. 7.

A brief and non-exhaustive description will be given below of States’ duties with regard to the major non-derogable rights. The cases chosen to illustrate the legal duties of States in this chapter are those of greatest relevance to emergency situations and/or the fight against hard crime and terrorism. For more details on the interpretation of some of these rights such as the right to life, the right to freedom from torture, the prohibition of slavery, the right to freedom of thought, conscience and religion and the prohibition of discrimination, readers are referred to the relevant chapters of this Manual.

In spite of their non-derogable nature, these rights tend in many cases to be the most frequently violated in emergency situations, thereby rendering a return to normalcy more difficult. In such situations, the role of judges, prosecutors and lawyers in contributing to the effective protection of the individual becomes more crucial than ever, and their respective responsibilities must be exercised with full independence and impartiality lest the individual be left without legal protection.

3.3 The right to life

The fundamental right to life is non-derogable under all three treaties, which means that it must be protected by law and that no person may at any time be arbitrarily killed. It is true that the exact extent of the protection afforded by article 6 of the International Covenant, article 4 of the American Convention and article 2 of the

European Convention varies according to the specific treaty limitations on imposition of the death penalty, and, as pointed out by the Human Rights Committee, such limitations are “independent of the issue of derogability”.⁷⁸ Of the three treaties, only the European Convention defines the specific situations in which “deprivation of life shall not be regarded as inflicted in contravention of this Article”, namely “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” (art. 2(2)).

According to the European Court of Human Rights, “the exceptions delineated in paragraph 2 indicate that this provision extends to, but is not concerned exclusively with, intentional killing”. Paragraph 2 rather “describes the situations where it is permitted to ‘use force’ which may result, as an unintended outcome, in the deprivation of life”.⁷⁹ The term “absolutely necessary” indicates that “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”.⁸⁰ These examples may serve as useful indicators for both domestic judges and members of other international monitoring bodies who have to consider the use to force with a lethal outcome in connection with law enforcement activities.

The right to life as protected by international human rights law means, *inter alia*, that States must at no time engage in, or condone, arbitrary or extrajudicial killings of human beings, and that, as set forth at length in Chapter 15, they have a legal duty to prevent, investigate, prosecute, punish and redress violations of the right to life. The legal duty to take positive steps effectively to protect the right to life is equally valid in times of public emergency.

States must at all times take positive steps to protect the right to life.

States must at no time participate in, or condone, the arbitrary or extrajudicial taking of human life.

Even in public emergencies threatening the life of the nation, States have a strict legal duty to prevent, investigate, prosecute, punish and redress violations of the right to life.

⁷⁸General Comment No. 29 (72), in UN doc. GAOR, A/56/40 (vol. I), p. 204, para. 7.

⁷⁹*Eur. Court HR, Case of McCann and Others v. the United Kingdom, Series A, No. 324*, p. 46, para. 148.

⁸⁰*Ibid.*, p. 46, para. 149.

3.4 The right to freedom from torture and from cruel, inhuman or degrading treatment or punishment

The right to freedom from torture or other forms of ill-treatment is also non-derogable in all three treaties (article 7 of the International Covenant, article 5(2) of the American Convention and article 3 of the European Convention). This means that States may at no time resort to torture or to cruel, inhuman or degrading treatment or punishment in order, for instance, to punish or to extract confessions or information from suspected terrorists or other offenders. The Inter-American Court of Human Rights has specified that, as in times of peace, the State remains the guarantor of human rights, including the rights of people deprived of their liberty, and is thus also responsible for the conditions in detention establishments.⁸¹

The European Court found that the combined and premeditated use “for hours at a stretch” of the following five “disorientation” or “sensory deprivation” techniques “amounted to a practice of inhuman and degrading treatment” contrary to article 3 of the European Convention: wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink. These “techniques” were used in various interrogation centres in Northern Ireland in the early 1970s.⁸² The Court also found a violation of article 3 in the case of *Tomasi v. France*, in which the applicant, during a police interrogation that lasted for “a period of forty odd hours”, had been “slapped, kicked, punched and given forearm blows, made to stand for long periods and without support, hands handcuffed behind the back; he had been spat upon, made to stand naked in front of an open window, deprived of food, threatened with a firearm and so on”.⁸³ The Court concluded that this treatment was “inhuman and degrading” contrary to article 3 of the European Convention, adding that “the requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regard to terrorism, cannot result in limits being placed on the protection to be afforded in respect of the physical integrity of individuals”.⁸⁴ The treatment meted out to the applicant in the *Aksoy* case was, however, “of such a serious and cruel nature that it [could] only be described as torture”. The applicant, who was detained on suspicion of being involved in terrorist activities, had been subjected to “Palestinian hanging”, that is to say he had been “stripped naked, with his arms tied together behind his back, and suspended by his arms”. This ill-treatment, which was “deliberately inflicted” and “would appear to have been administered with the aim of obtaining admissions or information from the applicant”, had led to “a paralysis of both arms which lasted for some time”.⁸⁵

⁸¹Cf. I-A Court HR, *Castillo Petruzzzi et al. Case, judgment of May 30, 1999, Series C, No. 52*, p. 219, para. 195.

⁸²*Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25*, p. 41, para. 96, and pp. 66-67, paras. 167-168.

⁸³*Eur. Court HR, Case of Tomasi v. France, judgment of 27 August 1992, Series A, No. 241-A*, p. 40, para. 108.

⁸⁴*Ibid.*, p. 42, para. 115.

⁸⁵*Eur. Court HR, Case of Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI*, p. 2279, para. 64.

In the *Castillo Petruzzi et al.* case, the Inter-American Court of Human Rights concluded that the combination of incommunicado detention for 36 and 37 days and the appearance in court of the persons in question “either blindfolded or hooded, and either in restraints or handcuffs” was in itself a violation of article 5(2) of the Convention.⁸⁶

In the same case, the Court concluded that the terms of confinement imposed on the victims by the military tribunals “constituted cruel, inhuman and degrading forms of punishment” violating article 5 of the American Convention.⁸⁷ According to the rulings of the military courts, the terms of incarceration “included ‘continuous confinement to cell for the first year ... and then forced labour, which sentences they [the alleged victims] are to serve in solitary-confinement cells chosen by the Director of the National Bureau of Prisons’” in Peru.⁸⁸ In its reasoning the Court recalled its jurisprudence, according to which “prolonged isolation and deprivation of communication are in themselves cruel and inhuman punishment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being.”⁸⁹ According to the Court, “*incommunicado* detention is considered to be an exceptional method of confinement because of the grave effects it has on persons so confined. ‘Isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prison.’”⁹⁰ In its view, therefore, “*incommunicado* detention, ... solitary confinement in a tiny cell with no natural light, ... a restrictive visiting schedule ... all constitute forms of cruel, inhuman or degrading treatment in the terms of Article 5(2) of the American Convention.”⁹¹ With regard to the use of force against detainees, the Court invoked its jurisprudence, according to which:

“Any use of force that is not strictly necessary to ensure proper behaviour on the part of the detainee constitutes an assault on the dignity of the person ... in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person’s right to physical integrity.”⁹²

On the issue of torture see also, in particular, Chapter 8, section 2, and Chapter 11, section 4.

⁸⁶I-A Court HR, *Castillo Petruzzi et al. Case, judgment of May 30, 1999, Series C, No. 52*, p. 218, para. 192.

⁸⁷*Ibid.*, pp. 220-221, para. 198.

⁸⁸*Ibid.*, p. 219, para. 193.

⁸⁹*Ibid.*, p. 219, para. 194.

⁹⁰*Ibid.*, p. 219, para. 195.

⁹¹*Ibid.*, p. 220, para. 197.

⁹²*Ibid.*, loc. cit.

The use of torture and of cruel, inhuman or degrading treatment or punishment is prohibited at all times, including in time of war or any other public emergency threatening the life of the nation.

The prohibition of torture and other forms of ill-treatment is thus also strictly prohibited in the fight against terrorism and hard crime.

Torture or other forms of ill-treatment may not be used to extract information or confessions from suspects.

Prolonged incommunicado detention amounts to a form of ill-treatment prohibited by international law even in emergency situations.

3.5 The right to humane treatment

The right to humane treatment is made non-derogable by article 27(2) of the American Convention on Human Rights, read in the light of article 5(2) according to which “all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”.

On the same subject, article 10 of the International Covenant states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”. However, article 10 is not mentioned as a non-derogable right in article 4(2) of the Covenant. Yet in General Comment No. 29 the Committee states its belief 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 of the Covenant and by the close connection between articles 7 and 10.”⁹³

The distinction made in the work of the Human Rights Committee between articles 7 and 10 is not clear-cut. A violation of article 10(1) was found, for example, in the case of *S. Sextus v. Trinidad and Tobago*, in which the author complained of his conditions of detention: his cell measured a mere 9 feet by 6 feet and there was no integral sanitation but a simple plastic pail was provided as a toilet. A small hole (8 by 8 inches) provided inadequate ventilation and, in the absence of natural light, the only light was provided by a fluorescent strip illuminated 24 hours a day. After his death sentence was commuted to 75 years’ imprisonment, the author had to share a cell of the same size with 9 to 12 other prisoners and, since there was only one bed, he had to sleep on the floor. In the absence of any comments by the State party, the Committee relied on the detailed account given by the author to find a violation of article 10(1).⁹⁴ One of many others cases involving a violation of article 10(1) was that of *M. Freemantle v. Jamaica*, which also concerned deplorable conditions of detention. The State party failed to refute the author’s claim that he was confined to a 2 metre square cell for 22 hours

⁹³UN doc. GAOR, A/56/40 (vol. I), p. 205, para. 13(a).

⁹⁴Communication No. 818/1998, *S. Sextus v. Trinidad and Tobago* (Views adopted on 16 July 2001), in UN doc. GAOR, A/56/40 (vol. II), p. 117, para. 7.4, read in conjunction with p. 112, paras. 2.2 and 2.4.

every day, “spent most of his waking hours in enforced darkness”, remained isolated from the other men most of the time, and was not permitted to work or to undertake education.⁹⁵

The positive right of all persons deprived of their liberty to be treated humanely is to be guaranteed at all times, including in emergency situations.

The right to be treated humanely implies, inter alia, that people deprived of their liberty must be held in conditions respectful of their human dignity.

3.6 The right to freedom from slavery and servitude

The right to freedom from slavery and servitude is non-derogable under the International Covenant (arts. 4(2) and 8(1) and (2)) and the European Convention (arts. 15(2) and 4(1)). However, only article 8(1) of the International Covenant specifies *expressis verbis* that “slavery and the slave-trade in all their forms shall be prohibited”.

According to article 27(2) of the American Convention, on the other hand, article 6 as a whole is non-derogable, which means that not only is the right not to be subjected to slavery, involuntary servitude, slave trade and traffic in women non-derogable but also the right not to be required to perform forced and compulsory labour.

Like the articles regulating the right to life, the articles defining the right not to be subjected to forced and compulsory labour contain limitation provisions that exempt from the definition of “forced or compulsory labour” certain kinds of labour such as services exacted in times of emergency, danger or calamity that threaten the well-being of the community. To the extent that the labour required falls within this category, it can, of course, also be required in public emergencies (for the texts of the relevant provisions, see article 8(3)(c)(iii) of the International Covenant, article 6(3)(c) of the American Convention and article 4(3)(c) of the European Convention).

It is also noteworthy that, under articles 34 and 35 of the Convention on the Rights of the Child, which contains no derogation provision, the States parties have a legal duty both to protect children from sexual exploitation and abuse and “to prevent the abduction of, the sale of or traffic in children for any purpose or in any form”. These legal obligations are reinforced by the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which entered into force on 18 January 2002.⁹⁶

⁹⁵Communication No. 625/1995, *M. Freemantle v. Jamaica* (Views adopted on 24 March 2000), in UN doc. GAOR, A/55/40 (II), p. 19, para. 7.3.

⁹⁶For more information about this Optional Protocol, see the United Nations web site: www.unhcr.ch/html/menu2/dopchild.htm

Slavery, the slave trade, servitude, and trafficking in women and children are strictly prohibited at all times, including in public emergencies threatening the life of the nation (at the universal and European levels) or the independence or security of the State (in the Americas).

Even in times of armed conflict or in other kinds of emergencies, States are therefore under a legal obligation to take positive measures to prevent, investigate, prosecute and punish such unlawful practices as well as to provide redress to the victims.

3.7 The right to freedom from ex post facto laws and the principle of ne bis in idem

3.7.1 The prohibition of ex post facto laws

The right not to be held guilty of any criminal offence on account of an act or omission that did not constitute a criminal offence when committed is guaranteed by article 15(1) of the International Covenant, article 9 of the American Convention and article 7(1) of the European Convention. The same provisions also prohibit the imposition of a heavier penalty than that applicable at the time when the offence was committed. Moreover, article 15(1) of the International Covenant and article 9 of the American Convention guarantee the right of the guilty person to benefit from a lighter penalty introduced after the commission of the offence.

Although the temptation may be considerable in crisis situations to introduce retroactive legislation to deal with particularly reprehensible acts, this is strictly forbidden under international human rights law. The purpose of this essential rule is obvious: a person must be able to foresee at any given time – including in emergency situations – the consequences of any specific action, including possible penal prosecution and associated sanctions (*the principle of foreseeability*). Any other situation would entail intolerable legal insecurity in a State governed by the rule of law, which presupposes respect for human rights.

