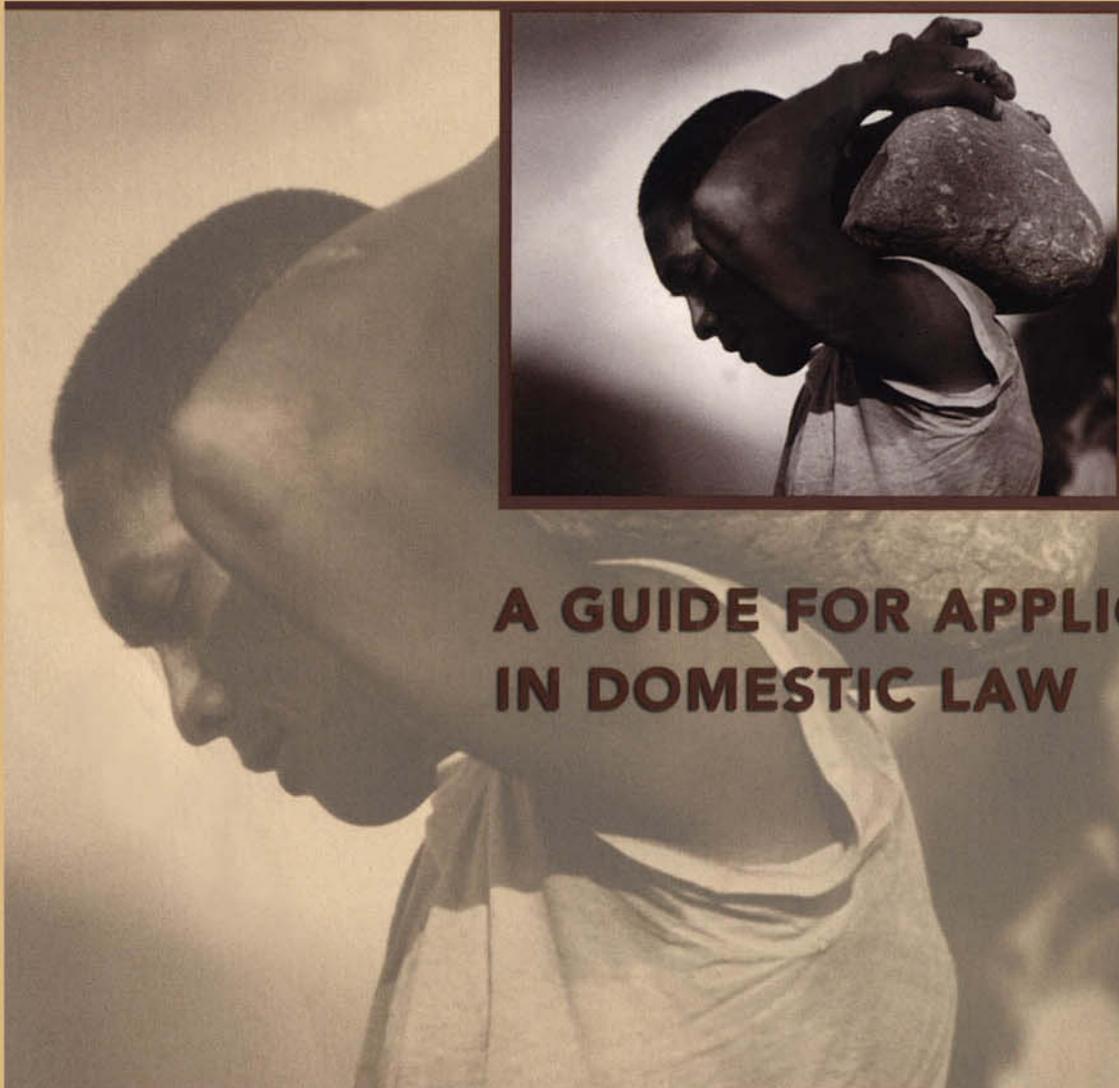


# The International Dimension of Human Rights



**A GUIDE FOR APPLICATION  
IN DOMESTIC LAW**

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INTER-AMERICAN DEVELOPMENT BANK  
AMERICAN UNIVERSITY

# **The International Dimension of Human Rights**

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A Guide for Application in Domestic Law

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Claudia Martin and Diego Rodríguez-Pinzón  
**American University**

with contributions from  
Fernando Carrillo-Flórez  
**Inter-American Development Bank**

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## Foreword

This book is the result of a joint effort between the Inter-American Development Bank (IDB) and the Washington College of Law (American University) Center for Human Rights and Humanitarian Law in response to a need within the Americas to train members of the judiciary in the domestic application of international human rights standards. The initiative summarizes the efforts of a multilateral organization such as the IDB and a private organization such as the Center for Human Rights to promote international human rights standards.

The book is based on objectives established at the Summit of the Americas in Quebec, Canada. The strengthening of judicial administration in the Americas—one of the central objectives of the new century—is critical to ensuring the rule of the law in the region. Among the many actions required to support the work of imparting justice in each of the countries, education in human rights is essential to the success of the proposed goals.

In the process of integration and internationalization of all aspects of national life within the region, the application of international norms related to the administration of justice is of singular relevance. Therefore, the IDB and the Center for Human Rights believe that it is of great importance that the members of national judiciaries know, analyze and apply applicable international human rights laws. These norms form the base of fundamental guarantees on which modern democracy is structured. They contain minimum standards for judicial activity and other matters. Appropriate compliance with these laws by the States of the hemisphere will provide a more favorable environment for poverty reduction, economic growth and trade, judicial security and improved quality of life for the citizens of the Americas.

This book represents a contribution to the strengthening of the Inter-American Human Rights System of the Organization of American States (OAS). The promotion of human rights is one of the fundamental mandates of the OAS and is carried out by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. The IDB and the Center hope that the contribution of the teaching methodology that inspired this manual provides another link for the already solid collaboration between the different actors involved in the matter.

*The International Dimension of Human Rights* is a tool for guidance and consultation in training and can be used by any teaching authority—law schools, universities, intergovernmental organization workshops, as well as governmental and nongovernmental organizations. Through this text, the members of the judiciary in the Americas will be able to see firsthand that the Inter-American Court and the Inter-American Commission have eminently judicial tasks and, therefore, their pronouncements have judicial validity that can be applied domestically. This is important when taking into account that, at the national level, organizations such as the Court and the Commission are still seen as political bodies rather than forums for adjudication, conflict mediation and interpretation of the American Convention on Human Rights.

Various Supreme or Constitutional Courts in Latin America have, in their deliberations on cases submitted before them, used documents included in this book, which gives us incentive to continue with a job that in such a short time has begun to bear fruit.

**Carlos M. Jarque**  
*Manager*  
*Sustainable Development Department*

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**CHAPTER I**  
**GENERAL NOTIONS OF INTERNATIONAL LAW**

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## **A. SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW**

### **1. GENERAL.**

#### *Comment*

The sources of international law are listed in Article 38 of the Statute of the International Court of Justice. In accordance to authoritative interpretations of this Article, these sources can be divided into principal or primary sources and subsidiary or secondary sources. The primary sources are treaties, custom and general principles of law. The secondary sources are jurisprudence and doctrine. These categories, although developed in general international law, are relevant to international human rights law and have been used by several adjudicatory bodies when interpreting human rights provisions.

This section has the objective of providing a general overview of how the sources of international law have been analyzed by experts in the field and how the supervisory bodies of the inter-American system have used them.

---

#### **Article 38 Statute of the International Court of Justice**

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

---

**THOMAS BUERGENTHAL,**  
**PUBLIC INTERNATIONAL LAW IN A NUTSHELL 20 (2nd. ed. 1990)<sup>1</sup>**  
*[Some citations have been omitted]*

**II. PRIMARY SOURCES**

§ 2-1. Article 38(1) of the Statute of the International Court of Justice. This provision is generally considered to be the most authoritative enumeration of the sources of international law. It reads as follows:

. . . .

§ 2-2. Meaning of Article 38 of the ICJ Statute. Article 38 was included in the Statute of the ICJ to describe the nature of the international law that the Court was to apply. . . . Article 38(1) indicates that international law consists of or has its basis in international conventions (treaties), international custom, and general principles of law. It follows that a rule cannot be deemed to be international law unless it is derived from one of these three sources. This is also the view that the new Restatement adopts. Restatement (Third) § 102(1).

“Judicial decisions” and the “teachings” of the publicists are not sources of law as such; they are “subsidiary means” for finding what the law is. International lawyers look to these authorities as evidence to determine whether a given norm can be deemed to have been accepted as a rule of international law. *See* *The Paquete Habana*, 175 U.S. 677 (1900); Restatement (Third), Reporters’ Note 1 to § 102.

. . . .

Customary international law develops from the practice of states. To international lawyers, “the practice of states” means official governmental conduct reflected in a variety of acts, including official statements at international conferences and in diplomatic exchanges, formal instructions to diplomatic agents, national court decisions, legislative measures or other actions taken by governments to deal with matters of international concern. Inaction can also be deemed a form of state practice.

---

<sup>1</sup> Reprinted from *Public International Law in a Nutshell*, Thomas Buergenthal, 2nd. ed. 1990, ©1990 with permission of the West Group.

A practice does not become a rule of customary international law merely because it is widely followed. It must, in addition, be deemed by states to be obligatory as a matter of law. This test will not be satisfied if the practice is followed out of courtesy or if states believe that they are legally free to depart from it at any time. The practice must comply with the “opinio juris” requirement, short for the Latin *opinio juris sive necessitatis* –a conviction that the rule is obligatory.

....

In recent decades, resolutions and similar acts of intergovernmental international organizations have acquired a very significant status both as sources and as evidence of international law. Some of these resolutions are legally binding on the member states of the organizations. That is conduct and pronouncements of states in other contexts. Thus, for example, if a UN General Assembly resolution declares a given principle to be a rule of international law, that pronouncement does not make it the law, but it is some evidence on the subject. If the resolution is adopted unanimously or by an overwhelming majority, which includes the major powers of the world, and if it is repeated in subsequent resolutions over a period of time, and relied upon by states in other contexts, it may well reach the stage where its character as being declaratory of international law becomes conclusive. When that stage is reached is difficult to determine, but that these resolutions play an important part in the international law-making process can no longer be doubted.

Of course, not very many measures adopted by international organizations acquire this status. The resolutions or declarations in question usually have to proclaim one or more principles and identify them either as preexisting international law or as rules that states in general should comply with as a matter of law. These acts might be characterized as “legislative” resolutions that are not all that dissimilar in their content or purpose from the legislative treaties discussed in § 2 - , supra. Resolutions dealing with human rights, decolonization, outer space, ocean resources, environmental issues, use of force, etc., are at times formulated to perform that purpose. See, e.g., *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*, Merits, ICJ 1986, p. 14, at 100-1 [hereinafter cited as *Nicaragua v. U. S. (Merits)*]; *Advisory Opinion on Western Sahara*, 1975 ICJ 612, at 23-33. It is not uncommon in some of these areas for the “legislative” declarations to be followed up by a formal treaty open to accession by the international community in general.

....

### ***Questions***

1. What are the sources of international law? How would you compare the sources of domestic law to the above-mentioned “sources of international law”? Are judicial decisions a source of law in your domestic legal system? What problems might a domestic legal practitioner face

when approaching the sources of international law?

---

## **2. INTERNATIONAL CUSTOMARY LAW**

### ***Comment***

In international human rights law, international custom does not play a primary role because most of the international standards in this area are already recognized in treaties. Additionally, most of the states in the Americas have ratified most of the main inter-American human rights treaties.

However, a matter that requires further review when discussing international customary law is the juridical value of the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man. Although initially they were adopted as non-binding instruments, overtime they have acquired an obligatory character. The discussion is focused on establishing whether their obligatory nature stems from international customary law, as authoritative interpretations of human rights obligations contained in the United Nations or OAS Charter, respectively.

### **a. Juridical Value of the Universal Declaration of Human Rights and American Declaration of the Rights and Duties of Man**

THOMAS BUERGENTHAL,  
INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 33-38 (2nd. ed. 1995)<sup>2</sup>

#### **2. Legal Effect and Political Importance**

The Universal Declaration is not a treaty. It was adopted by the UN General Assembly as a resolution having no force of law. Its purpose, according to its preamble, is to provide “a common understanding” of the human rights and fundamental freedoms referred to in the UN Charter and to serve “as a common standard of achievement for all peoples and all nations....”

---

<sup>2</sup> Reprinted from *International Human Rights in a Nutshell*, Thomas Buergenthal, 2nd. ed. 1995, ©1995 with permission of the West Group.