Article 15(2) of the International Covenant nonetheless makes an exception for “the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations”. Article 7(2) of the European Convention contains a virtually identical provision, although it refers to “civilized nations” rather than to “the community of nations”.

The Human Rights Committee concluded that article 15(1) was violated in the case of *Weinberger v. Uruguay*, in which the victim had been convicted on the basis of the retroactive application of penal law. The author was convicted and sentenced to eight years’ imprisonment under the Military Penal Code for “subversive association” “with aggravating circumstances of conspiracy against the Constitution”. The conviction was

allegedly based, inter alia, on the victim's "membership in a political party which had lawfully existed while the membership lasted".⁹⁷

In its judgment in the case of *Kokkinakis v. Greece*, the European Court held that article 7(1) of the European Convention not only outlaws "the retrospective application of the criminal law to an accused's disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."⁹⁸ In other words, the ***unreasonable uncertainty of legal provisions criminalizing a certain conduct*** also falls foul of the requirements of article 7(1) of the European Convention. However, whenever the retroactive application of criminal law is to the accused person's ***advantage*** rather than to his or her disadvantage, there has been no violation of article 7(1) of the Convention.⁹⁹

Although ***preventive measures*** are not per se covered by article 15(1) of the International Covenant or articles 9 and 7(1) of the American and European Convention respectively, they can in special circumstances be considered to constitute a "penalty" for the purposes of these provisions. The European Court of Human Rights concluded in the case of *Welch v. the United Kingdom* that a confiscation order constituted a "penalty" within the meaning of article 7(1) although the Government considered that it was a preventive measure falling outside the ambit of article 7(1).¹⁰⁰ The applicant had been convicted of a drug offence and sentenced to an ultimately 20-year-long prison term; in addition, the trial judge had issued a confiscation order under a law that had entered into force ***after*** the applicant had committed his criminal acts.¹⁰¹ In default of the payment of the relevant sum, the applicant was liable to serve a consecutive prison sentence of two years.¹⁰²

3.7.2 The principle of ne bis in idem

The principle of *ne bis in idem* has been made expressly non-derogable only under the European Convention on Human Rights and then only with regard to criminal proceedings taking place in one and the same country (see article 4 of Protocol No. 7 to the Convention). According to article 4(1) of the Protocol:

⁹⁷Communication No. R.7/28, *Weinberger v. Uruguay* (Views adopted on 29 October 1978), in UN doc. GAOR, A/36/40, pp. 118-119, paras. 12 and 16.

⁹⁸*Eur. Court HR, Case of Kokkinakis v. Greece, judgment of 25 May 1993, Series A, No. 260-A, p. 22, para. 52.*

⁹⁹*Eur. Court HR, Case of G. v. France, judgment of 27 September 1995, Series A, No. 325-B, p. 38, paras. 24-27.*

¹⁰⁰*Eur. Court HR, Case of Welch v. the United Kingdom, judgment of 9 February 1995, Series A, No. 307-A, p. 14, para. 35.*

¹⁰¹*Ibid.*, p. 7, para. 9.

¹⁰²*Ibid.*, p. 7, paras. 9-10.

“No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.”

The proceedings can nevertheless be reopened on certain conditions “if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case” (art. 4(2) of Protocol No. 7).

The European Court of Human Rights concluded that the principle of *ne bis in idem* had been violated in the case of, for instance, *Gradinger v. Austria*. The applicant was first convicted by an Austrian Regional Court of causing death by negligence while driving a car and sentenced to pay a fine. In addition, a district authority fined him under the Road Traffic Act for driving under the influence of alcohol.¹⁰³ The Regional Court, however, had concluded that the applicant had not been drinking to such an extent that he could be considered to have caused death by negligence under the influence of drink within the meaning of the Criminal Code.¹⁰⁴

The principle of *ne bis in idem* as contained in article 14(7) of the International Covenant is applicable to both convictions and acquittals, while the corresponding provision in article 8(4) of the American Convention concerns only acquittals “by a nonappealable judgment”.

Every person has the right not to be held guilty of any criminal offence for an act or omission that was not a criminal offence when committed.

At the European level, the prohibition of the retroactive application of criminal law also means that a criminal offence must be clearly defined in law and that the law cannot be interpreted extensively to the accused person’s disadvantage.

International human rights law also prohibits the retroactive application of penalties to the disadvantage of the convicted person.

The International Covenant on Civil and Political Rights and the American Convention on Human Rights further guarantee the right of a guilty person to benefit from a lighter penalty introduced after the commission of the offence.

*The principle of **ne bis in idem** is non-derogable under the European Convention on Human Rights and protects against double jeopardy in respect of proceedings taking place in one State.*

These rights must be effectively guaranteed at all times, including in time of war or any other public emergency.

¹⁰³*Eur. Court HR, Case of Gradinger v. Austria, judgment of 23 October 1995, Series A, No. 328-C, p. 55, paras. 7-9.*

¹⁰⁴*Ibid.*, p. 55, para. 8.

3.8 The right to recognition as a legal person

Every person's non-derogable right to juridical personality is expressly guaranteed by articles 16 and 4(2) of the International Covenant and articles 3 and 27(2) of the American Convention. The right to recognition as a person before the law is of fundamental importance in that it not only entitles every person to have rights and duties but also vests in the person concerned the right to vindicate his or her rights and freedoms before national courts and other competent organs and moreover allows the person in many instances to bring complaints to international monitoring bodies. The fundamental nature of the right to juridical personality as a precondition for the enjoyment and exercise of human rights is recognized by the American Convention which logically places it before the right to life.

In the context of article 16 of the International Covenant, the Human Rights Committee requested that Egypt submit information on the legal status of Muslims who convert to another religion since it appeared that such Muslims were “legally dead” under the Muslim Code of Religious Law.¹⁰⁵ Article 16 was also examined in a case against Argentina concerning a child of disappeared persons who was adopted by a nurse. The Committee did not accept the claim that the girl's right to juridical personality had been violated in this case, since the Argentine courts had “endeavoured to establish her identity and issued her identity papers accordingly”.¹⁰⁶ In the view of the Inter-American Commission on Human Rights, on the other hand, the removal of children of disappeared persons is a violation of their right “to be recognized legally as persons” in accordance with article 3 of the American Convention.¹⁰⁷

Every human being has the right at all times to be recognized as a legal person before the law. No circumstances or beliefs can justify any limitation on this fundamental right.

3.9 The right to freedom of thought, conscience and religion

Everybody's right to freedom of thought, conscience and religion – including the freedom to hold beliefs – is non-derogable under article 18 of the International Covenant, read in conjunction with article 4(2), while freedom of conscience and religion is non-derogable in the Americas by virtue of articles 12 and 27(2) of the American Convention.

¹⁰⁵UN doc. GAOR, A/39/40, p. 57, para. 301.

¹⁰⁶Communication No. 400/1990, *D. R. Mónaco de Gallicchio, on her own behalf and on behalf of her granddaughter X. Vicario* (Views adopted on 3 April 1995), in UN doc. GAOR, A/50/40 (vol. II), p. 14, para. 10.2.

¹⁰⁷A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families, in OAS doc. OEA/Ser.L/V/II.74, doc. 10, rev. 1, *Annual Report of the Inter-American Commission on Human Rights 1987-1988*, p. 340.

The substance of these rights was considered in Chapter 12 and will not therefore be analysed again in this context. It should, however, be pointed out that both article 18(3) of the International Covenant and article 12(3) of the American Convention authorize certain limitations on the freedom to manifest one's religion or beliefs, limitations that are also permissible in public emergencies. But even in such serious crisis situations, the principle of legality must be respected in that the limitations have to be "prescribed by law" and be "necessary to protect public safety, order, health, or morals or the (fundamental) rights and freedoms of others".¹⁰⁸ Limitations on the right to manifest one's freedom of thought, conscience and religion must not therefore be imposed for any other reason, even in armed conflicts or other serious crisis situations.¹⁰⁹

Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, the right to freedom of thought, conscience and religion must be guaranteed at all times and cannot be derogated from in any circumstances.

In time of war or any other public emergency, the right to manifest one's religion and beliefs must be determined exclusively by the ordinary limitation provisions.

3.10 The right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation

The right not to be "imprisoned merely on the ground of inability to fulfil a contractual obligation" is guaranteed by article 11 of the International Covenant and is non-derogable pursuant to article 4(2). With regard to Gabon, the Human Rights Committee expressed "concern about the practice of putting people in prison for civil debts, which is in breach of article 11 of the Covenant". The State party was told that it must abolish imprisonment for debt.¹¹⁰ The Committee also asked why the Government of Madagascar "had not repealed the ordinance sanctioning failure to fulfil a contractual obligation by imprisonment", which was not in conformity with article 11.¹¹¹ In other words, this right must be ensured in all States at all times, independently of the stage of development of the country concerned.

The right not to be imprisoned for being unable to comply with contractual obligations must be guaranteed by all States at all times, including in time of war or public emergency.

¹⁰⁸Article 18(3) of the International Covenant contains the term "fundamental" but not article 12(3) of the American Convention.

¹⁰⁹See also General Comment No. 29 of the Human Rights Committee, in UN doc. GAOR, A/56/40 (vol. I), p. 204, para. 7.

¹¹⁰UN doc. GAOR, A/56/40 (vol. I), p. 44, para. 15.

¹¹¹UN doc. GAOR, A/46/40, p. 134, para. 544.

3.11 The rights of the family

The rights of the family are only expressly made non-derogable in the American Convention (article 27(2) read in conjunction with article 17). According to article 17(1), “the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.” This article also guarantees “the right of men and women of marriageable age to marry and to raise a family” (art. 17(2)) and stipulates that “no marriage shall be entered into without the free and full consent of the intending spouses” (art. 17(3)). It further imposes a duty on States parties to “take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution” (art. 17(4)). Lastly, it states that “the law shall recognize equal rights for children born out of wedlock and those born in wedlock” (art. 17(5)).

Although the right of the family as contained in article 23 of the International Covenant and article 12 of the European Convention has not been made non-derogable, it is difficult to see for what purpose it could ever be strictly necessary in a public emergency to derogate from this right. Rights corresponding to those contained in article 17 of the American Convention are also recognized in article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, a treaty that makes no provision for derogation.

The rights of the family, including the right of men and women to marry with their free and full consent and the right to raise a family, have been made expressly non-derogable under the American Convention on Human Rights and must be protected at all times.

3.12 The right to a name

The right to a name is guaranteed by article 18 of the American Convention, according to which “every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.” The Inter-American Commission on Human Rights expressed the view that the minor children of disappeared parents had been denied the right to their identity and name contrary to article 18 by virtue of their separation from their parents.¹¹²

The right to a name is not expressly guaranteed by either the International Covenant or the European Convention but is recognized in articles 7 and 8 of the Convention on the Rights of the Child. This Convention makes no provision for derogations and it has been pointed out by the Human Rights Committee that, “as article 38 of the Convention clearly indicates, the Convention is applicable in

¹¹²A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families, in OAS doc. OEA/Ser.L/V/II.74, doc. 10, rev. 1, *Annual Report of the Inter-American Commission on Human Rights 1987-1988*, p. 340.

emergency situations”.¹¹³ Under article 38(1) of the Convention on the Rights of the Child, “the States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.”

The right of every person to a name under the American Convention on Human Rights, and the right of every child to a name under the Convention on the Rights of the Child, must be guaranteed at all times, including in time of war or any other public emergency.

3.13 The rights of the child

According to article 19 of the American Convention, “every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state”. The Inter-American Commission on Human Rights considers that it amounts to a violation of this article to remove children from their disappeared parents.¹¹⁴ The Commission also concluded that this provision was violated when the Peruvian Armed Forces kept the four minor children of former President García under house arrest for several days.¹¹⁵

The right of the child to special measures of protection is also guaranteed by article 24 of the International Covenant, including the right to “be registered immediately after birth”, the right to a name and the right to acquire a nationality. Again, this provision is not made non-derogable *expressis verbis*, but the duty to provide special protection for minors is particularly significant in times of societal upheaval.

Among the various provisions of the Convention on the Rights of the Child that impose duties on States parties to take special measures to protect the child, special reference should be made to article 19, which requires them to take all appropriate measures to protect the child “from all forms of physical or mental violence”, and article 34, which requires them to “take all appropriate national, bilateral and multilateral measures” to prevent the sexual exploitation and abuse of the child. As the Convention on the Rights of the Child contains no derogation provision, there is a presumption in favour of its being applicable at all times, including in emergency situations. In any event, all forms of physical or mental ill-treatment of the child committed or condoned by the State fall under the general prohibition of torture and other forms of ill-treatment.

¹¹³General Comment No. 29, in UN doc. GAOR, A/56/40 (vol. I), p. 208, footnote e.

¹¹⁴A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families, in OAS doc. OEA/Ser.L/V/II.74, doc. 10, rev. 1, *Annual Report of the Inter-American Commission on Human Rights 1987-1988*, p. 340

¹¹⁵Report No. 1/95, Case No. 11.006 v. Peru, 7 February 1995, in OAS doc. OEA/Ser.L/V/II.88, doc. 9 rev., *Annual Report of the Inter-American Commission on Human Rights 1994*, p. 101.

The right of the minor child to measures of special protection has been made expressly non-derogable in the Americas.

The child has the right to enjoy full and effective protection of all non-derogable rights, and special measures must be taken at all times, including in time of war or other public emergency, to protect the child against all forms of ill-treatment and exploitation.

3.14 The right to a nationality

Pursuant to article 20(1) and (2) of the American Convention, “every person has the right to a nationality” and “every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality”. Article 20(3) stipulates that “no one shall be arbitrarily deprived of his nationality or of the right to change it”. Under the International Covenant, only the child has the right to a nationality (cf. article 24(3) of the Covenant and subsection 3.13 *supra*).

The Inter-American Court of Human Rights “has defined nationality as ‘the political and legal bond that links a person to a given state and binds him to it with ties of allegiance and loyalty, entitling him to diplomatic protection from that state’”.¹¹⁶ In its view, however, “‘international law does impose certain limits on the broad powers enjoyed by the states’ and ... ‘nationality is today perceived as involving the jurisdiction of the state as well as human rights issues’.”¹¹⁷

With reference to the exceptional powers of the Chilean President to strip Chileans of their nationality in emergency situations during the military dictatorship in the 1970s, the Inter-American Commission on Human Rights stated that since all emergencies are, by nature, transitory, it could not see how “it is possible or necessary to take measures of an irreversible nature, that will affect a citizen and his family for the rest of their lives”.¹¹⁸

The right to a nationality is non-derogable in the Americas and must therefore be guaranteed at all times.

¹¹⁶I-A Court HR, *Castillo Petruzzi Case*, judgment of May 30, 1999, Series C, No. 52, p. 182, para. 99.

¹¹⁷Ibid., p. 183, para. 101.

¹¹⁸OAS doc. OEA/Ser.L/V/II.40, doc. 10, *Inter-American Commission on Human Rights - Third Report on the Situation of Human Rights in Chile (1977)*, p. 80, para. 8.

3.15 The right to participate in government

Article 23 of the American Convention guarantees the right of every citizen:

- ❖ “To take part in the conduct of public affairs, directly or through freely chosen representatives” – article 23(1)(a);
- ❖ “To vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters” – article 23(1)(b); and
- ❖ “To have access, under general conditions of equality, to the public service of his country” – article 23(1)(c).

Article 23(2) makes it possible to regulate the exercise of these rights, but “only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings”. The inclusion of the right to participate in government in the list of non-derogable rights in article 27(2) of the American Convention is an expression of the conviction of the American States of the fundamental importance of maintaining a democratic constitutional order for the purpose of meeting the exigencies of emergency situations. The corresponding rights in article 25 of the International Covenant have not been made non-derogable. The same applies to the more limited rights contained in article 3 of Protocol No. 1 to the European Convention.

The right to participate in government must be guaranteed at all times in the Americas, including in public emergencies threatening the independence or security of the States parties to the American Convention on Human Rights.

3.16 Non-derogable rights and the right to effective procedural and judicial protection

To ensure full and effective protection of non-derogable rights in emergency situations, it is not sufficient to make them non-derogable per se: ***these rights must, in addition, be accompanied by the availability at all times of effective domestic remedies to alleged victims of violations of these rights.*** In General Comment No. 29 on article 4 of the International Covenant, the Human Rights Committee states that:

“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.”¹¹⁹

With regard the principle of legality and the rule of law, the Committee states that:

“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.”¹²⁰

In addition to containing a long list of rights that cannot in any circumstances be derogated from, article 27(2) of the American Convention in Human Rights makes non-derogable “the judicial guarantees essential for the protection of such rights”. This phrase, which has taken on singular importance in the jurisprudence of the Inter-American Court of Human Rights, was adopted by the 1969 Specialized Inter-American Conference in response to a proposal by the United States.¹²¹

With regard to the meaning of the term “judicial guarantees essential for the protection” of non-derogable rights, the Inter-American Court has held that:

“Guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof. The States Parties not only have the obligation to recognize and to respect the rights and freedoms of the persons, they also have the obligation to protect and ensure the exercise of such rights and freedoms by means of the respective guarantees (art. 1.1), that is, through suitable measures that will in all circumstances ensure the effectiveness of these rights and freedoms.”¹²²

However, “the determination as to what judicial remedies are ‘essential’ for the protection of the rights which may not be suspended will differ depending upon the rights that are at stake. The ‘essential’ judicial guarantees necessary to guarantee the rights that deal with the physical integrity of the human person must of necessity differ

¹¹⁹UN doc. GAOR, A/56/40 (vol. I), p. 206, para. 15.

¹²⁰Ibid., p. 206, para. 16; emphasis added.

¹²¹OAS doc. OEA/Ser.K/XVI/1.2, *Conferencia Especializada Inter-Americana sobre Derechos Humanos*, San José, Costa Rica, 7-22 de noviembre de 1969, *Actas y Documentos*, p. 448.

¹²²I-A Court HR, *Advisory Opinion OC-8/87 of January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Series A, No. 8, pp. 40-41, para. 25.

from those that seek to protect the right to a name, for example, which is also non-derogable.”¹²³ It follows that “essential” judicial remedies within the meaning of article 27(2) “are those that ordinarily will effectively guarantee the full exercise of the rights and freedoms protected by that provision and whose denial or restriction would endanger their full enjoyment”.¹²⁴ However:

“The guarantees must be not only *essential* but also *judicial*. The expression ‘judicial’ can only refer to those judicial remedies that are truly capable of protecting these rights. Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency.”¹²⁵

It thus remained for the Court to decide whether the guarantees contained in articles 25(1) and 7(6) of the Convention “must be deemed to be among those ‘judicial guarantees’ that are ‘essential’ for the protection of the non-derogable rights”.¹²⁶ Article 25(1) of the American Convention reads:

“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.”

Article 7(6) provides that:

“Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.”

With regard to article 25(1), the Court concluded that it “gives expression to the procedural institution known as ‘amparo’, which is a simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention.” Clearly, therefore, “it can also be applied to those that are expressly mentioned in Article 27(2) as rights that are non-derogable in emergency situations”.¹²⁷ Article 7(6) was just one of the components of the institution called “amparo” protected by article 25(1).¹²⁸ With regard to the fundamental

¹²³Ibid., p. 41, para. 28.

¹²⁴Ibid., p. 42, para. 29.

¹²⁵Ibid., p. 42, para. 30; emphasis added.

¹²⁶Ibid., p. 42, para. 31.

¹²⁷Ibid., pp. 42-43, para. 32.

¹²⁸Ibid., p. 44, para. 34.

importance of the writ of *habeas corpus* in protecting a person's right to life and physical integrity, the Court stated:

“35. In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.

36. This conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments. This experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended.”¹²⁹

The Court therefore concluded “that *writs of habeas corpus and of 'amparo'* are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society”.¹³⁰

With regard to article 25(1) of the Convention, the Court has furthermore ruled that the absence of an effective remedy for a violation of a right guaranteed by the Convention is by itself a violation of the Convention. A remedy must be “truly effective” and whenever it “proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, [it] cannot be considered effective”.¹³¹ In “normal circumstances” these conclusions “are valid with respect to all the rights recognized by the Convention”. However, in the Court's view:

“it must also be understood that the declaration of a state of emergency—whatever its breadth or denomination in internal law—cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency.”¹³²

Moreover, according to the Court, “the concept of due process of law expressed in Article 8 of the Convention should be understood as applicable, in the main, to all the judicial guarantees referred to in the American Convention, even during a suspension governed by Article 27 of the Convention.”¹³³ Reading article 8 together with articles 7(6), 25 and 27(2) of the Convention

¹²⁹Ibid., p. 44, paras. 35-36.

¹³⁰Ibid., p. 48, para. 42; emphasis added.

¹³¹I-A Court HR, *Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 of the American Convention on Human Rights)*, Series A, No. 9, p. 33, para. 24.

¹³²Ibid., pp. 33-34, para. 25.

¹³³Ibid., p. 35, para. 29.

“leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees. This result is even more clear with respect to habeas corpus and amparo, which are indispensable for the protection of the human rights that are not subject to derogation.”¹³⁴

In a paragraph summing up its basic conclusions on the question of judicial guarantees the Court held that:

“the judicial guarantees essential for the protection of the human rights not subject to derogation, according to Article 27(2) of the Convention, are those to which the Convention expressly refers in Articles 7(6) and 25(1), considered within the framework and the principles of Article 8, and also those necessary to the preservation of the rule of law, even during the state of exception that results from the suspension of guarantees.”¹³⁵

These interpretative criteria were later applied in the *Neira Alegría et al.* case, in which the Court concluded that Peru had, to the detriment of three persons, violated the right to *habeas corpus* guaranteed by article 7(6) in relation to the prohibition in article 27(2) of the American Convention. In this case “the control and jurisdiction of the armed forces over the San Juan Bautista Prison translated into an implicit suspension of the *habeas corpus* action, by virtue of the application of the Supreme Decrees that imposed the state of emergency and the Restricted Military Zone status.”¹³⁶ The quelling of a riot in the prison concerned had resulted in the death of numerous inmates. *Habeas corpus* proceedings were brought on behalf of Mr. Neira-Alegría and two other prisoners who disappeared following the riot. The *habeas corpus* applications were, however, dismissed on the ground **that** the petitioners had not proved that the inmates had been abducted, **that** the incidents were investigated by the military courts **and that** “such occurrences were outside the scope of the summary of *habeas corpus* procedure”.¹³⁷

In international human rights law, the principle of legality and rule of law must be guaranteed at all times, including in public emergencies threatening the life of the nation (International Covenant and European Convention) or the security or independence of the State (American Convention). This means that, in a constitutional order respectful of human rights and fundamental freedoms, law governs the conduct both of the State and of individuals.

¹³⁴Ibid., p. 35, para. 30.

¹³⁵Ibid., p. 39, para. 38.

¹³⁶I-A Court HR, *Neira Alegría et al. Case, judgment of January 19, 1995*, OAS doc. OAS/Ser.L/V/III.33, doc. 4, *Annual Report of the Inter-American Court of Human Rights 1995*, p. 60, para. 84.

¹³⁷Ibid., p. 59, para. 79. For a violation of articles 7(6) and 25 of the American Convention, see also I-A Court HR, *Suárez Rosero case, judgment of November 12, 1997, Series C, No. 35*, pp 72-75, paras. 57-66.

*Non-derogable rights must be fully protected in such emergency situations. To this end, States must at all times provide **effective domestic remedies** allowing alleged victims to vindicate their rights before domestic courts or other independent and impartial authorities. No derogatory measures, however lawful, are allowed to undermine the efficiency of these remedies.*

*The right to be tried by an independent and impartial tribunal is absolute under the International Covenant on Civil and Political Rights in cases in which criminal proceedings may result in the imposition of **capital punishment**. Such proceedings must at all times respect all the due process guarantees contained in article 14 of the Covenant which are also, to that extent, non-derogable. They must, of course, also be consistent with the prohibition of retroactive criminal law defined in the non-derogable provisions of article 15 of the Covenant.*

*At the American level, domestic remedies to ensure the full enjoyment of non-derogable rights must be **judicial** in nature, such as the writ of **habeas corpus** and **amparo**, and the proceedings concerned must respect the **principles of due process of law**. These principles are therefore to that extent also non-derogable under the American Convention on Human Rights.*

4. Derogable Rights and the Condition of Strict Necessity

Both article 4(1) of the International Covenant and article 15(1) of the European Convention lay down the principle of strict proportionality, which means that, in a public emergency threatening the life of the nation, the derogating State may take measures derogating from its legal obligations only “to the extent strictly required by the exigencies of the situation”. Under article 27(1) of the American Convention, the State concerned may take such measures only “to the extent and for the period of time strictly required by the exigencies of the situation”. As shown below, however, the specification as to the time element in article 27(1) does not add anything of substance to what is already implied by the condition of strict necessity contained in articles 4(1) of the Covenant and article 15(1) of the European Convention. Lastly, article 30 of the European Social Charter, 1961, and article F of the European Social Charter, 1996 (Revised), stipulate that any derogatory measures taken must be limited “to the extent strictly required by the exigencies of the situation”.

4.1 General interpretative approach

4.1.1 Article 4(1) of the International Covenant on Civil and Political Rights

The Human Rights Committee has observed that the principle of strict proportionality is “a fundamental requirement for any measures derogating from the Covenant” and that it is a requirement that 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. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers.”¹³⁸ Moreover, the Committee points out that:

“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.”¹³⁹

Furthermore, the enumeration of non-derogable rights in article 4(2) cannot justify, even where a threat to the life of the nation exists, an *a contrario* argument to the effect that unlimited derogations are permissible from rights not contained in that provision, since “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.”¹⁴⁰

It is clear from this statement that the Committee will make its own assessment of the strict necessity of any derogatory measures taken. The Committee thereby confirms the view adopted in the *Landinelli Silva and Others* case considered in the early years of its work. Although the facts of that case, which concerned drastic limitations on the political rights of members of certain political groups, were not considered ultimately under article 4 of the Covenant, the Committee made a hypothetical examination of the strict necessity of the impugned measures on the assumption that an emergency situation existed in Uruguay.¹⁴¹

The Committee has on various occasions raised doubts regarding compatibility with the condition of strict proportionality when considering the periodic reports of States parties. For example, it expressed “deep concern at the continued state of emergency prevailing in Israel, which has been in effect since its independence” and

¹³⁸General Comment No. 29, in UN doc. *GAOR*, A/56/40 (vol. I), p. 203, para. 4.

¹³⁹*Ibid.*

¹⁴⁰*Ibid.*, p. 203, para. 6.