In the decades that have elapsed since its adoption in 1948, the Declaration has undergone a dramatic transformation. Today few international lawyers would deny that the Declaration is a normative instrument that creates at least some legal obligations for the Member States of the UN. The dispute about its legal character concerns not much claims that it lacks all legal force. The disagreement focuses instead on questions about whether all the rights it proclaims are binding and under what circumstances, and on whether its obligatory character derives either from its status as an authoritative interpretation of the human rights obligations contained in the UN Charter, its status as customary international law, or its status as a general principle of law. *See* Restatement (Third) § 701, Reporters' Notes 4-6; Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States," 32 *Am. U. L. Rev.* 1, 16-17 (1982); L. Henkin, *The Age of Rights* 19 (1990); Simma & Alston, "The Source of Human Rights Law: Custom, *Jus Cogens*, and General Principles," 12 *Australian Y.B. Int'l L.* 82 (1992).

The process leading to the transformation of the Universal Declaration from a non-binding recommendation to an instrument having a normative character was set in motion, in part at least, because the effort to draft and adopt the Covenants remained stalled in the UN for almost two decades. During that time the need for authoritative standards defining the human rights obligations of UN Member States became ever more urgent. As time went on, the Declaration came to be utilized with ever greater frequency for that purpose. Whenever governments, the UN or other international organizations wished to invoke human rights norms or condemn their violations, they would refer to and draw on the Declaration as the applicable standard. Thus the Declaration came to symbolize what the international community means by "human rights," reinforcing the conviction that all governments have an "obligation" to ensure the enjoyment of the rights the Declaration proclaims. *See* Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character," in B. Ramcharan (ed.), *Human Rights: Thirty Years After the Universal Declaration* 21, at 28-37 (1979).

The legal significance of this process has been analyzed in at least three ways. Some international lawyers and governments have contended that the UN's consistent reliance on the Universal Declaration when applying the human rights provisions of the UN Charter compels the conclusion that the Declaration has come to be accepted as an authoritative interpretation of these provisions. According to this view, the Member States of the UN have agreed that they have an obligation under the Charter to promote "universal respect for, and observance of" the rights which the Declaration proclaims. Waldock, "Human Rights in Contemporary International Law and the Significance of the European Convention," in *The European Convention of Human Rights* 1, at 14 (*Int'l & Comp. L. Supp. Publ. No. 11*, 1965); Buergenthal, "International Human Rights Law and Institutions: Accomplishments and Prospects," 63 *Wash. L. Rev.* 1, at 9 (1988). Whether a state can be deemed to violate this obligation when it denies all, some or even only one of these rights will then depend upon the interpretation given to the undertaking contained in Article 55(c) of the Charter read together with Article 56.

Another view that is gaining increasing support sees in the repeated reliance on and resort to the Universal Declaration by governments and intergovernmental organizations the requisite state

practice which is capable of giving rise to customary international law. This theory leads to the conclusion that the Declaration or, at the very least, some of its provisions, have become customary international law. A careful analysis of the relevant state practice suggests, however, that not all the rights proclaimed in the Declaration have to date acquired this status. That is why the Restatement (Third) characterizes only some rights proclaimed in the Universal Declaration as customary international law. Without claiming to be exhaustive, it lists the following governmental practices as violating international law: genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights. Restatement (Third) § 702. *See also* T. Meron, *Human Rights and Humanitarian Norms as Customary Law* 92-95 (1989) (containing a useful analysis of the process for reaching conclusions of this type).

One distinguished commentator has combined the two aforementioned theories by advancing the following view:

The Declaration . . . is now considered to be an authoritative interpretation of the U.N. Charter, spelling out in considerable detail the meaning of the phrase “human rights and fundamental freedoms,” which Member States agreed in the Charter to promote and observe. The Universal Declaration has joined the Charter . . . as part of the constitutional structure of the world community. The Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding all states, not only members of the United Nations. Sohn, “The New International Law: Protection of the Rights of Individuals Rather than States,” 32 *Am. U. L. Rev.* 1, at 16-17 (1982).

It remains to be seen whether this characterization of the Universal Declaration will gain general acceptance, particularly if it is understood as imposing on all states an immediate obligation to conform to its every provision. Some commentators are now putting forth a third theory, which characterizes various international human rights norms, including the Universal Declaration, as being reflective of a dynamic modern aspect of general principles of law. Simma & Alston, “The Source of Human Rights Law: Custom, Jus Cogens, and General Principles,” 12 *Australian Y.B. Int’l L.* 82 (1992). *See also* Charney, “Universal International Law,” 87 *Am. J. Int’l L.* 529, B49 (1993). Whatever the theory, it is today clear that the international community attributes a very special moral and normative status to the Universal Declaration that no other instrument of its kind has acquired. *See, e.g.*, Vienna Declaration, Preamble, adopted at the World Conference on Human Rights, June, 1993.

**Roach *et al.* v. United States**  
*Case 9647, Inter-Am. C.H.R. 147,*  
*Annual Report 1986-1987, OEA/Ser.L/V/II.71, doc. 9 rev.1 (1987)*  
*[Footnotes omitted]*

**I. INTRODUCTION**

**A. Summary of the facts and the Petitioners' complaint**

1. The Petitioners are James Terry Roach and Jay Pinkerton who were sentenced to death and executed in the United States for crimes which they were adjudged to have committed, and which they perpetrated before their eighteenth birthdays.

2. The Petitioners are represented by David Weissbrodt and Mary McClymont. The American Civil Liberties Union and the International Human Rights Law Group have co-sponsored the complaint. Amnesty International also filed a petition with the Commission alleging that the imminent execution of James Terry Roach, while lawful in the United States, is a violation of international law. Eighteen organizations have communicated to the Commission their support of the complaint.

3. James Terry Roach was convicted of the rape and murder of a fourteen year old girl and the murder of her seventeen year old boyfriend. Roach committed these crimes at the age of seventeen and was sentenced to death in the General Session Court, Richland County, South Carolina on 16 December 1977. Roach petitioned the United States Supreme Court for a writ of certiorari on three separate occasions. All petitions were denied. Roach also exhausted all appeals to the state and federal courts, and on 10 January 1986 he was executed.

4. Jay Pinkerton was convicted of murder and attempted rape which he committed at the age of seventeen. The death sentence was appealed to the Texas Supreme Court which affirmed the trial court's decision. The United States Supreme Court denied Pinkerton's writ of certiorari on 7 October 1985. Pinkerton was executed on 15 May 1986.

5. On 23 February 1987, the U.S. Supreme Court announced that it would decide in its next term the case of *Thompson v. Oklahoma*, thereby, for the first time, taking up the issue of the execution of juvenile offenders. The constitutional issue presented is whether the execution of a juvenile offender violates the U.S. Constitution's prohibition on cruel and unusual punishment.

6. In their complaint to the Commission, the petitioners allege that the United States has violated Article I (right to life), Article VII (special protection of children), and Article XXVI (prohibition against cruel, infamous or unusual punishment) of the American Declaration of the Rights and Duties of Man by executing persons for crimes committed before their eighteenth birthday. The Petitioners allege a violation of their right to life guaranteed under the American Declaration, as

informed by customary international law, which prohibits the execution of persons who committed crimes under the age of eighteen.

....

### **III. SUBMISSIONS OF THE PARTIES**

#### **A. The Petitioners**

34. The Petitioners allege that the imposition of the death penalty on James Terry Roach and Jay Pinkerton by United States courts for crimes committed before their eighteenth birthday violated the American Declaration of the Rights and Duties of Man. Specifically, Petitioners allege violations of Article I (right to life), Article VII (special protection of children), and Article XXVI (cruel, infamous or unusual punishment) of the American Declaration as informed by customary international law which prohibits the imposition of the death penalty for crimes committed by juveniles under eighteen.

35. The Petitioners state that the United States is subject to the jurisdiction of the Commission as a member State of the Organization of American States and is obligated, therefore, to observe the enumerated rights in the American Declaration.

36. The Petitioners' case meets the admissibility requirements of Article 37 of the Commission's Regulations as the Petitioners have exhausted all domestic remedies. United States courts, both federal and state, have failed to address Petitioners' claims that the imposition of the death penalty on juvenile offenders is constitutionally prohibited.

37. The Petitioners' complaint may be summarized as follows:

- a. Imposition of the death penalty on juveniles violates the American Declaration as informed by customary international law.
- b. The United States is legally bound by the American Declaration of the Rights and Duties of Man. The American Declaration should be interpreted according to the canons of the Vienna Convention on the Law of Treaties because the Convention represents a world-wide consensus on how international instruments should be construed.
- c. Articles 31 and 32 of the Vienna Convention set out the principal interpretative norms for treaties and other international instruments. According to Article 31 of the Vienna Convention, the terms of the American Declaration should be interpreted in accordance with their ordinary meaning and in light of the object and purpose of the instrument. Construing Articles I, VII and XXVI together and in accordance with their ordinary meaning, and in light of the object and purpose of the Declaration, these articles should be interpreted to prohibit the execution of persons who committed offenses under the age of 18.

d. The U.S. Government is incorrect in asserting that the rights in the Declaration “must be interpreted in terms of the intentions of the member states at the time of the adoption of the Declaration, not in terms of changing norms of customary international law.” This rigid and static approach to the interpretation of the Declaration is in conflict with the terms of the Declaration, the norms of the Vienna Convention, the normal approach which international bodies take to human rights instruments, the practice of the Commission, and the practice of the United States in its own domestic cases. The preamble to the American Declaration states, “The international protection of the rights of man should be the principal guide of an evolving American law....”.

e. In construing the terms of the American Declaration in light of its object and purpose, the Commission should pay particular attention to Article XXVI which forbids “cruel, infamous or unusual punishment.” This is broader than the United States constitutional prohibition against cruel and unusual punishment. Juveniles are recognized as lacking in maturity and are most susceptible to various influences and psychological pressure. Killing a young person who has not had the chance to mature to adulthood is the “ultimate cruel punishment,” therefore, Article XXVI should be interpreted as a prohibition against the execution of juveniles. Then, on its ordinary meaning and in light of the object and purpose of these articles, the United States is violating the American Declaration by executing juveniles.

f. Article 31 of the Vienna Convention also looks to “relevant rules of international law” to help interpret treaties. Therefore, the Commission should take into account the customary international law norm prohibiting the execution of juvenile offenders. This prohibition has obtained the status of customary international law. Pursuant to Article 38(1)(b) of the Statute of the International Court of Justice, “international custom, as evidence of a general practice accepted as law” is one of the sources of international law. Treaties are clearly evidence of State practice, especially if accompanied by *opinio juris*, or claims in the treaty or the travaux préparatoires indicating that a treaty provision is a restatement of pre-existing customary laws.

g. The major human rights instruments such as the American Convention on Human Rights (Article 4(5)), the International Covenant on Civil and Political Rights (Article 6(5)), and the Fourth Geneva Convention prohibit the imposition of the death penalty on persons under eighteen years of age.

Article 4(5) of the American Convention reads: “Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.” The fourth Geneva Convention states in Article 68, in relevant part: In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.

As of January 1, 1986 there are 162 states parties to this Convention, including the United States. This Convention applies to periods of international armed conflict and Article 68 forbids the execution of civilians and military personnel no longer in combat, who committed offenses prior to the age of 18. If nearly all the nations of the world,

including the United States, have agreed to such a norm for periods of international armed conflict, the norm protecting juvenile offenders from execution ought to apply with even greater force for periods of peace.

h. In addition, approximately two-thirds of the nations of the world have either abolished the death penalty or have prohibited it for juveniles by adhering to these human rights instruments. Whereas the European “Convention for the Protection of Human Rights and Fundamental Freedoms” (1950), in Article 2 allowed the death penalty, an evolving abolitionist philosophy is reflected in Protocol No 6 which states “the death penalty shall be abolished. No one shall be condemned to such penalty or executed.”

Petitioners point out that the travaux préparatoires of these Conventions demonstrate that these prohibitions against juvenile executions are in fact codifications of customary international law as can be derived from the debates during the drafting of the provisions of these Conventions.

i. As further evidence of State practice, in terms of actually carrying out the death sentence, Petitioners submit evidence, compiled by Amnesty International, to the effect that since 1979, although 80 nations of the world have executed over 11,000 persons, only six persons who committed offenses under 18 were executed by four nations, including the United States.

In the United States, the laws of various jurisdictions which permit the use of the death penalty nonetheless recognize the uniqueness of juvenile offenders and at least 21 states set a minimum age for imposition of the death penalty. Therefore, although the data is incomplete, available information shows that national laws, as well as the practice of states not to execute minors, further demonstrate the existence of a customary law norm prohibiting execution of offenders who committed capital crimes as juveniles.

....

## **B. The Government**

38. The U.S. Government considers that the absence of a prohibition on the execution of juvenile offenders within United States domestic law is not inconsistent with human rights standards applicable to the United States. The Commission must look to the American Declaration for the relevant standards as the United States is not a party to the American Convention. The argument may be summarized as follows:

(a) The American Declaration is silent on the issue of capital punishment as Article I simply states, “Every human being has the right to life, liberty and the security of his person.” From the drafting history of the Declaration, there is evidence that Article I was not meant to affect the legislative discretion of the American states with respect to capital punishment. A Declaration that does not expressly limit the circumstances under which the death penalty may be imposed may not be interpreted as foreclosing the reasonable discretion of the American states to determine for themselves the minimum age at which

imposition of the death penalty is appropriate.

(b) The drafters considered and declined to adopt any specific standards on the issue of capital punishment. The reference to capital punishment prohibiting it except for exceptional crimes was deleted in the final draft. The debate surrounding Article I demonstrates that a standard on capital punishment could not be devised due to the diversity of State legislation in the hemisphere. Therefore, the States are able to legislate within their own discretion on the issue of capital punishment.

(c) Only Article I is at issue because if no standard on capital punishment was incorporated into the American Declaration, then a prohibition against the execution of juveniles could not be “silently subsumed” within the other rights. Article VII on the special protection and care of women and children was not contemplated to extend to juveniles convicted of serious crimes. There is no official record of the drafters’ intentions but the use of the word “children” was not meant to refer to juveniles nearing their eighteenth year.

There is also no official record of the drafters’ intentions with regard to the prohibition against “cruel, infamous or unusual punishment” of Article XXVI. However, at the time of the drafting the death penalty was widely practiced and therefore, could not be considered cruel or unusual.

None of the three articles of the Declaration cited by petitioners addresses the death penalty or establishes any particular age of majority. The U.S. Government believes that the Declaration is deliberately silent on the issue of capital punishment. Therefore, there purposely is no limitation on the legislative prerogative of the American States regarding the imposition of the death sentence.

(d) The Vienna Convention should not be relied on to interpret the American Declaration as the Declaration is not a treaty and it is not binding on the United States. The U.S. Government does not agree with the Commission’s holding in Case No 2141 (United States) that the Declaration acquired binding force with the adoption of the revised OAS Charter. Res. 23/81, OAS/Ser. L/V/II.52, Doc. 48., Mar. 6, 1981. The Declaration was not drafted with the intent to create legal obligations, therefore the Commission should take special care “where the intentions of the drafters are manifest with respect to any particular article,” not to overturn that meaning.

Even assuming the Vienna Convention could be applied to the Declaration, the Petitioners have not shown the “clear meaning” of Articles I, VII, or XXVI. Each is “ambiguous” with respect to the prohibition of the death penalty on juveniles. Therefore, recourse to the travaux préparatoires is necessary.

(e) The petitioners request that the Commission look to the American Convention and other international instruments to “interpret” the Declaration as encompassing the standard of Article 4(5). This requires the Commission to go far beyond its interpretative powers. Specific standards in the American Convention, such as the prohibition against the execution of those who committed crimes under eighteen years of age, are binding

only on those parties to the Convention. These standards were not accepted by the United States.

(f) The three human rights instruments mentioned by petitioners are irrelevant to the Commission's consideration of the case. The United States is not a party to the International Covenant nor the American Convention, and standards cannot be imposed by "interpretation" on a State which is not a party. See, Case No 2141 (United States). In addition, the United States delegate at the drafting of the American Convention pointed out that the United States had problems with Article 4(5)'s arbitrary age limit of 18 conflicting with its federal structure.

(g) Petitioners are also incorrect in stating that Article 4(5) of the American Convention is declaratory of customary international law. The age of majority for purposes of imposing the penalty is not a matter of uniform state practice. Some countries desired a specific age limit while others wanted reference only to "minors" or "juveniles" during the drafting of the International Covenant's Article 6(5), demonstrating that they were not codifying an already existing binding norm. Instead, this was a specific standard intended to create uniformity where none existed.

At the same time, there is no evidence of *opinio juris*. Even the states which have enacted prohibitions against the execution of those who committed crimes before their eighteenth birthday did not do so out of any sense of legal obligation. Since the American Convention and the International Covenant have been enacted, any changes in state legislation cannot be viewed as evidence of a generally applicable customary rule of law. "Relevant rules of law" must exist apart from any conventional or treaty standards. "Simply because states in the U.S. or other nations have chosen eighteen as the age of majority does not impose an obligation that other states must choose the exact same age."

(h) The U.S. Government does not acknowledge the existence of a customary international law norm which prohibits the execution of juveniles. To establish a norm of customary law there must be "extensive and virtually uniform" state practice and second, evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The rule must be recognized as a legal obligation based on the custom or practice of states. In this case, there is neither the uniformity of state practice, nor the required *opinio juris* to regard the standard as a binding norm of customary international law.

(i) The U.S. Government further maintains that it has dissented from such a standard. It abstained from participating in the debate and vote on the draft International Covenant, and submitted it to the U.S. Senate with reservations. The United States also opposed Article 4(5) of the American Convention, and when president Carter signed the American Convention he proposed the Senate advice and consent to ratification of the treaty be accompanied by a reservation stating that "United States adherence to Article 4 is subject to the Constitution and other law of the United States." Four Treaties Pertaining to Human Rights, Message from the President of the United States, S. Doc. No Exec. C, D, E, 8F, at xii, 95th Cong., 2d Sess (1978).

The U.S. Government concludes its brief by stating that “There is no basis in international law for applying to the United States a standard taken from treaties to which it is not a party and which it has indicated it will not accept when it becomes a treaty.”

(j) The U.S. Government requests the Commission to hold that the recent executions are not inconsistent with the American Declaration.

....

## **V. OPINION OF THE COMMISSION**

### **A. Point at issue**

43. The question presented by the petitioners in the present case is whether the absence of a federal prohibition within U.S. domestic law on the execution of persons who committed serious crimes under the age of 18 is inconsistent with human rights standards applicable to the United States under the inter-American system.

Crimes in the United States fall under either state or federal jurisdiction. A defendant may be tried in federal court if he is charged with the commission of a crime under federal law, or he may appeal to a federal court from a state court under certain circumstances. A great deal of autonomy has been left to the states in prescribing the appropriate punishment for criminal conduct. However, all punishment must be in conformity with the United States Constitution as interpreted by the Supreme Court.

### **B. The international obligation of the United States under the American Declaration**

44. The American Declaration is silent on the issue of capital punishment. Article I of the American Declaration reads as follows:

Every human being has the right to life, liberty and the security of his person.

45. The American Convention on Human Rights, on the other hand, refers specifically to capital punishment in five of its provisions. Article 4 of the American Convention, which protects the right to life, reads as follows:

#### Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the

most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

46. The international obligation of the United States of America, as a member of the Organization of American States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights is governed by the Charter of the OAS (Bogotá, 1948), as amended by the Protocol of Buenos Aires on 27 February 1967, ratified by the United States on 23 April 1968.

47. The United States is a member State of the Organization of American States, but is not a State party to the American Convention on Human Rights, and, therefore, cannot be found to be in violation of Article 4(5) of the Convention, since as the Commission stated in Case 2141 (United States), para. 31: “it would be impossible to impose upon the United States Government or that of any other State member of the OAS, by means of ‘interpretation,’ an international obligation based upon a treaty that such State has not duly accepted or ratified.”

48. As a consequence of articles 3(j), 16, 51(e), 112 and 150 of the Charter, the provisions of other instruments of the OAS on human rights acquired binding force.. Those instruments, approved with the vote of the U.S. Government, are the following:

- American Declaration of the Rights and Duties of Man (Bogotá, 1948)
- Statute and Regulations of the IACHR

49. The Statute provides that, for the purpose of such instruments, the IACHR is the organ of the OAS entrusted with the competence to promote the observance of and respect for human rights. For the purpose of the Statute, human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the American Convention on Human Rights (San José, 1969).

### C. The Petitioners' argument

50. The central violation denounced in the petition concerns a violation of the right to life, Article I of the Declaration, which states: "Every human being has the right to life..." Since the Declaration is silent on the issue of capital punishment, Petitioners, in connection with Article I, seek an affirmative response to the question: Is there a norm of customary international law which prohibits the imposition of the death penalty on persons who committed capital crimes before completing eighteen years of age?

51. The elements of a norm of customary international law are the following:

- a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;
- b) a continuation or repetition of the practice over a considerable period of time;
- c) a conception that the practice is required by or consistent with prevailing international law; and
- d) general acquiescence in the practice by other states

52. The evidence of a customary rule of international law requires evidence of widespread state practice. Article 38 of the Statute of the International Court of Justice (I.C.J.) defines "international custom, as evidence of a general practice accepted as law." The customary rule, however, does not bind States which protest the norm.

....

How many states need to engage in the state practice for it to acquire the authority of a customary norm has never been definitively established, but it is clear that while a universal practice is not necessary, the practice must be common and widespread.

53. The U.S. Government, in December 1977, transmitted the American Convention on Human Rights, *inter alia*, to the U.S. Senate for advice and consent to ratification subject to specified reservations. As regards the issue in question, the U.S. Government proposed reservations to Articles 4 and 5 which were presented as follows:

Article 4 deals with the right to life generally, and includes provisions on capital punishment. Many of the provisions of Article 4 are not in accord with United States law and policy, or deal with matters in which the law is unsettled. The Senate may wish to enter a reservation as follows: "United States adherence to Article 4 is subject to the Constitution and other law of the United States."

[Article [5)], [p]aragraph 5 requires that minors subject to criminal proceedings are to be

separated from adults and brought before specialized tribunals as speedily as possible. (...) With respect to paragraph (5), the law reserves the right to try minors as adults in certain cases and there is no present intent to revise these laws. The following statement is recommended:

“The United States (...) with respect to paragraph (5), reserves the right in appropriate cases to subject minors to procedures and penalties applicable to adults.”

54. Since the United States has protested the norm, it would not be applicable to the United States should it be held to exist. For a norm of customary international law to be binding on a State which has protested the norm, it must have acquired the status of jus cogens. Petitioners do not argue that a rule prohibiting the execution of juvenile offenders has acquired the authority of jus cogens, a peremptory norm of international law from which no derogation is permitted. The Commission, however, is not a judicial body and is not limited to considering only the submissions presented by the parties to a dispute.

#### **D. General principles applicable to the present case**

55. The concept of jus cogens is derived from ancient law concepts of a “superior order” of legal norms, which the laws of man or nations may not contravene. The norms of jus cogens have been described by publicists as comprising “international public policy.” They are “rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary to protect the public interest of the society of States or to maintain the standards of public morality recognized by them.”

According to Ian Brownlie, the major distinguishing feature of rules of jus cogens is their “relative indelibility.” Brownlie suggests certain examples of jus cogens such as: “the prohibition of aggressive war, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.”

Since the acceptance of norms of jus cogens is still subject to some debate in some sectors, it might be argued that the International Court of Justice did not consider the prohibition against genocide, for example, to be a norm of jus cogens. It has been argued, however, that the World Court has made “indirect references” to the concept of jus cogens, without actually calling it such by name, in the advisory opinion on the Reservations to the Genocide Convention case, in which the Court stated:

... that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.

The rule prohibiting genocide would be binding on States not parties to the Genocide Convention, even if derived only from customary international law, without having acquired the status of jus cogens, but it achieves the status of jus cogens precisely because it is the kind of rule

that it would shock the conscience of mankind and the standards of public morality for a State to protest.

The International Court of Justice, in a later case, categorized the prohibition of genocide as an obligation erga omnes. Whereas the ICJ does not make reference to the concept jus cogens, it has been suggested that the examples given of obligations erga omnes are examples of what the ICJ would consider to be norms of jus cogens. The following distinction between obligations of a State vis-à-vis the international community (erga omnes) and vis-à-vis another State is taken from the judgment in the Barcelona Traction case:

In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

Obligations the performance of which is the subject of diplomatic protection are not of the same category.

As to whether “the principles and rules concerning the basic rights of the human person” is intended to mean that all codified human rights provisions contained in international treaties are embraced by the concept of jus cogens is an issue that is both controversial and beyond the scope of the matter presented for the Commission to decide.

56. The Commission finds that in the member States of the OAS there is recognized a norm of

ius cogens which prohibits the State execution of children. This norm is accepted by all the States of the inter-American system, including the United States. The response of the U.S. Government to the petition in this case affirms that “[A]ll states, moreover, have juvenile justice systems; none permits its juvenile courts to impose the death penalty.”

57. The Commission finds that this case arises, not because of doubt concerning the existence of an international norm as to the prohibition of the execution of children but because the United States disputes the allegation that there exists consensus as regards the age of majority. Specifically, what needs to be examined is the United States law and practice, as adopted by different states, to transfer adolescents charged with heinous crimes to adult criminal courts where they are tried and may be sentenced as adults.

....

60. The Commission is convinced by the U.S. Government’s argument that there does not now exist a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty. Nonetheless, in light of the increasing numbers of States which are ratifying the American Convention on Human Rights and the United Nations Covenant on Civil and Political Rights, and modifying their domestic legislation in conformity with these instruments, the norm is emerging. As mentioned above, thirteen states and the U.S. capital have abolished the death penalty entirely and nine retentionist states have abolished it for offenders under the age of 18.