¹⁴¹Communication No. R.8/34, *J. Landinelli Silva and Others* (Views adopted on 8 April 1981), in UN doc. *GAOR*, A/36/40, p. 133, para. 8.4.

recommended “that the Government review the necessity for the continued renewal of the state of emergency with a view to limiting as far as possible its scope and territorial applicability and the associated derogation of rights”. It recalled in particular that some articles may never be derogated from and that others may only “be limited to the extent strictly required by the exigencies of the situation”.¹⁴² Spain and the United Kingdom have, among others, been criticized for prolonged and excessive use of emergency measures. In the case of Spain, the Committee was concerned, for instance, about “the suspension of the rights of terrorist suspects under article 55(2) of the Constitution and the fact that circumstances had given rise to what amounted to permanent emergency legislation”. In the case of the United Kingdom, the Committee expressed concern about “the excessive powers enjoyed by police under anti-terrorism laws” in Northern Ireland, “the liberal rules regarding the use of firearms by the police” and “the many emergency measures and their prolonged application”.¹⁴³

These few examples show that the Committee is clearly concerned about the *territorial, temporal* and *material* extent of any emergency measures taken by State parties.

4.1.2 Article 27(1) of the American Convention on Human Rights

In its advisory opinion on *Habeas Corpus in Emergency Situations*, the Inter-American Court of Human Rights held that:

“Since Article 27(1) [of the Convention] envisages different situations and since, moreover, the measures that may be taken in any of these emergencies must be tailored to ‘the exigencies of the situation,’ it is clear that what might be permissible in one type of emergency would not be lawful in another. The lawfulness of the measures taken to deal with each of the special situations referred to in Article 27(1) will depend, moreover, upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures.”¹⁴⁴

The right to resort to derogatory measures under article 27 is, in other words, a flexible tool to deal with emergency situations, a tool aimed at bringing back normalcy to the community. It follows that derogations from articles that cannot possibly be instrumental in restoring peace, order and democracy are not lawful under the Convention.

In the above-mentioned advisory opinion, the Inter-American Court further stated that action taken by the public authorities “must be specified with precision in the decree promulgating the state of emergency” and that any action that goes beyond the limits of that strictly required to deal with the emergency “would also be unlawful notwithstanding the existence of the emergency situation”.¹⁴⁵ The Court then pointed out that, since it is improper to suspend guarantees without complying with the foregoing conditions,

¹⁴²UN doc. GAOR, A/53/40, p. 47, para. 307.

¹⁴³UN doc. GAOR, A/46/40, p. 45, para. 183 (Spain), and p. 102, para. 411 (United Kingdom).

¹⁴⁴I-A Court HR, *Advisory Opinion OC-8/87, January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Series A, No. 8, p. 39, para. 22.

¹⁴⁵Ibid., p. 46, para. 38.

“39. ... it follows that the specific measures applicable to the rights and freedoms that have been suspended may also not violate these general principles. Such violation would occur, for example, if the measures taken infringed the legal regime of the state of emergency, if they lasted longer than the time limit specified, if they were manifestly irrational, unnecessary or disproportionate, or if, in adopting them there was a misuse or abuse of power.

40. If this is so, it follows that in a system governed by the rule of law it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency. In this context, habeas corpus acquires a new dimension of fundamental importance.”¹⁴⁶

4.1.3 Article 15(1) of the European Convention on Human Rights

The European Court of Human Rights has examined the consistency of derogatory measures with the condition that they must be “strictly required by the exigencies of the situation” in connection with the use of special powers of arrest and detention.¹⁴⁷ According to its jurisprudence, however, a “wide margin of appreciation” should be left to national authorities, not only in determining whether the State is faced with a “public emergency threatening the life of the nation” but also in deciding on “the nature and scope of derogations necessary to avert it”.¹⁴⁸ However,

“The Contracting Parties do not enjoy an unlimited power of appreciation. It is for the Court to rule on 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... At the same time, in exercising its supervision the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation.”¹⁴⁹

While paying special attention to arguments adduced by Governments in favour of derogations, the Court in fact examines in detail, as will be shown below, the question of the alleged necessity of the derogatory measures, including the question of safeguards against abuse.

Derogations from human rights obligations must not go beyond what is strictly required by the exigencies of the situation. This means that the relevant measures must be tailored to the “exigencies of the situation” in terms of their territorial application, their material content and their duration.

¹⁴⁶Ibid., p. 46, paras. 39-40.

¹⁴⁷*Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25, p. 79, para. 211.*

¹⁴⁸*Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25, p. 79, para. 207; Eur. Court HR, Case of Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, Series A, No. 258-B, p. 49, para. 43; and Eur. Court HR, Case of Aksoy v. Turkey, Judgment of 18 December 1996, Reports 1996-VI, p. 2280, para. 68.*

¹⁴⁹*Eur. Court HR, Case of Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, Series A, No. 258-B, pp. 49-50, para. 43; and Eur. Court HR, Case of Aksoy v. Turkey, Judgment of 18 December 1996, Reports 1996-VI, p. 2280, para. 68.*

Derogatory measures going beyond the condition of strict necessity are unlawful and have to be judged in the light of the legal standards applicable in normal times.

The international monitoring bodies have a right and duty to make their own independent assessment of the strict necessity of any derogatory measures taken by States parties.

The Contracting States to the European Convention on Human Rights have a “wide margin of appreciation” in assessing the strict necessity of the measures concerned, a margin of appreciation that is, however, accompanied by a European supervision.

4.2 The right to effective remedies

The Human Rights Committee notes in General Comment No. 29 that article 2(3) of the International 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 their 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.”¹⁵⁰

In other words, even in situations in which a State party concludes that a threat to the life of the nation requires it to derogate from its obligations under the Covenant, it remains legally bound to provide effective remedies to victims of human rights violations, including those who are victims of an excessive or wrongful application of emergency measures.

The Committee thus expressed concern “about the lack of safeguards and effective remedies available to individuals during a state of emergency” in Gabon and recommended that the State party “should establish effective remedies in legislation that are applicable during a state of emergency”.¹⁵¹ The Committee also emphasized that Colombia’s constitutional and legal provisions “should ensure that compliance with article 4 of the Covenant can be monitored by the courts”.¹⁵²

¹⁵⁰UN doc. GAOR, A/56/40 (vol. I), p. 206, para. 14.

¹⁵¹Ibid., p. 43, para. 10.

¹⁵²UN doc. GAOR, A/52/40 (vol. I), pp. 48-49, para. 301.

In its advisory opinion on *Judicial Guarantees in States of Emergency*, the Inter-American Court stated with regard to derogatory measures that from article 27(1) comes the general requirement “that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it”.¹⁵³

With regard to rights that have not been suspended or derogated from, the Court has unequivocally ruled that “the declaration of a state of emergency – whatever its breadth or denomination in internal law – cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires the States Parties to establish for the protection of [such] rights.” In other words, “the judicial guarantees essential for the effectiveness of rights and freedoms that are not subjected to derogation must be preserved”.¹⁵⁴

The question of safeguards against the excessive or abusive use of emergency measures at the European level will be considered in section 4.3 below, since it is intimately linked to the condition of strict necessity of the use of special powers of arrest and detention.

The legal duty of States to provide effective domestic remedies for violations of human rights remains in full force in public emergencies in respect of rights that have not been derogated from, including non-derogable rights that must be fully guaranteed at all times.

To the extent that States resort to derogations from their obligations under human rights treaties, they have to provide effective remedies for the purpose of assessing the strict necessity of the emergency measures and preventing abuses both in general and in any given case.

4.3. The right to liberty and special powers of arrest and detention

The use of special powers of arrest and detention is one of the most common means of addressing crisis situations. Such measures can sometimes be far-reaching, involving the elimination of judicial review of the lawfulness of the action taken, as well as long-term detention or internment, as a result of which persons deprived of their liberty may be denied the possibility of having any charges against them examined in a trial before an independent and impartial court of law applying due process guarantees. From a legal point of view, the situation at the international level is not homogeneous, with the European Court seemingly willing to go further than either the Human Rights

¹⁵³I-A Court HR, *Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 of the American Convention Human Rights)*, Series A, No. 9, p. 31, para. 21.

¹⁵⁴Ibid., p. 34, para. 25, and p. 39, para. 39, and I-A Court HR, *Castillo Petruzzi et al. Case, judgment of May 30, 1999, Series C, No. 52*, pp. 215-216, para. 186.

Committee or the Inter-American Commission and Court of Human Rights in excluding judicial review in times of crisis. However, legal developments in this regard may be evolving towards a more uniform approach.

The Human Rights Committee has stated unequivocally that 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 ... through arbitrary deprivations of liberty.”¹⁵⁵ As noted in the preceding subsection, the Committee has stated in equally firm terms that the right to an effective remedy must be preserved during a state of emergency. It follows that persons deprived of their liberty in “a public emergency which threatens the life of the nation” have a right to an effective remedy to challenge the lawfulness of the arrest and detention. In other words, judicial remedies, such as the writ of *habeas corpus*, must be effectively available at all times. On this important issue the Committee was more forthcoming in its reply to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (as it was then called) concerning the suggestion to draft a 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. Having this in mind, the Committee believes that there is a considerable risk that the proposed draft third optional protocol might implicitly invite State parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus, the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency.”¹⁵⁶

From the various statements of the Human Rights Committee it seems clear that the guarantees contained in article 9 (3) and (4) must be effectively enforced at all times, even in public emergencies threatening the life of the nation. These guarantees comprise, in particular, the right of anyone “arrested or detained on a criminal charge [to] be brought promptly before a judge or other officer authorized by law to exercise judicial power” (art. 9(3)) and the right of anyone “who is deprived of his liberty by arrest or detention ... to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful” (art. 9(4)). For the interpretation of these provisions, see Chapter 5 on “Human Rights and Arrest, Pre-trial and Administrative Detention”.

¹⁵⁵UN doc. GAOR, A/56/40 (vol. I), p. 205, para. 11.

¹⁵⁶See UN doc. GAOR, A/49/40 (vol. I), annex XI, p. 120. The first part of this statement was also included in General Comment No. 29), but only in a footnote; see GAOR, A/56/40 (vol. I), pp. 208-209, footnote i.

With regard to protection of the right to liberty and security under the American Convention on Human Rights, the legal situation is clear inasmuch as, where special powers of arrest and detention are used “in time of war, public danger, or other emergency that threatens the independence or security of a State Party”, every person subject thereto has an unconditional right to an effective remedy in the form of *habeas corpus* and *amparo*, as guaranteed by articles 7(6) and 25(1) of the Convention, for the protection of rights that cannot be derogated from in accordance with article 27(2) of the Convention. To the extent that special powers of arrest and detention may, per se, be authorized under article 27(1) of the Convention, there must likewise be effective remedies available to persons deprived of their liberty enabling them to challenge the compatibility of the measures concerned with the condition of strict necessity.

At the European level, the European Court of Human Rights has accepted far-reaching extraordinary powers of arrest and detention, including internment, in connection with the situation in Northern Ireland, without the possibility of judicial review. These cases, such as the *Ireland v. the United Kingdom* case, are complex and only a relatively brief summary of the legal issues to which they gave rise will be considered in this chapter.

In the *Lawless* case, the Court concluded that the special powers of detention conferred upon the Ministers of State under the Offences against the State (Amendment) Act of 1940 were contrary to article 5(1)(c) and (3) of the European Convention on the grounds that the five-month-long detention of Mr. Lawless “was not ‘effected for the purpose of bringing him before the competent legal authority’ and that during his detention he was not in fact brought before a judge for trial ‘within a reasonable time’” as prescribed by those provisions.¹⁵⁷ According to the Court, the “plain and natural meaning” of the wording of article 5(1)(c) and (3) “plainly entails the obligation to bring everyone arrested or detained in any of the circumstances contemplated by the provisions of paragraph 1 (c) before a judge for the purpose of examining the question of deprivation of liberty or for the purpose of deciding on the merits”.¹⁵⁸ As Mr. Lawless was never brought before a judge for either of these purposes, his detention violated article 5 of the Convention and the Court had therefore to examine whether this violation could be justified under article 15(1) of the Convention as being “strictly required by the exigencies of the situation” obtaining in Ireland in 1957.

After an examination of the facts and the arguments of the parties to the case, the Court concluded that there were no other means available to the Contracting State that would have made it possible to deal with the situation. As a result, “the administrative detention ... of individuals suspected of intending to take part in terrorist activities *appeared*, despite its gravity, to be a measure required by the circumstances.”¹⁵⁹ The means that the Court had excluded as being capable of dealing with the emergency were:

¹⁵⁷ Eur. Court HR, *Lawless Case (Merits)*, judgment of 1 July 1961, Series A, No. 3, p. 53, para. 15.

¹⁵⁸ Ibid., p. 52, para. 14.

¹⁵⁹ Ibid., p. 58, para. 36; emphasis added.

- ❖ “the application of the ordinary law had proved unable to check the growing danger which threatened the Republic of Ireland”;
- ❖ “the ordinary criminal courts, or even the special criminal courts or military courts”;
- ❖ “the amassing of the necessary evidence to convict persons involved in activities of the IRA and its splinter groups”, a process that met with great difficulties “caused by the military, secret and terrorist character of those groups and the fear they created among the population”;
- ❖ “the fact that these groups operated mainly in Northern Ireland, their activities in the Republic of Ireland being virtually limited to the preparation of armed raids across the border was an additional impediment to the gathering of sufficient evidence”; and
- ❖ the fact that “the sealing of the border would have had extremely serious repercussions on the population as a whole, beyond the extent required by the exigencies of the situation”.¹⁶⁰

The Court then noted that “the Offences against the State (Amendment) Act of 1940, was subject to a number of safeguards designed to prevent abuses in the operation of the system of administrative detention”. These safeguards were: (1) the constant supervision thereof by the Parliament and the establishment of a Detention Commission consisting of one member of the Defence Forces and two judges; (2) a person detained under the 1940 Act “could refer his case to that Commission whose opinion, if favourable to the release of the person concerned, was binding upon the Government”; (3) the ordinary courts could “compel the Detention Commission to carry out its functions”.¹⁶¹ Lastly, the Government had publicly announced that it would release any person detained under the Act “who gave an undertaking to respect the Constitution and the Law and not to engage in any illegal activity”.¹⁶²

The Court concluded that, subject to these safeguards, “the detention without trial provided for by the 1940 Act. *appears* to be a measure strictly required by the exigencies of the situation” within the meaning of article 15 of the Convention. The Court further took the view that, as applied to Mr. Lawless in person, the measure concerned did not go beyond the principle of strict necessity.¹⁶³

Similar questions arose years later in the *Ireland v. the United Kingdom* case concerning various complex powers of extrajudicial deprivation of liberty used by the United Kingdom in Northern Ireland which had their legal basis in Regulations 10 (arrest), 11(1) (arrest), 11(2) (detention) and 12 (internment), and in the Terrorists Order (interim custody and detention) and the Emergency Provisions Act (arrest, interim custody and detention). Without considering these powers in detail, it should be mentioned that Regulation 10 allowed persons to be arrested in the absence of “suspicion” of an offence merely “for the preservation of the peace and maintenance of

¹⁶⁰Ibid., loc. cit.

¹⁶¹Ibid., p. 58, para. 37.

¹⁶²Ibid., loc. cit.

¹⁶³Ibid., pp. 58-59, paras. 37-38; emphasis added. Although the Chamber of the Court was unanimous, the result was split in the European Commission of Human Rights, which had earlier dealt with the case. In the Commission a majority of 8 to 6 considered that the administrative detention was strictly required by the exigencies of the situation. The minority opinions provide useful arguments for a fuller understanding of the complexities of the *Lawless* case. For the Opinion of the Commission, see *Eur. Court HR, Lawless Case, Series B, 1960-1961*, pp. 113-156.

order” and was “sometimes also used to interrogate the person concerned about the activities of others”. The other Regulations required suspicion of an “offence” and/or “activity ‘prejudicial to the preservation of the peace or maintenance of order’”.¹⁶⁴ The Terrorists Order and the Emergency Provisions Act “were applicable only to individuals suspected of having been concerned in the commission or attempted commission of any act of terrorism, that is the use of violence for political ends, or in the organisation of persons for the purpose of terrorism”.¹⁶⁵

In general terms the Court concluded that the impugned measures violated the provisions of article 5(1)(c), 5(2), 5(3) and 5(4) respectively, since **(1)** the detentions were not effected for the purpose of bringing the detainee before the competent legal authority; **(2)** “the persons concerned were not normally informed why they were being arrested [but] in general they were simply told ... that the arrest was made pursuant to the emergency legislation” without being given any further details; **(3)** “the impugned measures were not effected for the purpose of bringing the persons concerned ‘promptly’ before ‘the competent legal authority’”; **(4)** the persons arrested or detained were “even less entitled to ‘trial within a reasonable time’ or to ‘release pending trial’”; **(5)** “there was no entitlement to ‘take proceedings by which the lawfulness of [the] detention [would] be decided speedily by a court’ and ‘release ordered if the detention’ proved to be ‘not lawful.’”¹⁶⁶

In examining whether these violations of article 5 could be justified under article 15(1) of the European Convention, the Court considered first whether the deprivation of liberty contrary to article 5(1) was necessary, and second the failure of guarantees to attain the level fixed by paragraphs 2 to 4 of article 5.¹⁶⁷

With regard to article 5(1), the Court concluded that “the limits of the margin of appreciation left to the Contracting States by Article 15 § 1 were not overstepped by the United Kingdom when it formed the opinion that extrajudicial deprivation of liberty was necessary from August 1971 to March 1975.”¹⁶⁸ “Unquestionably, the exercise of the special powers was mainly, and before 5 February 1973 even exclusively, directed against the IRA as an underground military force ... which was creating, in August 1971 and thereafter, a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province’s inhabitants... Being confronted with a massive wave of violence and intimidation, the Northern Ireland Government and then, after the introduction of direct rule, the British Government were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extrajudicial deprivation of liberty, was called for.”¹⁶⁹

However, the Court had some problems with Regulation 10 which permitted the arrest of a person “for the sole purpose of obtaining from him information about

¹⁶⁴*Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, Vol. 25, pp. 74-75, para. 196.*

¹⁶⁵*Ibid.*, p. 75, para. 196.

¹⁶⁶*Ibid.*, pp. 74-77, paras. 194-201.

¹⁶⁷*Ibid.*, p. 80, para. 211.

¹⁶⁸*Ibid.*, p. 82, para. 214.

¹⁶⁹*Ibid.*, pp. 80-81, para. 212.

others”. In the Court’s view, “this sort of arrest can be justifiable only in a very exceptional situation, but the circumstances prevailing in Northern Ireland did fall into such a category.” Moreover, the period of authorized deprivation of liberty was limited to a maximum of 48 hours.¹⁷⁰

The Irish Government contended that the extraordinary measures had proved “ineffectual” in that they had “not only failed to put a break on terrorism but also had the result of increasing it”, facts which in its view confirmed “that extrajudicial deprivation of liberty was not an absolute necessity”. This argument was not accepted by the Court which considered that it “must arrive at its decision in the light, not of a purely retrospective examination of the efficacy of those measures, but of the conditions and circumstances when they were originally taken and subsequently applied”.¹⁷¹

With regard to the lack of the guarantees prescribed in article 5(2)-(4) of the European Convention, the Court concluded that “an overall examination of the legislation and practice at issue reveals that they evolved in the direction of increasing respect for individual liberty. The incorporation right from the start of more satisfactory judicial, or at least administrative, guarantees would certainly have been desirable ... but it would be unrealistic to isolate the first from the later phases. When a State is struggling against a public emergency threatening the life of the nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards reconcilable with the priority requirements for the proper functioning of the authorities and for restoring peace within the community. The interpretation of Article 15 must leave a place for progressive adaptations.”¹⁷²

It should be noted that the right to a judicial or administrative remedy was not only absent in the case of deprivation of liberty lasting for 48 or 72 hours but also in cases in which individuals were interned or deprived of their liberty for years under, for example, Regulation 12(1), article 5 of the Terrorists Order and paragraph 24 of Schedule I of the Emergency Provisions Act. Nevertheless, in the words of the Court, “the advisory committee set up by Regulation 12(1) afforded, notwithstanding its non-judicial character, a certain measure of protection that cannot be discounted. By establishing commissioners and an appeal tribunal, the Terrorists Order brought further safeguards which were somewhat strengthened by the Emergency Provisions Act. There was in addition the valuable, if limited, review effected by the courts, when the opportunity arose, by virtue of the common law.”¹⁷³

In the *Brannigan and McBride* case, which also concerned anti-terrorist legislation in the United Kingdom, the Court had to consider *the lack of judicial intervention* in the exercise of the power to detain suspected terrorists for up to seven days. The case arose out of the derogation made by the United Kingdom Government after the Court found a violation of article 5(3) in the *Brogan and Others* case, in which it concluded that the applicants had not been brought “promptly” before a court. In that case the Court

¹⁷⁰Ibid., p. 81, para. 212.

¹⁷¹Ibid., pp. 81-82, para. 214.

¹⁷²Ibid., p. 83, para. 220.

¹⁷³Ibid., p. 83, paras. 218-219. It is noteworthy that the Court had earlier held that the judicial review provided by these *habeas corpus* proceedings was “not sufficiently wide in scope” for the purposes of article 5(4) of the Convention, p. 77, para. 200.

recalled that “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 § 3 [and] is implied by the rule of law, ‘one of the fundamental principles of a democratic society which is expressly referred to in the Preamble to the Convention’.”¹⁷⁴

After rejecting the applicants’ argument in the *Brannigan and McBride* case that the derogation was not a genuine response to an emergency and that it was premature,¹⁷⁵ the Court concluded that, having regard to: (1) “the nature of the terrorist threat in Northern Ireland”, (2) “the limited scope of the derogation and the reasons advanced in support of it” and (3) “the existence of basic safeguards against abuse”, the United Kingdom Government had “not exceeded their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation”.¹⁷⁶ In its reasoning the Court noted:

- ❖ “the opinions expressed in various reports reviewing the operation of the Prevention of Terrorism legislation that the difficulties of investigating and prosecuting terrorist crime give rise to the need for an extended period of detention which would not be subject to judicial control”, difficulties that had been recognized in the *Brogan and Others* judgment;
- ❖ that “it remains the view of the respondent Government that it is essential to prevent the disclosure to the detainee and his legal adviser of information on the basis of which decisions on the extension of detention are made and that, in the adversarial system of the common law, the independence of the judiciary would be compromised if judges or other judicial officers were to be involved in the granting or the approval of extensions”;
- ❖ that “the introduction of a ‘judge or other officer authorised by law to exercise judicial power’ into the process of extension of periods of detention would not of itself necessarily bring about a situation of compliance with Article 5 § 3. That provision – like Article 5 § 4 – must be understood to require the necessity of following a procedure that has a judicial character although that procedure need not necessarily be identical in each of the cases where the intervention of a judge is required.”¹⁷⁷

The Court pointed out that it was not its role “to substitute its view as to what measures were most appropriate or expedient at the relevant time in dealing with an emergency situation for that of the Government which have direct responsibility for establishing the balance between the taking of effective measures to combat terrorism on the one hand, and respecting individual rights on the other... In the context of Northern Ireland, where the judiciary is small and vulnerable to terrorist attacks, public confidence in the independence of the judiciary is understandably a matter to which the Government attach great importance.”¹⁷⁸ It followed that the Government had not “exceeded their margin of appreciation in deciding, in the prevailing circumstances, against judicial control”.¹⁷⁹

¹⁷⁴*Eur. Court HR, Case of Brogan and Others v. the United Kingdom, judgment of 29 November 1988, Series A, No. 145-B, p. 32, para. 58.*

¹⁷⁵*Eur. Court HR, Case of Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, Series A, No. 258-B, pp. 51-52, paras. 49-54.*

¹⁷⁶*Ibid.*, p. 56, para. 66.

¹⁷⁷*Ibid.*, p. 54, para. 58.

¹⁷⁸*Ibid.*, p. 54, para. 59.

¹⁷⁹*Ibid.*, p. 54, para. 60.

Lastly, the Court was satisfied that *safeguards against abuse* did in fact exist and provided “an important measure of protection against arbitrary behaviour and incommunicado detention”. The safeguards were:

- ❖ “the remedy of habeas corpus ... to test the lawfulness of the original arrest and detention”;
- ❖ the fact that “detainees have an absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest. Both of the applicants were, in fact, free to consult a solicitor after this period”;
- ❖ the fact that “within this period the exercise of this right can only be delayed where there exists reasonable grounds for doing so. It is clear ... that ... the decision to delay access to a solicitor is susceptible to judicial review and that in such proceedings the burden of establishing reasonable grounds for doing so rests on the authorities. In these cases judicial review has been shown to be a speedy and effective manner of ensuring that access to a solicitor is not arbitrarily withheld”; and
- ❖ the fact that “detainees are entitled to inform a relative or friend about their detention and to have access to a doctor”.¹⁸⁰

Lastly, it is important to point out that, in rejecting the applicants’ allegations that the United Kingdom derogation had been premature, the Court held that:

“The validity of the derogation cannot be called into question for the sole reason that the Government had decided to examine whether in the future a way could be found of ensuring greater conformity with Convention obligations. Indeed, such a process of continued reflection is not only in keeping with Article 15 § 3 which requires permanent review of the need for emergency measures but is also implicit in the very notion of proportionality.”¹⁸¹

In other words, the condition that a derogating State may take only such measures as are “strictly required by the exigencies of the situation” means that not only must such measures be strictly proportionate to the threat to the nation when they are introduced but the derogating State must continuously ensure that they remain proportionate thereto, failing which they will be in breach of the requirements of article 15(1) of the Convention.

This conclusion was confirmed in the case of *Marshall v. the United Kingdom*, which was declared *inadmissible* by the Court and was therefore not considered on the merits. The applicant complained that he had been detained for a period of **seven days** under section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989 without being brought before a judge. In his view, the delay constituted a violation of the requirement of promptness in article 5(3) of the Convention that could not be justified under article 15(1) as being “strictly required by the exigencies of the situation” because statistics showed that “at the material time most individuals detained under

¹⁸⁰Ibid., pp. 55-56, paras. 62-64. However, four members of the Court disagreed with the conclusions arrived at in this case; see pp. 61-69, 71 and 74-75.