61. The Commission, however, does not find the age question dispositive of the issue before it, which is whether the absence of a federal prohibition within U.S. domestic law on the execution of juveniles, who committed serious crimes under the age of 18, is in violation of the American Declaration.

62. The Commission finds that the diversity of state practice in the U.S—reflected in the fact that some states have abolished the death penalty, while others allow a potential threshold limit of applicability as low as 10 years of age—results in very different sentences for the commission of the same crime. The deprivation by the State of an offender’s life should not be made subject to the fortuitous element of where the crime took place. Under the present system of laws in the United States, a hypothetical sixteen year old who commits a capital offense in Virginia may potentially be subject to the death penalty, whereas if the same individual commits the same offense on the other side of the Memorial Bridge, in Washington, D.C., where the death penalty has been abolished for adults as well as for juveniles, the sentence will not be death.

63. For the federal Government of the United States to leave the issue of the application of the death penalty to juveniles to the discretion of state officials results in a patchwork scheme of legislation which makes the severity of the punishment dependent, not, primarily, on the nature of the crime committed, but on the location where it was committed. Ceding to state legislatures the determination of whether a juvenile may be executed is not of the same category as granting

states the discretion to determine the age of majority for purposes of purchasing alcoholic beverages or consenting to matrimony. The failure of the federal government to preempt the states as regards this most fundamental right—the right to life—results in a pattern of legislative arbitrariness throughout the United States which results in the arbitrary deprivation of life and inequality before the law, contrary to Articles I and II of the American Declaration of the Rights and Duties of Man, respectively.

## CONCLUSION

64. The Commission concludes, by 5 votes to 1, that the United States Government violated Article I (right to life) of the American Declaration of the Rights and Duties of Man in executing James Terry Roach and Jay Pinkerton.

65. The Commission concludes, by 5 votes to 1 that the United States Government violated Article II (right to equality before the law) of the American Declaration of the Rights and Duties of Man in executing James Terry Roach and Jay Pinkerton.

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**Interpretation of the American Declaration of the Rights and Duties of Man  
Within the Framework of Article 64 of the American Convention on Human Rights**  
*Inter-Am. Ct. H.R., Interpretation of the American Declaration of the Rights and Duties of Man  
Within the Framework of Article 64 of the American Convention on Human Rights,  
Advisory Opinion OC-10/89 of July 14, 1989, (ser. A) No. 10 (1989)*

30. Article 64(1) of the Convention authorizes the Court to render advisory opinions “regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.” That is, the object of the advisory opinions of the Court are treaties (see generally “Other Treaties,” supra 27).

31. According to the Vienna Convention on the Law of Treaties of 1969

“‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (Art. 2(1)(a)).”

32. The Vienna Convention of 1986 on the Law of Treaties among States and International Organizations or among International Organizations provides as follows in Article 2(1)(a):

“‘treaty’ means an international agreement governed by international law and concluded

in written form:

(i) between one or more States and one or more international organizations; or

(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

33. In attempting to define the word “treaty” as the term is employed in Article 64(1), it is sufficient for now to say that a “treaty” is, at the very least, an international instrument of the type that is governed by the two Vienna Conventions. Whether the term includes other international instruments of a conventional nature whose existence is also recognized by those Conventions (Art. 3, Vienna Convention of 1969; Art. 3, Vienna Convention of 1986), need not be decided at this time. What is clear, however, is that the Declaration is not a treaty as defined by the Vienna Conventions because it was not approved as such, and that, consequently, it is also not a treaty within the meaning of Article 64(1).

34. Here it must be recalled that the American Declaration was adopted by the Ninth International Conference of American States (Bogotá, 1948) through a resolution adopted by the Conference itself. It was neither conceived nor drafted as a treaty. Resolution XL of the Inter-American Conference on the Problems of War and Peace (Chapultepec, 1945) expressed the belief that in order to achieve the international protection of human rights, the latter should be listed and defined “in a Declaration adopted as a Convention by the States.” In the subsequent phase of preparation of the draft Declaration by the Inter-American Juridical Committee and the Ninth Conference, this initial approach was abandoned and the Declaration was adopted as a declaration, without provision for any procedure by which it might become a treaty (Novena Conferencia Internacional Americana, 1948, Actas y Documentos. Bogotá: Ministerio de Relaciones Exteriores de Colombia, 1953, vol. I, pp. 235-236). Despite profound differences, in the Sixth Committee of the Conference the position prevailed that the text to be approved should be a declaration and not a treaty (see the report of the Rapporteur of the Sixth Committee, Novena Conferencia Internacional Americana, 1948, Actas y Documentos. Bogotá: Ministerio de Relaciones Exteriores de Colombia, 1953, vol. V, p. 512).

In order to obtain a consensus, the Declaration was conceived as

“the initial system of protection considered by the American states as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable (American Declaration, Fourth Considerandum).”

This same principle was confirmed on September 26, 1949, by the Inter-American Committee of Jurisconsults, when it said:

“It is evident that the Declaration of Bogotá does not create a contractual juridical obligation, but it is also clear that it demonstrates a well-defined orientation toward the international protection of the fundamental rights of the human person (C.J.I., *Recomendaciones e informes, 1949-1953* (1955), p. 107. See also U. S. Department of State, *Report of the Delegation of the United States to the Ninth International Conference of American States, Bogotá, Colombia, March 30-May 2, 1948*, at 35-36 (Publ. No. 3263, 1948)).”

35. The mere fact that the Declaration is not a treaty does not necessarily compel the conclusion that the Court lacks the power to render an advisory opinion containing an interpretation of the American Declaration.

36. In fact, the American Convention refers to the Declaration in paragraph three of its Preamble which reads as follows:

“Considering that these principles have been set forth in the Charter of the Organization of the American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope.”

And in Article 29(d) which indicates:

“Restrictions Regarding Interpretation

No provision of this convention shall be interpreted as:

d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

From the foregoing, it follows that, in interpreting the Convention in the exercise of its advisory jurisdiction, the Court may have to interpret the Declaration.

37. The American Declaration has its basis in the idea that “the international protection of the rights of man should be the principal guide of an evolving American law” (Third Considerandum). This American law has evolved from 1948 to the present; international protective measures, subsidiary and complementary to national ones, have been shaped by new instruments. As the International Court of Justice said: “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 ad 31). That is why the Court finds it necessary to point out that to determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the revolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which

that instrument was believed to have had in 1948.

38. The evolution of the here relevant “inter-American law” mirrors on the regional level the developments in contemporary international law and especially in human rights law, which distinguished that law from classical international law to a significant extent. That is the case, for example, with the duty to respect certain essential human rights, which is today considered to be an erga omnes obligation (Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 3. For an analysis following the same line of thought see also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) supra 37, p. 16 ad 57; cfr. United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 3 ad 42).

39. The Charter of the Organization refers to the fundamental rights of man in its Preamble ((paragraph three) and in Arts. 3(j), 16, 43, 47, 51, 112 and 150; Preamble (paragraph four), Arts. 3(k), 16, 44, 48, 52, 111 and 150 of the Charter revised by the Protocol of Cartagena de Indias), but it does not list or define them. The member states of the Organization have, through its diverse organs, given specificity to the human rights mentioned in the Charter and to which the Declaration refers.

40. This is the case of Article 112 of the Charter (Art. 111 of the Charter as amended by the Protocol of Cartagena de Indias) which reads as follows:

“There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.

An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.”

Article 150 of the Charter provides as follows:

“Until the inter-American convention on human rights, referred to in Chapter XVIII (Chapter XVI of the Charter as amended by the Protocol of Cartagena de Indias), enters into force, the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights.”

41. These norms authorize the Inter-American Commission to protect human rights. These rights are none other than those enunciated and defined in the American Declaration. That conclusion results from Article 1 of the Commission’s Statute, which was approved by Resolution No. 447, adopted by the General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979. That Article reads as follows:

“1. The Inter-American Commission on Human Rights is an organ of the Organization of

the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.

2. For the purposes of the present Statute, human rights are understood to be:

a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;

b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.”

Articles 18, 19 and 20 of the Statute enumerate these functions.

42. The General Assembly of the Organization has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS. For example, in Resolution 314 (VII-O/77) of June 22, 1977, it charged the Inter-American Commission with the preparation of a study to “set forth their obligation to carry out the commitments assumed in the American Declaration of the Rights and Duties of Man.” In Resolution 371 (VIII-O/78) of July 1, 1978, the General Assembly reaffirmed “its commitment to promote the observance of the American Declaration of the Rights and Duties of Man,” and in Resolution 370 (VIII-O/78) of July 1, 1978, it referred to the “international commitments” of a member state of the Organization to respect the rights of man “recognized in the American Declaration of the Rights and Duties of Man.” The Preamble of the American Convention to Prevent and Punish Torture, adopted and signed at the Fifteenth Regular Session of the General Assembly in Cartagena de Indias (December, 1985), reads as follows:

“Reaffirming that all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations and are violations of the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights.”

43. Hence it may be said that by means of an authoritative interpretation, the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter. Thus the Charter of the Organization cannot be interpreted and applied as far as human rights are concerned without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the Declaration.

44. In view of the fact that the Charter of the Organization and the American Convention are treaties with respect to which the Court has advisory jurisdiction by virtue of Article 64(1), it follows that the Court is authorized, within the framework and limits of its competence, to interpret the American Declaration and to render an advisory opinion relating to it whenever it is

necessary to do so in interpreting those instruments.

45. For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.

46. For the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself. It must be remembered, however, that, given the provisions of Article 29(d), these States cannot escape the obligations they have as members of the OAS under the Declaration, notwithstanding the fact that the Convention is the governing instrument for the States Parties thereto.

47. That the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it within the framework of the principles set out above.

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**Article 75 § 22**  
**Constitution of Argentina**

*<<http://www.chanrobles.com/argentina.htm>>*

Congress is empowered:

....

22. To approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House. In

order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress

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**Article 46**  
**Constitution of Nicaragua**  
*reprinted in 13 Constitutions of the Countries of the World*  
*(Gisbert H. Flanz Ed., Oceana Publications Inc., 1993)*

All persons in the national territory shall enjoy State protection and recognition of the rights inherent to the human person, as well as unrestricted respect, promotion and protection of those human rights, and the full applicability of the rights set forth in the Universal Declaration of Human Rights; in the American Declaration of the Rights of Duties of Man; in the International Pact of Economic, Social and Cultural Rights; in the International Pact of Civil and Political Rights of the United Nations; and in the American Convention of Human Rights of the Organization of American States.

**Questions**

1. Is the Universal Declaration of Human Rights binding? Does the Universal Declaration have the same legal status today as when it was approved in 1948? In your opinion, what processes have occurred that could assist you in answering this question? If you believe there has been a change in the legal status of the Declaration, do you think it affects all of the rights recognized? If not all, which rights would you single out? Would this suggest a hierarchy of rights?
2. According to the jurisprudence of the Inter-American Commission and Court, is the American Declaration binding for the OAS Member States? Do you detect a difference of opinion between the Commission and the Court when construing the binding character of the American Declaration? If so, which is the better view?
3. How would you apply these Declarations if the Constitution of your country grants them constitutional status (*See* constitutional provisions of Argentina and Nicaragua)? Do you think that by conferring constitutional status upon these Declarations, a State would be recognizing this binding character under international law?

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**3. TREATIES: APPLICABLE PRINCIPLES**

## *Comment*

The purpose of this section is to analyze some of the relevant questions regarding the application of international human rights treaties, especially the American Convention on Human Rights. In this context, we include the general criteria for interpreting a treaty and questions regarding the scope of the rights recognized by the Convention.

### **a. General Criteria for Treaty Interpretation**

**ROSALYN HIGGINS, PROBLEMS & PROCESS:  
INTERNATIONAL LAW AND HOW TO USE IT 32-35 (1994)<sup>3</sup>  
[Footnotes omitted]**

#### **Sources of Law and Legal Obligations**

Article 38 of the Statute speaks of general or special conventions as a source of law. Thus bilateral or multilateral conventions each have a place in the sources of international law.

It has been suggested by Fitzmaurice that treaties are not a source of law *stricto sensu*, but only a source of obligation between the parties. Judge Sir Robert Jennings has spoken of this as an insight whose truth, upon reflection, is apparent. Fitzmaurice's point is general, because he suggested that a treaty either contained already accepted norms, which themselves were thus the source of the law, or contained new provisions, which were an exchange of obligations between the treaty parties. But his observation is particularly striking in relation to bilateral treaties, where the rehearsal of existing norms is often relatively muted, and the exchange of new bilateral obligations of behaviour is often particularly marked.