¹⁸¹Ibid., p. 52, para. 54.

section 14 of the 1989 Act were released without charge”, which meant that the police were “using the power to gather information, or to arrest individuals against whom there [was] very little or no evidence”. The applicant further challenged the adequacy of available safeguards.¹⁸²

As noted by the Court, the Government itself relied on the same justifications for the measure of extended detention without judicial intervention as in the *Brannigan and McBride* case, justifications that the Court had accepted in that case. In the *Marshall* case the Court ruled that:

“at the time of the applicant’s arrest the continued reliance on the system of administrative detention of suspected terrorists for periods of up to seven days did not result in the overstepping of the margin of appreciation which is accorded to the authorities in determining their response to the threat to the community. The reasons which the Government gave in the *Brannigan and McBride* case against judicial control continue to be relevant and sufficient. It notes in this respect that the threat of terrorist outrage was still real and that the paramilitary groups in Northern Ireland retained the organisational capacity to kill and maim on a wide scale. The applicant contends that it would have been open to the authorities to contain the level of violence prevailing at the relevant time by means of the ordinary criminal law. He observes in this connection that violence on a similar scale in other parts of the United Kingdom have been addressed without recourse to the displacement of due process guarantees. The Court has examined this argument. However, it considers that the applicant’s reasoning does not take sufficient account of the specific nature of the violence which has beset Northern Ireland, less so the political and historical considerations which form the backdrop to the emergency situation, considerations which the Court described at length in its *Ireland v. the United Kingdom* judgment.”¹⁸³

Moreover, eight years after the adoption of the judgment in the *Brannigan and McBride* case, the Court remained “satisfied” that the safeguards against abuse continued “to provide an important measure of protection against arbitrary behaviour and incommunicado detention”.¹⁸⁴

Lastly, the Court was unable to accept the applicant’s submission that the Government had not conducted “a meaningful review of the continuing necessity for the derogation to Article 5 § 3”. Indeed, it was “satisfied on the basis of the material before it” that the authorities had “addressed themselves to this issue with sufficient frequency”, for example through annual reviews and parliamentary debates on any proposal to renew the legislation. The Court noted that the Government had finally withdrawn the derogation in February 2001.¹⁸⁵

¹⁸² *Eur. Court HR, Case of Marshall v. the United Kingdom, decision of 10 July 2001*, pp. 7-8 of the text of the decision as published on the Court’s web site <http://echr.coe.int>

¹⁸³ *Ibid.*, p. 10.

¹⁸⁴ *Ibid.*, loc. cit.

¹⁸⁵ *Ibid.*, pp. 10-11.

In the *Aksoy* case, the applicant had been held in custody in Turkey for at least *fourteen days*, in particular on suspicion of aiding and abetting PKK terrorists, without being brought before a judge or other officer.¹⁸⁶ The Court again stressed the importance of article 5 in the Convention system:

“it enshrines a fundamental 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 § 3, which is intended to minimise the risk of arbitrariness and to ensure the rule of law... Furthermore, prompt judicial intervention may lead to the detection and prevention of serious ill-treatment, which ... is prohibited by the Convention in absolute and non-derogable terms.”¹⁸⁷

The Turkish Government sought in this case to justify the long detention without judicial review “by reference to the particular demands of police investigations in a geographically vast area faced with a terrorist organisation receiving outside support”.¹⁸⁸ Although the Court reiterated its view “that the investigation of terrorist offences undoubtedly presents the authorities with special problems”, it could not 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... 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.”¹⁸⁹

With regard to the question of *safeguards*, the Court considered that, in contrast to the *Brannigan and McBride* 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.”¹⁹⁰

The Court had 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 [was] 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.”¹⁹¹ Turkey had therefore violated article 5(3) of the Convention, a violation that could not be justified under article 15(1).

¹⁸⁶ *Eur. Court HR, Aksoy v. Turkey, judgment of 18 December 1996, Reports 1996-VI*, p. 2281, para. 71, and p. 2282, para. 77.

¹⁸⁷ *Ibid.*, p. 2282, para. 76. It is noteworthy that the Court concluded in this case that the applicant had been subjected to treatment while detained that “was of such a serious and cruel nature that it can only be described as torture”, p. 2279, para. 64.

¹⁸⁸ *Ibid.*, p. 2282, para. 77.

¹⁸⁹ *Ibid.*, p. 2282, para. 78.

¹⁹⁰ *Ibid.*, p. 2283, para. 83.

¹⁹¹ *Ibid.*, p. 2284, para. 84.

The right to effective protection against arbitrary State interference with a person's right to liberty is fundamental. The right to swift judicial control of deprivations of liberty plays an essential role in protecting the individual against arbitrary arrest and detention.

Special powers of arrest and detention may, however, be resorted to in public emergencies threatening the life of the nation (universal and European levels) or the independence or security of the relevant State party (the Americas), but only to the extent that, and for as long as, such special powers are strictly required by the exigencies of the situation.

This means that special powers of arrest and detention are lawful only to the extent that they are strictly proportionate to the threat actually posed by the emergency.

It is for the derogating State to prove that the measures are strictly required by the exigencies of the situation. This legal duty implies that the derogating State must keep the necessity of the measures under constant review.

*Special powers of arrest and detention may **at no time** lead to arbitrary arrest or detention or to abuses of any kind. To prevent arbitrariness and abuses in the exercise of such powers, effective remedies and adequate safeguards must be preserved during emergency situations and be available to every person deprived of his or her liberty through arrest or detention:*

- *Under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, the right to a judicial remedy such as **habeas corpus** must be available at all times to assess the lawfulness of the deprivation of liberty;*
- *Jurisprudence under the European Convention on Human Rights varies according to the severity of the emergency faced by the derogating State and the safeguards available. While the European Court has in its most recent case law accepted **seven** days of detention without legal intervention provided that adequate safeguards against abuse, including **habeas corpus**, exist to test the lawfulness of the initial arrest and detention (United Kingdom), it has not accepted as strictly required by the exigencies of the situation the holding of a detainee for **fourteen** days without judicial intervention and without adequate safeguards (Turkey);*
- *Safeguards that are considered adequate at the European level include, in addition to judicial review in the form of habeas corpus, effective access to a lawyer, the right to have access to a medical doctor and the right to inform a family or friend of arrest and detention. The European Court usually examines the adequacy of these safeguards **in the aggregate**;*

- *Although the European Court of Human Rights has stressed the desirability of having adequate judicial or at least administrative remedies available as soon as special powers of arrest and detention are introduced, it has accepted as being strictly required by the exigencies of the situation cases of long-term detention or internment without such remedies but with alternatively designed safeguards. However, the trend in Europe also appears to be towards a strengthening of the rights of persons deprived of their liberty by virtue of emergency powers;*
- *The international monitoring bodies have emphasized the importance of judicial review of the lawfulness of deprivation of liberty for the purpose of protecting detainees against torture and other forms of ill-treatment.*

4.4 The right to a fair trial and special tribunals

As the right to a fair trial by a competent, independent and impartial tribunal is not made non-derogable *expressis verbis* either by the International Covenant or by the American and European Conventions, questions arise as to what elements of this fundamental right may be derogated from in states of emergency.

For a general analysis of the right to a fair trial, see Chapters 6 and 7 of this Manual, which describe in some detail the rights contained in article 14 of the International Covenant, article 7 of the African Charter on Human and Peoples' Rights, article 8 of the American Convention on Human Rights and article 6 of the European Convention on Human Rights. None of these provisions refers, for instance, to military or other special courts per se. They simply set out some basic principles that must be applied by all courts called upon to determine a criminal charge or a (civil or other) right or obligation. The question of "Military and other special courts or tribunals" was considered in Chapter 4, subsection 4.7, of this Manual, and Chapter 7, section 7, concerned "The Right to a Fair Trial and Special Tribunals".

It is important to recall at the outset that Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary states that:

"Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."

It is further recalled that the Human Rights Committee, in General Comment No. 13, states that "the provisions of article 14 apply to all courts and tribunals ... whether ordinary or specialized". Moreover, while the Covenant does not prohibit military or special courts,

“nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14... If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of Article 14.”¹⁹²

In General Comment No. 29, the Human Rights Committee states that: “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”;
- ❖ that “only a court of law may try and convict a person for a criminal offence”; and
- ❖ that “the presumption of innocence must be respected”.¹⁹³

In the case of *M. González del Río v. Peru*, the Committee held, furthermore, that “*the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception*”.¹⁹⁴ Yet the Committee has also admitted that “it would simply not be feasible to expect that all provisions of article 14 can remain fully in force in any kind of emergency”.¹⁹⁵

It seems clear from the various comments and views of the Human Rights Committee that, whether tried by an ordinary or special court, an accused person must in all circumstances, including in public emergencies, be given a fair trial by an independent and impartial court of law and that he or she must be presumed innocent until proved guilty. The Committee still has to define how, and to what extent, the other guarantees contained in article 14 may be limited in public emergencies. However, as expressly stated in article 14(3) of the Covenant, the guarantees contained therein are “minimum guarantees” to which “everyone shall be entitled ... in full equality”. The question therefore arises whether there is any scope at all for limiting these guarantees further in public emergencies. Similar “minimum” guarantees or rights are contained in article 8(2) of the American Convention on Human Rights and article 6(3) of the European Convention on Human Rights. Moreover, the provisions of article 7 of the African Charter on Human and Peoples’ Rights cannot be derogated from and must therefore be applied with full force in public emergencies.

¹⁹²United Nations *Compilation of General Comments*, p. 123, para. 4.

¹⁹³UN doc. *GAOR*, A/56/40 (vol. I), p. 206, para. 16.

¹⁹⁴Communication No. 263/1987, *M. González del Río v. Peru* (Views adopted on 28 October 1992), *GAOR*, A/48/40 (vol. II), p. 20, para. 5.2; emphasis added.

¹⁹⁵See the Committee’ reply to the Sub-Commission on the question of a draft third optional protocol to the Covenant, in UN doc. *GAOR*, A/49/40 (vol. I), annex XI.

With regard to international humanitarian law, the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 provide a number of fundamental fair trial guarantees. Although the guarantees vary from treaty to treaty, they include such aspects of a fair trial as:

- ❖ the right to be tried by a court offering the essential guarantees of independence and impartiality;
- ❖ the right to have access to a lawyer;
- ❖ the right to an interpreter;
- ❖ the right of the accused to be informed without delay of the particulars of the offence alleged against him and the right before as well as during the trial to all necessary rights and means of defence;
- ❖ the right not to be convicted of an offence except on the basis of individual penal responsibility;
- ❖ the right to be tried in one's presence;
- ❖ the right not to be compelled to testify against oneself;
- ❖ the right to examine, or to have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- ❖ the right to have the judgment pronounced publicly;
- ❖ the right to an appeal.¹⁹⁶

As these guarantees prescribed by humanitarian law are applicable to armed conflicts, they must, *a fortiori*, belong among the guarantees that States must ensure in emergency situations of a less severe nature. This is also the Human Rights Committee's understanding in General Comment No. 29 (see above).

A special tribunal set up to try certain categories of offences may involve discrimination contrary to article 26 of the Covenant without necessarily violating article 14. The case of *Kavanagh v. Ireland* concerned the Special Criminal Court created in Ireland following a Government proclamation of 26 May 1972 pursuant to Section 35(2) of the Offences against the State Act 1939. The author complained that he had been the victim of a violation of article 14(1) of the Covenant by being subjected to the Special Court "which did not afford him a jury trial and the right to examine witnesses at a preliminary stage". He had therefore not been afforded a fair trial.¹⁹⁷ The author accepted that "neither jury trial nor preliminary examination is in itself required by the Covenant, and that the absence of either or both of these elements does not necessarily

¹⁹⁶See article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; article 50 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949; articles 105-108 of the Geneva Convention Relative to the Treatment of Prisoners of War; articles 71-73 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949; common article 3 of the four Geneva Conventions; article 75(4) of Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; and article 6 of Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

¹⁹⁷Communication No. 819/1998, *Kavanagh v. Ireland* (Views adopted on 4 April 2001), in UN doc. *G.AOR, A/56/40* (vol. II), p. 133, para. 10.1.

render a trial unfair”. Yet he considered that “all of the circumstances of his trial before a Special Criminal Court rendered his trial unfair”.¹⁹⁸

The Human Rights Committee confirmed that “trial before courts other than the ordinary courts is not necessarily, per se, a violation of the entitlement to a fair hearing” and added that the facts in the *Kavanagh* case did not show that there had been such a violation.¹⁹⁹ On the other hand, the decision of the Director of Public Prosecutions (DPP) to charge the author before an extraordinarily constituted court deprived him “of certain procedures under domestic law, distinguishing the author from others charged with similar offences in the ordinary courts”. As trial by jury was considered to be “an important protection” in the State party, the latter was required to demonstrate that the decision to try the author by a different procedure “was based upon reasonable and objective grounds”.²⁰⁰ The Committee then noted that the Offences against the State Act set out a number of specific offences that can be tried before a Special Criminal Court “if the DPP is of the view that the ordinary courts are ‘inadequate to secure the effective administration of justice’”. However, the Committee considered it problematic that:

“even assuming that a truncated criminal system for certain offences is acceptable so long as it is fair, Parliament through legislation set out specific serious offences that were to come within the Special Criminal Court’s jurisdiction in the DPP’s unfettered discretion (‘thinks proper’), and goes on to allow, as in the author’s case, any other offences also to be so tried if the DPP considered the ordinary courts inadequate. No reasons are required to be given for the decisions that the Special Criminal Court would be ‘proper’, or that the ordinary courts are ‘inadequate’, and no reasons for the decision in the particular case have been provided to the Committee. Moreover, judicial review of the DPP’s decisions is effectively restricted to the most exceptional and virtually undemonstrable circumstances.”²⁰¹

The Committee therefore concluded that Ireland had “failed to demonstrate that the decision to try the author before the Special Criminal Court was based upon reasonable and objective grounds”. It followed that his rights under article 26 had been violated. Given this finding, the Committee believed that it was “unnecessary” to examine the question of equality before courts and tribunals contained in article 14(1),²⁰² although the latter provision must be considered to be *lex specialis* compared with article 26 of the Covenant.

While the Committee may not necessarily consider a trial before a special court to be contrary to article 14 of the Covenant, it has, as shown in Chapter 4, been particularly severe in its comments whenever military tribunals have been given competence to try civilians. In the case of Slovakia, for example, it noted with concern that “civilians may be tried by military courts in certain cases, including betrayal of State secrets, espionage and State security”. It recommended “that the Criminal Code be

¹⁹⁸Ibid., loc. cit.

¹⁹⁹Ibid.

²⁰⁰Ibid., p. 133, para. 10.2

²⁰¹Ibid., loc. cit.

²⁰²Ibid., p. 133, para. 10.3.

amended so as to prohibit the trial of civilians by military tribunals *in any circumstances*".²⁰³ With regard to Peru, the Committee welcomed "with satisfaction" the abolition of "faceless" courts, and "the fact that the offence of terrorism has been transferred from the jurisdiction of the military courts to that of the ordinary criminal courts".²⁰⁴ However, the Committee deplored the fact "that the military courts continue to have jurisdiction over civilians accused of treason, who are tried without the guarantees provided for in article 14 of the Covenant". Referring to General Comment No. 13 on article 14, it emphasized that "the jurisdiction of military courts over civilians is not consistent with the fair, impartial and independent administration of justice".²⁰⁵

With regard to Uzbekistan, the Committee noted with concern "that military courts have broad jurisdiction", which also covers "civil and criminal cases when, in the opinion of the executive, the exceptional circumstances of a particular case do not allow the operation of the courts of general jurisdiction. The Committee [noted] that the State party has not provided information on the definition of 'exceptional circumstances' and [was] concerned that these courts have jurisdiction to deal with civil and criminal cases involving non-military persons, in contravention of articles 14 and 26 of the Covenant. The State party should adopt the necessary legislative measures to restrict the jurisdiction of the military courts to trial of members of the military accused of military offences."²⁰⁶ Lastly, the Committee recommended that Guatemala "amend the law to limit the jurisdiction of the military courts to the trial of military personnel who are accused of crimes of an exclusively military nature".²⁰⁷

In the *Castillo Petruzzi et al.* case, the alleged victims had been convicted of treason by a "faceless" military tribunal and sentenced to life imprisonment. As the charge was treason, the procedure called "for a summary proceeding 'in the theatre of operations,' before 'faceless' judges" and actions seeking "judicial guarantees" were not allowed.²⁰⁸ Mr. Castillo Petruzzi himself had been convicted of treason by a Special Military Court of Inquiry and sentenced to "life imprisonment, with complete disqualification for life, continuous confinement to his cell for the first year of incarceration, and then forced labor". This ruling was upheld by the Special Military Tribunal and a motion for nullification of the judgment was subsequently rejected by the Special Tribunal of the Supreme Court of Military Justice.²⁰⁹ At the time of the trial a state of emergency was in effect in the Department of Lima and the Constitutional Province of Callo and the following guarantees of the Peruvian Constitution were suspended: inviolability of domicile, freedom of movement, right of assembly, as well as arrest and appearance before a judge.²¹⁰ With regard to Mr. Castillo Petruzzi's trial, it

²⁰³UN doc. GAOR, A/52/40 (vol. I), p. 60, para. 381; emphasis added.

²⁰⁴UN doc. GAOR, A/56/40 (vol. I), p. 45, para. 4.

²⁰⁵Ibid., p. 47, para. 12.

²⁰⁶Ibid., pp. 61-62, para. 15.

²⁰⁷Ibid., p. 96, para. 20.

²⁰⁸I-A Court HR, *Castillo Petruzzi et al Case, judgment of May 30, 1999, Series C, No. 52*, p. 162, para. 86.10.

²⁰⁹Ibid., pp. 170-171, paras. 86.36 and 86.40-86.43.

²¹⁰Ibid., pp. 159-160, para. 86.5.

was established *that* his lawyer was not allowed to confer with him “in private either before the preliminary hearing or even before the ruling of first instance was delivered”, *that* Mr. Castillo Petruzzi “was blindfolded and in handcuffs for the duration of the preliminary hearing” *and that* neither he nor his lawyer “was shown the prosecution’s evidence, nor was the defence attorney permitted to cross-examine the witnesses whose testimony appeared in the police investigation report.”²¹¹

The Inter-American Court of Human Rights concluded, on the following grounds, that article 8(1) of the American Convention on Human Rights had been violated in this case:

“128. ...Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual’s right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.

129. A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create ‘(t)ribunals that do not use the duly established procedures of the legal process ... to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.’

130. Under Article 8(1) of the American Convention, a presiding judge must be competent, independent and impartial. In the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have. Moreover, under the Statute of Military Justice, members of the Supreme Court of Military Justice, the highest body in the military judiciary, are appointed by the minister of the pertinent sector. Members of the Supreme Court of Military Justice also decide who among their subordinates will be promoted and what incentives will be offered to whom; they also assign functions. This alone is enough to call the independence of the military judges into serious question.

131. This Court has held that the guarantees to which every person brought to trial is entitled must be not only essential but also judicial. ‘Implicit in this conception is the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency.’”²¹²

²¹¹Ibid., p. 168, para. 86.30.

²¹²Ibid., pp. 196-197, paras. 128-131; footnotes omitted. In para. 129 the Court quoted Principle 5 of the United Nations Basic Principles on the Independence of the Judiciary.

The Court concluded “that the military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8(1) of the American Convention recognizes as essentials of due process of law”. A further problem was that the judges presiding over the treason trial were “faceless”, that the defendants had “no way of knowing the identity of their judge” and were therefore unable to assess their competence.²¹³

The European Court of Human Rights examined the conformity of the martial law tribunals in Turkey with article 6(1) of the European Convention on Human Rights. In the *Yalgin and Others* case, for instance, two of the applicants submitted that their right to a fair hearing had been breached as a consequence of their conviction by the Ankara Martial Law Court which lacked independence and impartiality. The European Court noted that the Martial Law Court had been “set up to deal with offences aimed at undermining the constitutional order and its democratic regime”. It concluded, however, that it was not its task “to determine *in abstracto* whether it was necessary to set up such courts in a Contracting State or to review the relevant practice, but to ascertain whether the manner in which one of them functioned infringed the applicants’ right to a fair trial”.²¹⁴ The Martial Law Courts in Turkey have five members: two civilian judges, two military judges and an army officer. The question of the independence and impartiality of the military judges and the army officer were considered together, while the independence and impartiality of the two civilian judges were not challenged.

The military judges chosen “were appointed with the approval of the Chief of Staff and by a decree signed by the Minister of Defence, the Prime Minister and the President of the Republic. The army officer, a senior colonel ... was appointed on the proposal of the Chief of Staff and in accordance with the rules governing the appointment of military judges. This officer [was] removable on the expiry of one year after his appointment.”²¹⁵ With regard to the existence of safeguards to protect the members of the Martial Law Court against outside pressure, the European Court noted that “the military judges undergo the same professional training as their civilian counterparts” and that they “enjoy constitutional safeguards identical to those of civilian judges. They may not be removed from office or made to retire early without their consent; as regular members of a Martial Law Court they sit as individuals. According to the Constitution, they must be independent and no public authority may give them instructions concerning their judicial activities or influence them in the performance of their duties.”²¹⁶

However, three other aspects of their status called into question their independence and impartiality:

²¹³ *Ibid.*, p. 197, paras. 132-133.

²¹⁴ *Eur. Court HR, Case of Yalgin and Others v. Turkey, judgment of 25 September 2001*, paras. 43-44 of the text of the judgment published at <http://echr.coe.int>

²¹⁵ *Ibid.*, para. 40.

²¹⁶ *Ibid.*, para. 41.

- ❖ *first*, “the military judges are servicemen who still belong to the army, which in turn takes orders from the executive”;
- ❖ *second*, “as the applicant rightly pointed out, they remain subject to military discipline and assessment reports are compiled on them for that purpose. They therefore need favourable reports both from their administrative superiors and their judicial superiors in order to obtain promotion”;
- ❖ *third*, “decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army”.²¹⁷

Lastly, the army officer on the Martial Law Court was “subordinate in the hierarchy to the commander of the martial law and/or the commander of the army corps concerned” and was “not in any way independent of these authorities”.²¹⁸

The European Court then observed that:

“even appearances may be of some importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. In deciding whether in a given case there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified.”²¹⁹

The Court further considered that:

“where, as in the present case, a tribunal’s members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties, accused persons may entertain a legitimate doubt about those persons’ independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society... In addition, the Court attaches great importance to the fact that a civilian had to appear before a court, composed, even if only in part, of members of the armed forces.”²²⁰

In the light of all these considerations, the Court was of the opinion that:

“the applicants – tried in a Martial Law Court on charges of attempting to undermine the constitutional order of the State – could have legitimate reason to fear about being tried by a bench which included two military judges and an army officer under the authority of the officer commanding the state of martial law. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat on that court makes no difference in this respect.”²²¹

²¹⁷Ibid., para. 42.

²¹⁸Ibid., loc. cit.

²¹⁹Ibid., para. 45.

²²⁰Ibid., para. 46.

²²¹Ibid., para. 47.

The Court therefore concluded that there had been a violation of article 6(1) of the Convention since “the applicants’ fears as to the Martial Law Court’s lack of independence and impartiality [could] be regarded as objectively justified”.²²²

It seems clear that, at the present stage of development of international human rights law, the international monitoring bodies are unlikely to conclude that special courts are per se contrary to human rights law but will tend to consider whether they fulfil the due process guarantees such law prescribes, including the right to be tried by an independent and impartial tribunal at all times. When military officers and other members of the armed forces form part of a special tribunal judging a civilian, the international monitoring bodies have invariably concluded that such tribunals are not independent and impartial as required by international human rights law (see also Chapter 4, section 4.7).

Every person has the right at all times to be tried by a court or tribunal which is competent, independent and impartial and which respects the right to a fair trial/ due process guarantees as well as the right to be presumed innocent until proved guilty.

Trials by special courts may not per se violate the right to a fair hearing/ due process guarantees. However, vigilance is required to ensure that such courts comply with all basic requirements of a fair trial/ due process guarantees, including the requirement that the court should be competent, independent and impartial. Like all regular courts, specially established tribunals must also strictly respect the principle of equality before the law and the prohibition of discrimination.

Military courts are not competent, a priori, to try civilians suspected of having committed criminal acts, since such courts are unlikely to dispense justice fairly, independently and impartially.

The fair trial/ due process standards laid down in international humanitarian law establish a minimum threshold beneath which no State may at any time lower fair trial/ due process guarantees. As these standards are laid down for armed conflicts of an international or internal character, crisis situations of a less serious nature call for higher standards.

*The **minimum guarantees** for criminal trials prescribed in article 14(3) of the International Covenant on Civil and Political Rights, article 8(2) of the American Convention on Human Rights and article 6(3) of the European Convention on Human Rights provide an important, if insufficient, yardstick for fair trial guarantees that should be applicable at all times, including in public emergencies threatening the life of the nation (universal and European levels) or the independence or security of the State (the Americas).*

²²²Ibid., para. 48.

5. The Condition of Consistency with Other International Legal Obligations

Article 4(1) of the International Covenant on Civil and Political Rights, article 27(1) of the American Convention on Human Rights and article 15(1) of the European Convention on Human Rights lay down the condition that derogatory measures must not be “inconsistent with” a State party’s “other obligations under international law”. The same condition is laid down in article 30(1) of the European Social Charter and in article F(1) of the Charter as revised.

The term “other obligations under international law” is broad and can in theory be interpreted to comprise any legal obligation derived from an international treaty or customary law, or even general principles of law, that is relevant to the enjoyment of the human rights and fundamental freedoms affected by a derogation. In General Comment No. 29, the Human Rights Committee states in this regard 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 a justification for derogation from the Covenant if such derogation would entail a breach of the State’s other 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.”²²³

To enable the Committee “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”, States parties should, when invoking article 4(1) or submitting their periodic reports, “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 [and] should duly take into account the developments within international law as to human rights standards applicable in emergency situations.”²²⁴

In the case of countries that have ratified both the International Covenant on Civil and Political Rights and the American Convention on Human Rights, it is of particular importance for the Human Rights Committee to examine whether measures derogating from a State party’s obligations under the Covenant are inconsistent with its obligations under the American Convention, which contains a much longer list of non-derogable rights.

²²³UN doc. GAOR, A/56/40 (vol. I), p. 204, para. 9.

²²⁴Ibid, pp. 204-205, para. 10.

The European Court of Human Rights has made it clear that its function under the European Convention requires it to examine the consistency of derogatory measures with a Contracting State's "other obligations under international law" *proprio motu*.²²⁵ However, in both the *Lawless* case and the *Ireland v. the United Kingdom* case, the Court had no data before it to suggest that the derogating State would have disregarded such obligations. In the latter case, it noted in particular that "the Irish Government never supplied to the Commission or the Court precise details on the claim formulated or outlined on this point in their application".²²⁶ As these cases show, although the Court has a duty to examine *proprio motu* the consistency of derogatory measures with the State's "other obligations under international law", it relies heavily on the arguments submitted by the party alleging a violation of this principle rather than carrying out an in-depth examination itself.