Is this distinction correct, and if so, is it meaningful? It is largely a definitional matter. If existing norms are repeated in a treaty, an obligation would exist in respect of those norms, even were they not contained in that treaty. This is exactly the point illustrated by the International Court of Justice—in somewhat controversial circumstances, to be sure—when it applied customary norms relating to the use of force even when it decided that its jurisdictional competence did not extend to the application of the provisions of Article 2(4) and Article 51 of the UN Charter. But of course multilateral treaties rarely simply repeat existing norms. Sometimes broad norms are

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<sup>3</sup> Reprinted from *Problems and Process, International Law and How to Use it*, Rosalyn Higgins, 1994, ©1994 Oxford University Press, by permission of the publisher.

filled out as to detail; sometimes existing norms will in a treaty be placed side by side with new norms. (The Vienna Convention on Diplomatic Relations provides a useful example. Much of it was declaratory of existing international law. A few provisions—such as the simple prohibition on a right to search diplomatic bags, which replaced the entitlement of a state to return a bag unopened if a state was not willing to submit it to search—were new.)

In so far as a treaty contains provisions not reflective of prior customary international law, it is true, as Fitzmaurice has said, that it provides for an exchange of obligations between the parties. But does it mean to say that this is therefore not a source of law? It can only mean that Fitzmaurice viewed law as something in respect of which an ‘obligation’ existed—that is, that ‘law’ and ‘obligation’ were two different phenomena. If State A and State B agree upon cultural exchanges, there would be an *obligation* existing between them, but no *law* of cultural exchange.

What it seems to boil down to is that, in the Fitzmaurice view, if obligations are binding only upon parties who agree to them, and no others (because they are new, albeit contained in a treaty), they are not law. The argument has now become one of definition. It is of course possible to choose to define law as norms of universal application. There is an echo of this view in the position taken by Professor Tunkin in 1956 when he wrote that decisions of the UN Security Council are not strictly speaking sources of international law. They have an *ad hoc* effect and may create binding obligations but are not of general application beyond the moment and effect to which they are directed. But it is equally possible to take a different definitional position, and to define law not as norms of general application, but as the conjoining of authority and law in a particular target. On that view law *embraces* obligation, and a Security Council resolution or a treaty commitment is still law for the addressee or ratifying party, and no less so because it is not obligatory on the world at large.

Looked at from this starting-point, custom is obligation involuntarily undertaken—that is, not based on the consent of any given state. No state has a veto over the emergence of a customary norm, which attains its status as such through repeated practice accomplished by *opinio juris*. Occasional views have been expressed to the contrary.

But this is really a different phenomenon—that of *non-opposability*. Where does non-opposability fit into our study of sources? A treaty is non-opposable to third parties, unless they accept its terms or unless it is a treaty whose terms a third party inherits by virtue of the law of state succession of treaties. States can also contribute to the formation of customary international law by unilateral practice. Striking examples of that phenomenon have been the Truman Proclamation, and other such unilateral acts, being the first claims of rights over the continental shelf; and the Norwegian claims to draw straight baselines on heavily indented coastlines. The Court found that the unilateral practice in the latter case was opposable to the United Kingdom, because of its failure of consistent protest. But we should not draw from that the conclusion that, if it had protested, it would not have been bound by an emerging customary rule of law. The role of protest is to slow the formation of the new legal rule, or to prevent a unilateral act from being opposable. But, if a rule of general application does emerge (perhaps because the phenomenon is

a more general one, widely practiced), then an initially protesting state will not remain exempt from the application of the new customary rule.

We may summarize the discussion on *sources* and *obligations* as follows. General international law creates and contains norms which are always obligatory. Treaties, in so far as they repeat the existing norms, create neither the norms nor the obligation. Law-making treaties that seek to develop new norms are both the source of the creation of the norm (though of course one can say the treaty is the vehicle for the *consent* that created the norm) and the mechanism for making it obligatory upon the ratifying parties. If treaties are concerned with norm-creation or elaboration *and* obligation, then there are other ways by which *obligations simpliciter* are undertaken. Thus treaties can be made opposable to a third party, by specific acceptance of their contents or, in certain categories of treaties, by state succession to such a treaty when it has been concluded by a state to which another state succeeds. Again, unilateral acts may be the source of an obligation undertaken but not of the norm which thereby becomes opposable.

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**Article 31**  
**General rule of interpretation**  
**Vienna Convention on the Law of Treaties**

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

**Article 32**  
**Supplementary means of interpretation**  
**Vienna Convention on the Law of Treaties**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

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**Restrictions to the Death Penalty**  
**(Arts. 4(2) and 4(4) of the American Convention on Human Rights)**  
*Inter-Am. Ct. H.R., Restrictions to the Death Penalty*  
*(Arts. 4(2) and 4(4) of the American Convention on Human Rights),*  
*Advisory Opinion OC-3/83 of September 8, 1983, (ser. A) No. 3 (1983)*

47. The questions formulated by the Commission present a number of more general issues which need to be explored. In the first place, in order to interpret Article 4(2) of the Convention, it is necessary to determine within what context that treaty envisages the application of the death penalty, which in turn calls for the interpretation of Article 4 as a whole. In the second place, it is also necessary to determine what general principles apply to the interpretation of a reservation which, although authorized by the Convention, nevertheless restricts or weakens the system of protection established by that instrument. Finally, it is necessary to resolve the specific hypothetical question that has been submitted to the Court.

48. The manner in which the request for the advisory opinion has been framed reveals the need to ascertain the meaning and scope of Article 4 of the Convention, especially paragraphs 2 and 4, and to determine whether these provisions might be interrelated. To this end, the Court will apply the rules of interpretation set out in the Vienna Convention, which may be deemed to state the relevant international law principles applicable to this subject.

49. These rules specify that treaties must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its

object and purpose.” [Vienna Convention, Art. 31(1).] Supplementary means of interpretation, especially the preparatory work of the treaty, may be used to confirm the meaning resulting from the application of the foregoing provisions, or when it leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. (Ibid., Art. 32.)

50. This method of interpretation respects the principle of the primacy of the text, that is, the application of objective criteria of interpretation. In the case of human rights treaties, moreover, objective criteria of interpretation that look to the texts themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the Parties. This is so because human rights treaties, as the Court has already noted, “are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States;” rather “their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States.” (The Effect of Reservations, supra 42, para. 29.)

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**Proposed Amendments to the Naturalization Provisions  
of the Constitution of Costa Rica**  
*Inter-Am. Ct. H.R., Proposed Amendments to the  
Naturalization Provisions of the Constitution of Costa Rica,  
Advisory Opinion OC-4/84 of January 19, 1984, (ser. A) No. 4 (1984)*

21. This Court has determined, moreover, that “the rules of interpretation set out in the Vienna Convention [on the Law of Treaties]...may be deemed to state the relevant international law principles applicable to this subject.” [Restrictions to the Death Penalty, supra 19, par. 48.]

22. In determining whether the proposed legislation to which the request relates may form the basis of an advisory opinion under Article 64(2), the Court must therefore interpret the Convention “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” [Vienna Convention on the Law of Treaties, Article 31(1); Restrictions to the Death Penalty, supra 19, par. 49.]

23. It follows that the “ordinary meaning” of terms cannot of itself become the sole rule, for it must always be considered within its context and, in particular, in the light of the object and purpose of the treaty. In its Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations, the International Court of Justice declared that “the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty,

is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur” [Competence of the General Assembly for the Admission of a State to the United Nations. Advisory Opinion, I.C.J. Reports 1950, p. 8], which of necessity includes the object and purpose as expressed in some way in the context.

24. The Court has held [Restrictions to the Death Penalty, supra 19, par. 47] in dealing with reservations, but this argument is equally valid when applied to the articles of the Convention, that the interpretation to be adopted may not lead to a result that “weakens the system of protection established by [the Convention],” bearing in mind the fact that the purpose and aim of that instrument is “the protection of the basic rights of individual human beings.” [I/A Court H.R., 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, par. 29.]

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**Article 29**  
**Restriction Regarding Interpretation**  
**American Convention on Human Rights**

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

**Compulsory Membership in an Association Prescribed  
by Law for the Practice of Journalism**

*Inter-Am. Ct. H.R., Compulsory Membership in an Association Prescribed by Law for the  
Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights),  
Advisory Opinion OC-5/85 of November 13, 1985, (ser. A) No. 5 (1985)*

51. With respect to the comparison between the American Convention and the other treaties already mentioned, the Court cannot avoid a comment concerning an interpretation suggested by Costa Rica in the hearing of November 8, 1985. According to this argument, if a right recognized in the American Convention were regulated in a more restrictive way in another international human rights instrument, the interpretation of the American Convention would have to take those additional restrictions into account for the following reasons:

“If it were not so, we would have to accept that what is legal and permissible on the universal plane would constitute a violation in this hemisphere, which cannot obviously be correct. We think rather that with respect to the interpretation of treaties, the criterion can be established that the rules of a treaty or a convention must be interpreted in relation with the provisions that appear in other treaties that cover the same subject. It can also be contended that the provisions of a regional treaty must be interpreted in the light of the concepts and provisions of instruments of a universal character. . . .”

It is true, of course, that it is frequently useful—and the Court has just done it—to compare the American Convention with the provisions of other international instruments in order to stress certain aspects concerning the manner in which a certain right has been formulated, but that approach should never be used to read into the Convention restrictions that are not grounded in its text. This is true even if these restrictions exist in another international treaty.

52. The foregoing conclusion clearly follows from the language of Article 29 which sets out the relevant rules for the interpretation of the Convention. Subparagraph (b) of Article 29 indicates that no provision of the Convention may be interpreted as “restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.”

Hence, if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.

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**Case of Jorge Daniel Arce**  
***Recurso de casación***<sup>4</sup>

*Supreme Court of Argentina, Judgment of October 14, 1997 (1997)*

Considering:

1) That against the judgment of the Oral Criminal Tribunal N° 15 which sentenced Jorge Daniel Arce and Pablo Armando Miranda or José Antonio Gramajo to five and six years of prison, respectively, the prosecutor filed a *recurso de casación* contesting the application of article 458 of the National Code of Criminal Procedure insofar as it prevents the Public Prosecutor's Office from resorting to this remedy when, as in this case, one of the situations described in parts 1 or 2 of this norm occurs.

2) That the National Chamber of Criminal Appeals to the Supreme Court declared that the *recurso de casación* was erroneously granted, and, based on previous jurisprudence of this Court, it found that the limit established in article 458 of the National Code of Criminal Procedure was properly applied. Likewise, it stated that the American Convention on Human Rights—which recognizes the right to appeal—is not applicable to those State organs that file the criminal appeal (pp. 639/641), because the main purpose of the Convention is to protect and guarantee the fundamental rights of human beings. The representative of the Public Prosecutor's Office filed an extraordinary appeal against this decision, arguing that the American Convention does not exclude the Public Prosecutor's Office from the scope of its protection, and that the decision violated the guarantees of due process and equality under the law (arts. 18 and 16 of the National Constitution).

....

4) That this Court understood in the *Girolodi* case—Judgments 318:514—that the most appropriate way to ensure the constitutional guarantee of the right to appeal to a higher tribunal was to declare art. 459(2) of the National Code of Criminal Procedure unconstitutional, insofar as it disallowed the admissibility of a *recurso de casación* filed on behalf of the accused against the judgments of criminal courts with regard to the length of a sentence. It remains to be analyzed now whether the previously invoked guarantee enshrined in the American Convention is applicable to the Public Prosecutor's Office.

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<sup>4</sup> *Editor's note:* Under Argentinian law, *casación* is a remedy that can be filed to question a judgment on the grounds that it did not observe or misapplied the law.

5) That art. 75(22), second paragraph, of the 1994 constitutional reform grants constitutional hierarchy to the American Convention on Human Rights, which stipulates that, “Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ... the right to appeal the judgment to a higher court” (art. 8(2)(h)).

6) That the first analysis turns on the meaning of the term “person” in art. 8, paragraph 2 of the American Convention on Human Rights. The Preamble and art. 1 of the Convention establish that “person” means every human being. Thus, it is fitting to apply the hermeneutic principle that when a law is clear and does not demand greater interpretive effort, its direct application is the only possible option (Judgments: 218:56). On the other hand, the guarantees emanating from human rights treaties must be understood in terms of the protection of the essential rights of human beings, not for the benefit of the contracting parties. The jurisprudence of the Inter-American Court of Human Rights serves as a guide for the interpretation of the Convention; and given the Argentine State’s recognition of the Court’s competence to hear all of the cases relative to the interpretation and application of the Convention’s precepts (see arts. 41, 62 and 64 of the Convention and art. 2 of law 23.054), the Court’s assertion that: “the States...assume various obligations, not in relation to other States, but to the individuals under their jurisdiction” (OC-2/82, September 24, 1982, para. 29) is relevant to this case.