In the *Brannigan and McBride* case, the applicant argued that the United Kingdom Government had violated the consistency principle in article 15(1) of the Convention since the public emergency had not been "officially proclaimed" as required by article 4 of the International Covenant. The Court observed on this occasion that it was not its role to seek to define authoritatively the meaning of the terms "officially proclaimed" in article 4 of the Covenant, but it had nevertheless to examine whether there was "any plausible basis for the applicant's argument in this respect".²²⁷ It concluded, however, that there was "no basis for the applicant's arguments", referring in this connection to the statement in the House of Commons by the Secretary of State for the Home Department in which he "explained in detail the reasons underlying the Government's decision to derogate and announced that steps were being taken to give notice of derogation under both Article 15 of the European Convention and Article 4 of the International Covenant. He added that there was 'a public emergency within the meaning of these provisions in respect of terrorism connected with the affairs of Northern Ireland in the United Kingdom.'"²²⁸ In the Court's view, this statement, "which was formal in character and made public the Government's intentions as regards derogation, was well in keeping with the notion of an official proclamation".²²⁹

Lastly, in the *Marshall* case the Court stated that it found "nothing in the applicant's reference to the observations of the United Nations Human Rights Committee to suggest that the (United Kingdom) Government must be considered to be in breach of their obligations under the International Covenant on Civil and Political Rights by maintaining their derogation after 1995". The applicant could not therefore maintain "that the continuance in force of the derogation was incompatible with the authorities' obligations under international law".²³⁰

²²⁵*Eur. Court HR, Lawless Case (Merits), judgment of 1 July 1961, Series A, No. 3, p. 60, paras. 40-41.*

²²⁶*Ibid.*, p. 60, para. 41, and *Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25, p. 84, para. 222.*

²²⁷*Eur. Court HR, Case of Brannigan and McBride v. the United Kingdom, judgment of 26 May 1993, Series A, No. 258-B, p. 57, para. 72.*

²²⁸*Ibid.*, p. 57, para. 73.

²²⁹*Ibid.*, loc. cit.

²³⁰*Eur. Court HR, Marshall case, decision on the admissibility of 10 July 2001, p. 11 of the decision as published at <http://echr.coe.int>*

The jurisprudence of the European Court of Human Rights shows, in other words, that unless the applicant has provided clear and well-founded submissions regarding the respondent State’s alleged failure to act in conformity with its “other obligations under international law”, the Court will not entertain the complaint.

When resorting to measures derogating from their obligations under international human rights law, States must ensure that these measures are not inconsistent with their “other obligations under international law” such as higher absolute human rights standards, humanitarian law standards or any other relevant principles binding on the derogating States by virtue of international treaty or customary law or general principles of law.

6. The Condition of Non-Discrimination

According to article 4(1) of the International Covenant on Civil and Political Rights and article 27(1) of the American Convention on Human Rights, derogatory measures must “not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

Article 15(1) of the European Convention on Human Rights contains no such reference to the principle of non-discrimination. To the extent that a Contracting State to the European Convention is also a State party to the International Covenant, it would not be allowed to take derogatory measures on the grounds listed above even under article 15 of the Convention, since such measures must not be “inconsistent” with the State’s “other obligations under international law”. In any event, there is a certain flexibility inherent in the principle of equality and non-discrimination that enables derogating States to adjust their measures to the specific needs of the crisis situation without violating their treaty obligations. As noted in Chapter 13 of this Manual, it does not follow from the principle of equality and non-discrimination that all distinctions made between people are illegal under international law. ***However, differentiations are lawful only if they pursue a legitimate aim and are proportionate to/reasonable in terms of that legitimate aim.*** To the extent that differential derogatory measures meet these criteria both in general and in the specific case concerned, they are lawful. As the principle of equality and non-discrimination is a fundamental rule of both international human rights law and general international law, derogatory measures that discriminate between persons or groups of persons cannot under any circumstances be considered lawful, even under treaties that do not include *expressis verbis* a prohibition on discrimination in the derogation provision.

The Human Rights Committee noted in General Comment No. 29 that although article 26 of the Covenant or the other provisions relating to non-discrimination (namely, arts. 2, 3, 14(1), 23(4), 24(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.”²³¹

The question of discrimination in the employment of extrajudicial powers of arrest and detention were at issue in the *Ireland v. the United Kingdom* case, although the European Court of Human Rights decided, by fifteen to two, that it had not been established that there had been discrimination contrary to article 14 read in conjunction with article 5 of the European Convention.²³² The Irish Government had argued that the exceptional powers were at first used only against “persons suspected of engaging in, or of possessing information about, IRA terrorism” and that “later on, they were also utilised, but to a far lesser extent, against supposed Loyalist terrorists”.²³³

Analysing the difference in treatment between Loyalist and Republican terrorism during *the first phase* of the period under consideration (1971 until end of March 1972), the Court concluded that “there were profound differences between Loyalist and Republican terrorism. At the time in question, the vast majority of murders, explosions and other outrages were attributable to Republicans” who had a “far more structured organisation” and “constituted a far more serious menace than the Loyalist terrorists” who could more frequently be brought before the criminal courts.²³⁴ However, *the second period* examined (30 March 1972 – 4 February 1973) gave rise to “delicate questions”. There was a “spectacular increase in Loyalist terrorism”. It seemed beyond doubt to the Court “that the reasons that had been influential before 30 March 1972 became less and less valid as time went on. However, the Court [considered] it unrealistic to carve into clear-cut phases a situation that was inherently changing and constantly evolving” and, “bearing in mind the limits on its powers of review, the Court [could not] affirm that, during the period under consideration, the United Kingdom violated Article 14, taken together with Article 5, by employing the emergency powers against the IRA alone.”²³⁵ The aim pursued during this time – “the elimination of the most formidable organisation first of all – could be regarded as legitimate and the means employed [did] not appear disproportionate.”²³⁶

²³¹UN doc. GAOR, A/56/40 (Vol. I), Report HRC, p. 204, para. 8.

²³²*Eur. Court HR, Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A, No. 25, p. 95.*

²³³*Ibid.*, p. 85, para. 225.

²³⁴*Ibid.*, p. 86, para. 228.

²³⁵*Ibid.*, pp. 86-87, para. 229.

²³⁶*Ibid.*, p. 87, para. 230.

However, 5 February 1973 marked a turning-point in that from then on “extrajudicial deprivation was used to combat terrorism as such ... and no longer just a given organisation”. Taking into account the full range of the processes of the law applied in the campaign against the two categories of terrorists, the Court found that “the initial difference of treatment did not continue during the last period considered”.²³⁷

When resorting to measures derogating from their legal obligations under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, States parties must ensure that these measures do not “involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”.

All derogating States must at all times guarantee the principle of equality and the prohibition of discrimination which is a fundamental principle of international human rights law and general international law. According to international jurisprudence, the prohibition of discrimination is inherently flexible and allows derogating States to take measures that are strictly necessary to overcome an emergency situation provided that the measures pursue a legitimate aim and are reasonable/proportionate in the light of that aim.

7. The Condition of International Notification

When States parties to the three main treaties dealt with in this chapter make use of their right to derogate, they also have a legal obligation to comply with the regime of international notification. As shown in subsection 2.2 above, acceptance of this obligation was one of the essential elements introduced by the drafters to prevent abuse of the right to derogate. Although the notification provisions in the various treaties are not identical, they resemble each other in many ways. Article 4(3) of the International Covenant reads as follows:

“Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.”

²³⁷Ibid., pp. 87-88, para. 231.

The Human Rights Committee holds that “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”.²³⁸ It 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 its compliance with article 4 does not depend on whether that State has submitted a notification.”²³⁹

In view of the “summary character” of many of the notifications received in the past, the Committee emphasizes that “the notification should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding the 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.”²⁴⁰

According to article 27(3) of the American Convention on Human Rights:

“Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.”

As in the case of article 4(3) of the Covenant, a State derogating under the American Convention must (1) *immediately* notify other States parties about the suspension, (2) submit information about the *provisions* which it has suspended and (3) state the *reasons* for the suspension. The State party must also give a date for the termination of the suspension. Article 27(3) does not, on the other hand, expressly oblige States parties to submit a second notice after the termination of the suspension.

Article 15(3) of the European Convention stipulates that:

“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.”

²³⁸UN doc. GAOR, A/56/40 (vol. I), p. 207, para. 17.

²³⁹Ibid., loc. cit.

²⁴⁰Ibid.

It is noteworthy that article 15(3) does not expressly require the derogating State to indicate the *provisions* from which it is derogating. However, the terms “fully informed” indicate that the State must provide comprehensive information about the derogatory measures taken. The European Court of Human Rights has competence to examine *proprio motu* the derogating State’s compliance with article 15(3) in cases brought before it. It follows from its case law that the notification must be submitted “without delay”, a condition that was considered fulfilled in the *Lawless* case, in which there was a twelve-day delay between the entry into force of the derogatory measures and submission of the notification.²⁴¹ In the same case the Court concluded that the Government had given the Secretary-General “sufficient information of the measures taken and the reasons therefor” when explaining in writing that “the measures had been taken in order ‘to prevent the commission of offences against public peace and order and to prevent the maintaining of military or armed forces other than those authorised by the Constitution’.” The Court further noted that enclosed with the notice was a copy of the relevant emergency legislation and the proclamation that brought it into force.²⁴²

Article 30(2) of the European Social Charter and article F(2) of the revised Charter contain in substance a similar obligation of notification, although it is sufficient that the notification is submitted “within a reasonable lapse of time”.

Although the conditions vary somewhat according to the treaty concerned, it may be said in general that a State party, when exercising its right to derogate under the international human rights treaties, must swiftly notify the other States parties of the derogatory measures, through the secretary-general of the organization concerned, describing the measures in sufficient detail, stating the reasons why they have been taken and, under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, specifying the provisions from which they derogate.

The condition of international notification is an important means of preventing abuse of the right to derogate since it allows improved monitoring of State action by other States parties and the monitoring bodies.

²⁴¹ Eur. Court HR, *Lawless Case (Merits)*, judgment of 1 July 1961, Series A, No. 3, p. 62, para. 47.

²⁴² *Ibid.*, loc. cit.

8. The Role of Judges, Prosecutors and Lawyers in Ensuring the Effective Protection of Human Rights in Emergency Situations

The rights and freedoms of the human person are never as fragile as in times of internal or international upheaval. To fend off an emergency, Governments often decide to take measures that interfere, sometimes drastically, with such rights as the right to liberty and security, the right to due process of law before an independent and impartial tribunal, the right to effective remedies for human rights violations, the right to privacy, and the right to freedom of expression, association and assembly. This chapter has shown, however, that under international human rights law, independent and impartial courts must, *in the first place*, be allowed to continue functioning freely during an emergency situation for the purpose of ensuring the effective protection of rights that can never in any circumstances be derogated from. *Second*, they must, at least under the International Covenant on Civil and Political Rights and the American Convention on Human Rights, remain competent to exercise control so that the derogatory measures do not – either in general or in specific cases – exceed the limits of what is strictly required to deal with the emergency situation. *Lastly*, under all treaties courts must be available to ensure that rights that are not derogated from continue to be fully ensured in practice.

These basic legal requirements imply that, even in emergency situations, judges, prosecutors and lawyers must be allowed to pursue their professional responsibilities impartially and independently, free from outside pressure or interference. The legal professions must be particularly vigilant in preventing any trespasses and excesses in the field of human rights committed in the name of an emergency situation, whether genuine or not. As seen in this chapter, even the fight against terrorism must comply with the fundamental rules protecting the human person from torture or other forms of ill-treatment, from arbitrary detention and from unfair trials by courts that fail to provide guarantees of due process. It is the professional duty of judges, prosecutors and lawyers to do their utmost to see to it that the principle of legality, the rule of law and fundamental human rights are effectively guaranteed even when a country is in a state of upheaval.

The duty of prosecutors forcefully to investigate and prosecute violations of such rights as the right to life and the right to physical integrity, liberty and security also remains intact. Prosecutors must guard against any act that violates these rights such as abduction, involuntary disappearances, extrajudicial killings, torture or other forms of ill-treatment, unacknowledged detention or other forms of arbitrary deprivation of liberty. The legal duty of States to prevent, investigate, prosecute, punish and redress these kinds of human rights violations are equally valid in emergency situations.

For their part, lawyers must remain committed to the vigorous defence of the rights and freedoms of the human person even in emergency situations, although their conditions of work may at such times be particularly challenging.

9. Concluding Remarks

Contrary to what may be believed, international human rights law provides a multitude of legal prescriptions for managing emergency situations that are so severe that they constitute a threat to the life of the nation or to the independence or security of the State. In such situations, the bedrock of human rights principles must remain in force, and it is the responsibility of the legal professions to help ensure that this is in fact the case.

Public opinion may call for strong measures and vengeance in response to a severe crisis, and Governments may well cater to these demands by resorting to drastic and far-reaching security measures. However, peace and security are best served by an evenhanded administration of justice, also in times of adversity. It is a good lesson to keep in mind that at no time in history has too much justice and respect for individual rights and freedoms been harmful to national and international peace, security and prosperity. In times of crisis, a concerted effort by all actors in society, including judges, prosecutors and lawyers, to maintain the highest possible standards of human rights protection is not only more difficult but also more necessary than ever to contribute to the restoration of a constitutional order in which human rights and fundamental freedoms can again be fully enjoyed by all.