7) That, likewise, it is appropriate to examine the scope of art. 8(2)(h) of the American Convention. Among the international agreements enumerated in art. 75(22), second paragraph, of the 1994 constitutional reform is the International Covenant on Civil and Political Rights (ICCPR). That treaty sheds light on the question posed from two perspectives. First, the treaties with constitutional hierarchy must be understood as forming a single piece of law, the aim of which is the protection of the fundamental rights of human beings. Second, the ICCPR was used as a model in the preparation of the American Convention, which allows for its use as a means of interpretation according to that established in the Convention (see art. 29(d)) and the Vienna Convention on the Law of Treaties (see art. 32). The ICCPR establishes that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law” (art. 14(5)). Thus, both norms taken together demonstrate that the guarantee of the right of appeal has been recognized only for the benefit of the accused. We thus conclude that, insofar as the Public Prosecutor’s Office is an organ of the State and is not the subject of this benefit, it is not covered by the norm of constitutional scope; nevertheless, the legislature is not precluded from granting the same right to the Public Prosecutor’s Office if considered necessary.

....

## **Questions**

1. What are the general criteria for the interpretation of treaties? Do you agree that the Vienna Convention on the Law of Treaties establishes a text-centered interpretation of treaties? Do you think that these same criteria should be used to interpret international declarations?
2. Compare these criteria with the guidelines for the interpretation of statutes in your country. What differences and similarities are you able to identify?
3. Article 31, paragraph 2 of the Vienna Convention uses the term “context”; does this term include the political expectations of the parties when they entered into negotiations? Do you think that the expressions “ambiguous or obscure” and “manifestly absurd or unreasonable” in Article 32 of the Vienna Convention have a fixed meaning?
4. What is the opinion of the Inter-American Court regarding the interpretation of the American Convention on Human Rights? Do you agree with the Inter-American Court’s criteria in this regard? Do you think that these criteria are “complementary” or “contradictory” to the traditional approach of international public law? How can the traditional approach to treaty interpretation be harmonized with Article 29 of the American Convention?
5. How has the Court interpreted part b of Article 29? How would you apply it in a concrete case? Would you follow the interpretation of Argentina’s Supreme Court in the *Arce* case?

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**b. Scope of the Protection of Human Rights**

**Alexandre Charles Kiss, *Permissible Limitations on Rights, in***  
**THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL**  
**AND POLITICAL RIGHTS 290 (Louis Henkin ed. 1981)<sup>5</sup>**  
*[Footnotes omitted]*

Few if any of the human rights recognized in the International Covenant on Civil and Political Rights are absolute. Many of them are subject to derogation in time of public emergency. Many are subject to limitation in the public interest at any time. Some rights may be limited if they conflict with the rights of others. But limitations, like derogations, are exceptional, to be construed and applied strictly, and not so as to swallow or vitiate the right itself.

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<sup>5</sup> Reprinted from *The International Bill of Rights: The Covenant on Civil and Political Rights*, ed. Louis Henkin ©1981 Columbia University Press. Reprinted by permission of the publisher.

The Universal Declaration of Human Rights; the only international instrument aimed at the global protection of human rights which concentrates limitations upon rights and freedoms in a single provision. In the Covenant on Civil and Political Rights as in all other human rights conventions, the limitations are scattered, with specific provisions—generally identical, but with some variations—applicable to particular freedoms or rights. The change from a single, general clause to several particular formulas reflected a desire to tailor limitations to the extent strictly necessary so as to assure maximum protection to the individual. For example, a comparison of Article 4 of the International Covenant on Economic, Social and Cultural Rights with Article 8(1) (a) and (c) of that Covenant illustrates the differences between a situation where limitations can be general and one where such limitations should be narrowly prescribed. Article 4, applicable to the Covenant on Economic, Social and Cultural Rights as a whole, allows only “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.”

....

The fact that there is no general limitation clause in the International Covenant on Civil and Political Rights has an important consequence: limitations are permitted only where a specific limitation clause is provided and only to the extent it permits. In some cases, however, the permissibility of some limitations might be implied from the character of the right although no limitation is expressed. For example, during the drafting of Article 17 of the Covenant, protecting the right to privacy, the family, the home, and private correspondence, it was proposed to add a limitation clause similar to those contained in Articles 12(3), 14(1), 18(3), but the Third Committee rejected that proposal as unnecessarily restricting the scope of the article. It was pointed out, however, that this article enunciates principles, leaving each state free to determine how those principles should be put into effect. Here too, of course, a state could not impose limitations that would vitiate the right.

The term which appear in the limitation clause of the Covenant on Civil and Political Rights are:

- National security.....Articles 12(3), 14(1), 19(3), 21, and 22(2)
- Public safety.....Articles 18(3), 21, 22(2)
- Public order (sometimes supplemented by *order public*, in parentheses).....Articles 12(3), 14(1), 18(3), 19(3), 21, 22(2)
- Public health.....Articles 12(3), 18(3), 19(3), 21, 22(2)
- Public morals .....Articles 12(3), 14(1), 18(3), 19(3), 21, 22(2)

This paper seeks to determine the significance and scope of those grounds of permissible limitations. Other expressions in the limitation clauses also deserve attention: limitations must be “provided by law”, “in conformity with law”, or “prescribed by law”, and “necessary in a democratic society.”

The Covenant provides that some rights may be limited as necessary to protect “the rights and freedoms of others”. That raises the issues of conflicts between rights and the options permitted to the state in choosing between individual rights or in establishing preferences or priorities among them.

....

All the terms under consideration—“national security”, “public safety”, “public order” (*order public*), “public health”, “public morals”—have much in common and may be closely linked. All of them are difficult to define and imply a measure of relativity in that they may be understood differently in different countries, in different circumstances, at different times. All of them relate to a particular conception of the interests of a society. All directly implicate the relationship between state authority and individuals or groups of individuals. Indeed, one might ask whether all the terms do not express different aspects of a single, universal concept—*ordre public*.

### **“National Security”**

....

The word “national” is generally used to refer to that which concerns a country as a whole. Thus, restrictions on human rights can be adopted under this concept only if the interest of the whole nation is at stake. This excludes restrictions in the sole interest of a government register, or power group. Limitations are not based on “national security” moreover, if their only purpose is to avoid riots or other troubles, or to frustrate revolutionary movements which do not threaten the life of the whole nation. Such grounds for restrictions may sometimes fall within the scope of “public order” or “public safety” but not “national security”.

The word “security” we have seen, clearly has a meaning different from public “safety” or “order” since these words are frequently used in the same clauses as alternative grounds. An explanation of “security” can be derived perhaps from the United Nations Charter. As all universal documents protecting human rights have their roots in the UN Charter, it may be suggested that the term “security” used in the Covenant corresponds to the term “national security” as used in the Charter. The Charter is dedicated to maintaining “international peace and security” meaning peace between states and the security of every state. To the end of maintaining peace and security, the principal norm of the Charter, Article 2(4), forbids the use or threat of force against the political independence or territorial integrity of another state. One may conclude that “national security” in the Covenant means the protection of territorial integrity and political independence against foreign force or threats of force. It would probably justify limitations on particular rights of individuals or groups where the restrictions were necessary to meet the threat

or use of external force. It does not require a state of war or national emergency, but permits continuing peacetime limitations, for example, those necessary to prevent espionage or to protect military secrets. Presumably this ground of limitation would permit special limitations on the rights of members of the armed forces.

### **“Public Safety”**

....

The interpretation of the term “public safety” is particularly difficult. It cannot be assimilated to “public order”, which is certainly a broader concept, but the two are apparently linked. “Public safety” apparently also includes but is a broader concept than “the prevention of disorder or crime”. The French text of the Covenant uses two different terms for the English “public safety”: *sécurité* in Article 18(3) and *sureté publique* in Articles 21 and 22. The latter term may provide some guidance when considered together with opinions manifested during the discussions in the Third Committee. Rights guaranteed by the Covenant may be restricted if their exercise involves danger to the safety of persons, to their life, bodily integrity, or health. The need to protect public safety could justify restrictions resulting from police rules and security regulations tending to protection of the safety of individuals in transportation and vehicular traffic; for consumer protection, for ameliorating labor conditions, etc.

### **“Public Order”**

....

For our purposes, then, *ordre public* permits limitations on particular human rights where these limitations are necessary for that accepted level of public welfare and social organization. But the human rights of individuals are part of that minimum civilized order and cannot be lightly sacrificed even for the good of the majority or the common good of all. The result is a concept that is not absolute or precise, and cannot be reduced to a rigid formula but must remain a function of time, place and circumstances. In both civil and common law systems it requires someone of independence and authority to apply it by evaluating the different interest in each case.

....

In sum, “public order” may be understood as a basis for restricting some specified rights and freedoms in the interest of the adequate functioning of the public institutions necessary to the collectivity when other conditions, discussed below, are met. Examples of what a society may deem appropriate for the *ordre public* have been indicated: prescription for peace and good order; safety; public health; esthetic and moral considerations; and economic order (consumer protection, etc.). It must be remembered, however, that in both civil law and common law systems, the use of this concept implies that courts are available and function correctly to

monitor and resolve its tensions with a clear knowledge of the basic needs of the social organization and a sense of its civilized values.

### **“Public Health”**

All but one of the limitation clause of the International Covenant on Civil and Political Rights include “public health” as one of the possible grounds for restricting the rights or freedoms guaranteed. (The only exception is Article 14(1), which allows the exclusion of the press and the public from all or part of a trial, and its absence there is understandable, given the subject matter.)

During the drafting of the Covenant there was little discussion of this concept. Some concrete problems which were explicitly raised—such as the prevention of epidemics—fall clearly within the scope of this limitation, while others, such as the control of prostitution, might come within other grounds for restriction, such as “public morals”.

The European and the American Convention on Human Rights also contain the term “public health” in all of their limitation clauses. The European Commission of Human Rights has interpreted the term broadly: for example, “public health” was held to include measures taken for the prevention of disease among cattle.

....

### **“Public Morals”**

“Public morals” here alludes to principles which are not always legally enforceable but which are accepted by a great majority of the citizens as general guidelines for their individual and collective behavior. Whether they include acts done in private, alone, or between consenting adults, has been debated. Any interpretation of the term “public morals” in the International Covenant would doubtless take into consideration the elements stressed by the European Court i.e., the primary responsibility of the state to secure the rights and liberties recognized in that Convention and the relativity and changing conception and content of morals.

### **A Supplementary Condition: “Provided by Law”**

....

The condition that a restriction must be provided by law is essentially a formal one: any restriction on recognized rights and freedoms in a state must be by general rule, normally imposed by the legislature; measures taken by the executive authority, such as the police or local administration, are excluded unless authorized by general legislation. That a restriction must be provided by law does not necessarily suggest any limits on the substance of the law. In the debates in the Human Rights Commission on Article 12, however, it seemed to be agreed that in

addition to serving one of the purposes indicated, all laws providing for restrictions on freedom of movement must be “just”. To that end, it was suggested that the article state that the law must be in accordance with the principles of the Charter and the Universal Declaration of Human Rights. Instead the final text requires that the restriction be “consistent with the other rights recognized in the Covenant”. Moreover, laws limiting any of the rights must be in conformity with the fundamental principle laid down in Article 5(1): any act aimed at the destruction of any of the rights and freedoms recognized in the Covenant is prohibited.

### **A Key Concept: “Necessary in a democratic society”**

Another condition included in some of the limitation clause of the Covenant (and of other international human rights instruments) is that such limitations must be “necessary in a democratic society”. Although included in Article 29 of the Universal Declaration on Human Rights, the reference to a democratic society was inserted in only three of the six limitation clauses of the Covenant: Article 14(1), right to a fair and public hearing; Article 21, right to a peaceful assembly; and Article 22(2), freedom of association.

....

[T]he reference to democracy was not included in Article 12, liberty of movement and freedom to choose a residence, Article 18, right to freedom of thought, conscience, and religion; or Article 19, right to hold opinions and freedom of expression. In fact, during the discussion of Article 18 in the Commission on Human Rights, a proposal to add the modifying clause “in a democratic society” did not succeed. It is difficult, however, to find any basis for concluding that the omissions are significant. The one specific limitation provision of the International Covenant on Economic, Social and Cultural Rights, Article 8(1a) and (1c), concerning the right to form and join trade unions and the right of trade unions to function, includes the words “necessary in a democratic society”. The same phrase appears also in some, but not all of the limitation clauses of the American Convention. Like the corresponding provisions of the Covenant on Civil and Political Rights, Article 12(3) of the American Convention (freedom of conscience and religion) and Article 13(2b) (freedom of thought and expression) do not include the phrase. In contrast, the provision of the American Convention recognizing the freedom of movement and residence (Article 22(3)), mentions “necessary in a democratic society” which the corresponding clause of the Covenant, Article 12(3), does not.

In the European Convention on Human Rights, the expression “necessary in a democratic society” seems to be one of the most important concepts. It is part of each limitation clause, and it also plays a paramount role in the case law of that Convention. This may be explained by the importance of an “effective political democracy” in the European countries “which are like-minded and have a common heritage of political traditions, ideals, freedom, and the rule of law.”

Still, the definition of that concept does not seem to be easy even where such an ideological basis exists. The European Commission of Human Rights explained that it would evaluate whether an

interference in the exercise of a recognized right was necessary by paying “due regard where appropriate to legislation of other States signatory to the Convention and to international instruments on the subject.” In the *Vagrancy* cases, the European Court expressed the opinion that there is an *ordre public* within the Council of Europe which is a model for a democratic society. In the *Handyside* case, the Court attempted to determine some elements of a “democratic society”, and of one of its essential foundations, the freedom of expression. It found pluralism, tolerance, and broad-mindedness to be essential elements of the concept. The margin of appreciation which states have in this field is under the control of the Court, which has the task to review, under the provisions of the Convention, the decisions of state authorities in the exercise of their power of appreciation.

....

In line with the experience of the European Convention of the European human rights institutions, it should be added that a “democratic society” also implies the existence of appropriate supervisory institutions to monitor respect for human rights.

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**Claudio Grossman, A Framework for the Examination of States of Emergency  
Under the American Convention on Human Rights  
1 AM. U.J. INT'L L. & POL'Y 35 (1986)<sup>6</sup>  
[Footnotes omitted]**

**II. CRITERIA NECESSARY TO DECLARE STATES OF EMERGENCY**

Article 27 of the American Convention on Human Rights regulates the suspension of human rights guarantees during states of emergency. Paragraph 1 of that article provides:

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

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<sup>6</sup> Reprinted from *A Framework for the Examination of States of Emergency Under the American Convention on Human Rights*, Claudio Grossman, 1986, ©1986 The American University Journal of International Law and Policy, with permission of the publisher.

not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

A careful examination of article 27 suggests the existence of five concurrent but distinct elements, each required in order to validate the declaration and maintenance of a state of emergency. These are: (1) subject; (2) object; (3) cause; (4) proper notice; and (5) conduct. As a preliminary matter, any analysis of these diverse requirements must take into account that the fundamental purpose of the American Convention is the protection of human rights. From this it follows that any norms by which the Convention permits restrictions on and suspensions of these rights must be narrowly interpreted.

#### **A. SUBJECT**

The “subject” of a declaration of exception is that legal person or entity possessing the juridical capacity to declare the state of emergency. Article 27 of the American Convention refers simply to the “State Party” in this regard. The Convention does not explicitly indicate which organ of the state party has the competence to issue such a declaration. From the point of view of general international law, one can argue that those who have the capacity to generate international responsibility on behalf of the state party also have the capacity to represent the state in resorting to human rights derogations.

The assumption of international obligations by a state can originate in the executive, legislative or judicial branches. Clearly, supervision of the application of emergency measures is an appropriate function for the judiciary. Indeed, article 27 specifically gives the courts a significant role in ensuring that several basic rights are not violated even during a state of emergency. On the other hand, in the Western hemisphere the principle of separation of powers generally renders the judiciary incapable of declaring an emergency or passing on the validity of such a declaration. In the alternative, to grant the executive branch exclusive jurisdiction in this area presents the grave danger of accumulation of power and the possibility of massive violations of human rights. The tendency in international human rights law is, therefore, to assign substantial power to the legislature in the declaration of states of emergency.

In its 1968 Resolution on the Protection of Human Rights in Connection with the Suspension of Constitutional Guarantees or State of Siege, the Inter-American Commission on Human Rights indicated that a declaration of a state of emergency may not presuppose any restriction of the rule of law or provisions of the constitution, or any alteration of the scope of the branches of government. In the same spirit, in article 29, with reference to rules of construction, the Convention forbids the interpretation of any provision in such a way as to exclude rights or guarantees that are “derived from representative democracy as a form of government.” In a representative democracy, an important role is usually conferred upon the legislature, either to provide authorization prior to the declaration of an emergency situation or to ratify post facto a declaration made by the executive when it was not possible for the legislature to convene in order to consider the declaration.

## B. OBJECT

The “object” of the declaration of emergency is that which will be affected by the declaration itself, namely the state’s obligation to fully protect and promote each of the rights guaranteed by the Convention. For the object to be valid, a state declaring an emergency should comply with all of the necessary requirements, namely competent subject, valid cause, proper notice, and conduct.

## C. CAUSE

The “cause” of a declaration of a state of emergency is the particular fact pattern that compels the ‘subject’ to derogate temporarily from certain of its peace-time human rights obligations. Article 27 of the American Convention refers to the existence of “war, public danger or other emergency that threatens the independence or security of a State Party” as legitimate grounds for such extreme action. From the very nature of these examples, it becomes apparent that a purported crisis situation must satisfy at least three requirements in order to constitute a legitimate cause.

i) The first requirement is that the cause be a real or imminent event. Mere potential dangers, latent or speculative in nature, do not warrant the proclamation of emergency conditions. In one of its earliest examinations of this question, the Secretariat of the Inter-American Commission on Human Rights expressed its concern regarding the declaration of “fictitious states of siege,” which it described as those instances in which the events alleged to justify the emergency declaration had not actually occurred.

The Commission has been obliged to address violations of the requirement of a real or imminent event committed by a number of American states. Examining the situations in Argentina, Bolivia, Columbia, Chile, Grenada, El Salvador, Haiti, Nicaragua, Paraguay and Uruguay in its 1980-81 annual report, the Commission critically observed that in many instances the state party had declared an emergency without complying with the above mentioned requirement, simply resorting to emergency powers as a device to garner broad powers which the government otherwise lacked. “These exceptional measures,” the Commission emphasized, “may only be justified in the face of real threats to the public order or the security of the state.”

ii) To constitute valid cause, the situation must also be one of exceptional gravity. The Convention notes that the emergency must threaten the independence or the security of the state party. Even the actual existence of war may not necessarily constitute such a threat. For example, a war may take place at a great distance from the territory of a country and not necessarily affect the normal life of a nation. Similarly, simple declarations of war may not always be accompanied by belligerent acts. As with all other public dangers, if a national government can confront a war with its ordinary powers, it cannot use the war to declare a state of emergency and thereby expand those powers.

Additionally, it is important to note that with one exception, all American States took part in the

unanimous approval of the International Covenant on Civil and Political Rights by the General Assembly of the United Nations on December 16, 1966. The Covenant requires no less than a threat to the life of the nation as a prerequisite to a declaration of a state of exception. Prior to the completion of the American Convention on Human Rights, the Council of the Organization of American States called for co-existence, compatibility and coordination of that document with the International Covenant. In light of these facts, it is clear that the criteria necessary for declaring situations of emergency in the case of the American Convention are no less strict than those in the universal instrument.

Moreover, in its Preliminary Study of the State of Siege and the Protection of Human Rights in the Americas, the Secretariat of the Inter-American Commission on Human Rights made it clear that innumerable abuses had been committed under states of siege behind a facade of guarding the security of the state. The Secretariat asserted that facades will not do; only unusually serious cases warrant the proclamation of a state of exception under the American Convention. In this respect, it is noteworthy that Chile, Uruguay, and the Inter-American Council of Jurists had each submitted drafts of the American Convention that would have made the standard for judging the gravity of a situation dependent on the internal law of the country involved. The acceptance of these proposals obviously would have diminished the significance of the “cause” requirement. The San Jose Conference rejected the proposals and reaffirmed the position of the Commission, which emphasized the extraordinary and grave character of situations of emergency, and which assessed the level of gravity by more objective international standards.

The requirement of extreme gravity imposes upon the state of siege a strictly subsidiary character. Within the framework of the American Convention, state parties may legitimately restrict the exercise of certain rights without resorting to the more drastic and sweeping action involved in declaring a state of siege. Those articles of the Convention dealing with the freedoms of thought and expression, assembly, association, and movement and residence each permit governments to restrict the exercise of these rights if expressly authorized by law and “if necessary in a democratic society . . . to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.” The above mentioned provisions are designed to enable the state to resolve most problems of public order. It is only when the means to which the state can resort to maintain peace and security—including legal restriction of certain selected rights—have failed that the state may resort to emergency powers. The Commission has concurred with this general proposition. In its commentaries on a major report prepared at its request by Dr. Daniel Hugo Martins, it noted that a state of emergency can be declared only when ordinary legislation is not sufficient.

In its practice, the Commission has repeatedly emphasized that a situation must be extraordinarily serious to constitute legitimate cause for a state party to proclaim an emergency. In its 1981 report on Colombia, for instance, the Commission indicated that constitutional provisions on the state of siege were applicable only in exceptionally grave cases. Later that year, the Commission listed certain requirements for the use of emergency measures by state parties and concluded that the new government of Bolivia had violated the “gravity of the situation”

requirement. Finally, in its 1983 report on Nicaragua, the Commission firmly reiterated that the mere existence of armed conflict or other national difficulty does not necessarily constitute valid cause for a declaration of a state of emergency: With respect to the first requisite of paragraph 1 of article 27, i.e., that there be a state of war, public danger, or other emergency that threatens the independence or security of the state, the doctrine generally accepts the propriety of suspension of obligations in terms of human rights only when there are extremely serious circumstances.

iii) For the cause of an emergency declaration to be sufficient, the Convention requires that the emergency affect the continued viability of the organized community as a whole. It is important to note that article 27, paragraph 1, of the American Convention refers only to the state party and not to the government of that state party. The Inter-American Commission, referring to this provision, has given notice that “in interpreting the first part of paragraph 1 of article 27 of the American Convention, . . . the emergency should be of a serious nature, created by an exceptional situation that truly represents a threat to the organized life of the state.” Commission Rapporteur Dr. Martins indicated in an early report on the subject that valid cause for the declaration of a state of siege includes only “serious cases that threaten the integrity or existence of the three constitutional elements of the state—people, territory, and legal order.”

Accordingly, two points of qualification are in order. First, a threat to the government of the state party does not suffice as peaceful circumstances such as elections can threaten the continued existence of a government. Moreover, the government of a state can itself be a threat to the organized life of the country, and in such situations it cannot legitimately rely on emergency powers to maintain itself in power. In its 1978 report on Nicaragua, for example, the Inter-American Commission concluded that the Somoza government, by violating essential rights in a serious and consistent manner, had adversely affected all segments of the Nicaraguan population.

The second point concerns the legal order of the state party. If at one determined moment of its history, a state party has a legal order, the application of which produces massive and systematic violations of internationally recognized human rights, the authorities of that state cannot validly declare a state of siege and exercise emergency powers in order to protect the existing legal system. The Convention justifies this assertion. Article 1 of the Convention establishes an obligation of the state to respect the human rights recognized in the Convention and to ensure free and full exercise of these rights by all persons subject to its jurisdiction without discrimination of any kind. Article 2 of the Convention establishes the duty of a state party to adopt domestic law provisions permitting the exercise of these rights and freedoms if they were not already ensured by legislative or other provisions. Other articles of the Convention indicate an entire group of rights that state parties must respect under any circumstances. In addition, article 29, regarding rules of interpretation, bars the construction of any provision of the Convention in such a way as to permit a state party, group or individual to suppress the enjoyment or exercise of rights recognized by the Convention, or to restrict the freedoms guaranteed by the American Declaration on the Rights and Duties of Man or by other treaties to which the state may be a party. Similarly, one may not read the Convention as precluding any

rights and guarantees that are “inherent in the human personality or derived from representative democracy as a form of government.”

Accordingly, a national legal order which contravenes these fundamental principles is incompatible with the requirements of the American Convention. The case of Nicaragua under Somoza is again instructive. Referring to the legal order and the norms then in force in that country with respect to states of siege, the Commission pointed out that they: create in the socio-political reality of the country, a legal structure from the formal point of view, but from the material point of view, this turns into a legal abnormality, since it lends itself to a systematic and generalized violation of human rights . . . .

Furthermore, as the Inter-American Commission on Human Rights stressed in the Resolution on the Protection of Human Rights in Connection with the Suspension of Constitutional Guarantees or the State of Siege, the norms of the Convention bearing on emergency situations only permit the defense of democratic regimes respectful of human rights.

#### **D. PROPER NOTICE**

The declaration of emergency provisions derogating certain obligations imposed by the Convention must satisfy certain requirements of proper notice. In the first place, in order to be valid the emergency provisions must provide the country’s inhabitants a reasonable guide for conduct. To accomplish this, it is necessary that the emergency provisions be published in sufficient detail. Consequently, secret norms or illegal actions by the authorities will not satisfy those standards which permit the suspension of guarantees.

A second requirement of proper notice is the immediate notification of all other state parties to the Convention by means of a communication to the Secretary General of the Organization of American States. The communication must meet certain conditions established in article 27 of the American Convention in order to be valid: (1) it must explicitly designate those rights guaranteed by the Convention which the state is suspending; (2) it must state the circumstances that require the suspension; and (3) it must set an exact date for the termination of such suspension. The purpose of these conditions is to permit the relevant OAS organs and the other state parties to execute their supervisory responsibilities in monitoring compliance with the Convention. This is especially important in emergency situations, when respect for human rights is most often in danger. To achieve this purpose, it is necessary that the derogating party provide detailed information concerning the suspension of rights, in order that the OAS and these other states may form a complete opinion regarding the derogating party’s degree of conformance with its international obligations.

#### **E. CONDUCT**

The requirement of “conduct” suggests that the state party declaring the emergency situation must behave in accordance with the Convention. While this may seem obvious, it is critical to

identify conduct as a distinct element because it is the concrete behavior of government authorities that ultimately determines the lawfulness of a state of emergency. The conduct that is required of the authorities during states of emergency is that enunciated in the first paragraph of article 1 of the Convention, i.e., to respect the recognized rights and freedoms and to ensure their exercise without any discrimination. Even in an emergency situation, according to the Convention, a state party may not interpret any of its emergency provisions as permitting it to suppress or limit the enjoyment of rights beyond certain prescribed limits.

At a minimum, then, disrespect and disregard for human rights, or discrimination in their protection, cannot accompany the invocation of emergency powers. Moreover, the requirement of conduct extends to both actions and failure to act. The Convention imposes an affirmative responsibility on states to prevent or quell violations of the Convention. Because states of siege create the danger that certain rights might be violated, the duty in article 1 to respect and ensure rights gives rise to the correlative duty to do all that is necessary to prevent abuses. State parties can fulfill this obligation by ensuring that each emergency measure which suspends or limits some provision of the Convention is accompanied by a second measure that: (1) inhibits possible abuses which may be more likely to occur as a consequence of the suspension and 2) guarantees the investigation and punishment of those responsible for the violation of human rights.

....

### **III. CRITERIA FOR THE SUSPENSION OF RIGHTS DURING A STATE OF EMERGENCY**

When all of the aforementioned criteria for the valid declaration of a state of emergency have been satisfied, the actual suspension of certain human rights guarantees may become lawful under the American Convention. The state party, however, does not receive carte blanche to suspend human rights protections; the Convention carefully restricts the nature and extent of permissible derogations.

#### **A. ABSOLUTE RIGHTS**

Even during a proclaimed emergency, the state may restrict only certain specified individual freedoms. The American Convention establishes a system comprising two distinct categories of human rights: nonderogable rights which a state party may never suspend regardless of the gravity of the circumstances, and those rights which it may restrict to a limited degree. Article 27 of the Convention enumerates the following rights as absolute and nonderogable: rights to life, to a name and nationality, to legal personality, to humane treatment while in custody, to freedom from slavery and from ex post facto laws, rights of the child and of the family, freedom of conscience and religion, and the right to participate in government. It also prohibits suspension of the judicial guarantees that are essential for the protection of these rights. In addition, article 27, as well as articles 1 and 24 of the Convention establish the absolute right to freedom from

any form of discrimination. In all, approximately one half of the civil and political rights established by the American Convention on Human Rights are not subject to suspension, even during an officially declared state of siege.

The list of absolute rights in the American Convention has two characteristics that distinguish it from analogous provisions in other human rights treaties, such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights. While the three treaties seek to provide many of the same protections, and while each of the treaties prohibits the suspension of certain freedoms even during a national emergency, the array of rights in the nonderogable category is much more comprehensive in the American Convention than in either of the other two instruments. In addition, only the American Convention explicitly notes that judicial guarantees indispensable for the protection of these absolute rights are not derogable.

## **B. DEROGABLE RIGHTS**

The second category of rights that exist under the Convention are those which a contracting party may legitimately suspend during a state of emergency if it meets the strict requirements of the Convention. Because a national emergency during which recognized rights are actually suspended is the most precarious time for the viability of a democratic system, the Convention establishes a detailed series of requirements governing the suspension of derogable rights. These requirements are: (1) necessity; (2) temporality; (3) proportionality; (4) non-discrimination; (5) compatibility with other international obligations; and (6) adherence to domestic law.

### **1. Necessity**

The valid proclamation of a state of emergency does not automatically justify a state's derogation from particular human rights obligations. No particular derogation of a given right can be deemed necessary if a less drastic option for state action is available. The Inter-American Commission has clearly indicated that suspension of a derogable right is "only justifiable in the absence of another alternative for resolving a serious emergency." Accordingly, a finding of necessity requires an analysis of the general situation of a country—including consideration of possible substitute measures that would not involve suspension of rights—and an assessment of the actual need for each individual derogation.

### **2. Temporality**

Temporality refers to the duration of emergency measures. As article 27 points out in its first paragraph, a suspension of rights is valid only "for the time strictly required by the exigencies of the situation." The requirement of temporality strictly excludes an expansive assessment of the necessary duration of any suspension of rights. Derogation from human rights obligations for an unlimited period of time constitutes a violation of the Convention, as does maintenance of such

measures once the circumstances motivating them have ended. The Inter-American Commission has indicated that in order to avoid a violation of the requirement of temporality, it is not sufficient to terminate a derogation; rather, the government must take positive action to restore the enjoyment of rights to persons affected through appropriate actions including provision of adequate compensation where appropriate.

### **3. Proportionality**

The Convention limits any suspension of the state's obligations contracted under the Convention to the "extent . . . strictly required." The requirement of proportionality prohibits unnecessary suspension of specific rights, greater restrictions on those rights than necessary, or the unnecessary extension of the geographical area to which the state of emergency applies. Like the requirements of necessity and temporality, the proportionality standard is a strict one. It does not allow a state party to justify unwarranted abuses of human rights with vague arguments about national security; a derogation which is disproportionate to the situation is one which is illegal.

### **4. Nondiscrimination**

The prohibition against discrimination is of such importance that it is stipulated in article 27 as well as in articles 1 and article 24. The multiple reference to this prohibition, not unusual in international instruments related to the protection of human rights, serves to codify what is already a fundamental principle of jus cogens: the total proscription of any form of discriminatory treatment based on race, religion, sex, ethnic group, political belief or other such quality. In accordance with this principle, otherwise legitimate suspensions of derogable rights can become invalid if they violate the prohibition against discrimination. The principle of nondiscrimination attaches to each one of the rights enumerated in the American Convention, and also to any restriction which a state party may place on these rights.

### **5. Compatibility with other International Obligations**

The restrictions on permissible state action in a time of emergency may extend beyond those explicitly delineated in the American Convention. According to article 27, state action must also be compatible with all other international legal obligations which are binding on the derogating party. Therefore, this may expand the list of nonderogable rights enumerated earlier. For example, although a state party to the American Convention may legally suspend the right to not be imprisoned for debt if this suspension proves necessary during a state of siege, the International Covenant on Civil and Political Rights characterizes its version of the same freedom as nonderogable. This right therefore acquires nonderogable status under the American Convention for those states which are parties to both treaties. This requirement of compatibility makes it necessary to conduct an exhaustive review of all obligations that are in force vis-à-vis the respective American state. If these obligations preclude any measure which the American Convention on Human Rights otherwise permits, implementation of that measure will place the state party in violation of article 27 of the American Convention.

## 6. Adherence to Domestic Law

The American Convention does not authorize the disregard of the internal law of the derogating state party during a state of emergency. The Convention specifically precludes any restriction on rights or freedoms—even if the restriction satisfies all other conditions established in the Convention—unless it is applied “in accordance with [the respective state party’s own domestic] laws enacted for reasons of general interest . . . .”The Inter-American Commission has consistently viewed restrictive action by state authorities, at or outside the margin of their own laws, as a violation of the Convention as well.

....

### *Questions*

1. Do international human rights treaties allow for the restriction of the rights recognized therein? If so, what are the criteria for establishing the legitimacy of a restriction?
2. What is the difference between “restriction” and “derogation or suspension” of a right? What are the requirements for derogating a right according to the American Convention? Which rights cannot be derogated even under state of emergency? Regarding those rights that can be suspended, what requirements must be complied with in order for such a suspension to be legitimate under the Convention?
3. Do you think that the provisions regulating states of emergency in human rights treaties should be more stringent or rigorous? What would you suggest in this regard? Would you add or delete rights from the list of those that can derogated?
4. Can a State be involved in a war that does not require derogation of certain rights?
5. How would you supervise compliance by States with the provisions that regulate “suspension or derogation” in human rights treaties? How much discretion should States be allowed in determining the need derogate certain rights? Would you allow different levels of discretion depending on the right affected?

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## 4. Jurisprudence

## 7. Judicial Decisions

(a) Decisions of international tribunals. Judicial decisions are not, strictly speaking a formal source, but in some instances at least they are regarded as authoritative evidence of the state of the law, and the practical significance of the label “subsidiary means” in Article 38(I)(d) is not to be exaggerated. A coherent body of jurisprudence will naturally have important consequences for the law.

....

### Decisions of the International Court of Justice and Its Predecessor

The Court applies the law and does not make it, and Article 59 of the Statute in part reflects a feeling on the part of the founders that the Court was intended to settle disputes as they came to it rather than to shape the law. Yet it is obvious that a unanimous, or almost unanimous, decision has a role in the progressive development of the law. Since 1947 the decisions and advisory opinions in the *Reparation*, *Genocide*, *Fisheries*, and *Nottebohm* cases have had decisive influence on general international law. However, some discretion is needed in handling decisions. The *Lotus* decision, arising from the casting vote of the President, and much criticized, was rejected by the International Law Commission in its draft articles on the law of the sea, and at its third session the Commission refused to accept the principles emerging from the *Genocide* case (a stand which was reversed at its fourteenth session). Moreover, the view may be taken that it is incautious to extract general propositions from opinions and judgments devoted to a specific problem or settlement of disputes entangled with the special relations of two states.

....

Judicial precedent in the practice of the Court. Strictly speaking, the Court does not observe a doctrine of precedent, but strives nevertheless to maintain judicial consistency. Thus, in the case on *Exchange of Greek and Turkish Populations*, the Court referred to “the precedent afforded by its Advisory Opinion No. 3”, i.e. the *Wimbledon* case, in respect of the view that the incurring of treaty obligations was not an abandonment of sovereignty. In the *Reparation* case the Court relied on a pronouncement in a previous advisory opinion for a statement of the principle of effectiveness in interpreting treaties. Such references are often a matter of “evidence” of the law,

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<sup>7</sup> Reprinted from *Principles of International Law*, Ian Brownlie 4th ed. 1990, ©1990 Oxford University Press, by permission of the publisher.

but a fairly substantial consistency is aimed at and so the technique of distinguishing previous decisions may be employed. In the case on *Interpretation of Peace Treaties* certain questions were submitted by the General Assembly to the Court for an advisory opinion. The questions concerned the interpretation of clauses in the peace treaties with Bulgaria, Hungary, and Romania, clauses relating to the settlement of disputes concerning the interpretation or execution of these treaties. In fact the request arose from allegations against these three states by other parties of breaches of the provisions of the treaties on the maintenance of human rights, a matter of substance. The Court rejected arguments to the effect that it lacked the power to answer the request for an opinion.

....

(c) Decisions of national Courts. Article 38(I)(d) of the Statute of the International Court is not confined to international decisions and the decisions of national tribunals have evidential value. Some decisions provide indirect evidence of the practice of the state of the forum on the question involved; others involve a free investigation of the point of law and consideration of available sources, and may result in a careful exposition of the law. Hall, Oppenheim, Moore, Hyde, McNair, and other writers from common law jurisdictions make frequent reference to municipal decisions, and such use is universal in monographs from this source. French, German, and Italian jurists tend to use fewer case references, while Soviet jurists are even more sparing. In the recent past there has been a great increase in the availability of decisions as evidence of the law. Municipal decisions have been an important source for material on recognition of belligerency, of governments and of states, state succession, sovereign immunity, diplomatic immunity, extradition, war crimes, belligerent occupation, the concept of a 'state of war', and the law of prize. However, the value of these decisions varies considerably, and many present a narrow national outlook or rest on a very inadequate use of the sources.

....

### ***Questions***

1. As mentioned above, jurisprudence is a "subsidiary" source of international law. In this regard, what value would you ascribe to the jurisprudence of the Inter-American Court on Human Rights when interpreting and applying a provision the American Convention? What value would you ascribe to the Commission's case law?

2. Do the decisions of national courts have value for international supervisory bodies? Elaborate.

## B. INTERNATIONAL RESPONSIBILITY OF STATES

### 1. GENERAL PRINCIPLES OF INTERNATIONAL RESPONSIBILITY OF STATES: ATTRIBUTION OF RESPONSIBILITY TO THE STATE

OPPEHHEIM'S INTERNATIONAL LAW, (9th ed. 1992), Vol. I,  
Excerpt from Chapter 4<sup>8</sup>  
[Footnotes omitted]

#### ON STATE RESPONSIBILITY IN GENERAL

[I]n international law, however, a state bears responsibility for its conduct in breach of its international obligations. Such responsibility attaches to a state by virtue of its position as an international person. The sovereignty of the state affords it no basis for denying that responsibility.

....

A distinction is sometimes made between the original and so-called vicarious responsibility of a state. "Original" responsibility is borne by a state for acts which are directly imputable to it, such as acts of its government, or those of its officials or private individuals performed at the government's command or with its authorisation. "Vicarious" responsibility, on the other hand, arises out of certain internationally injurious acts of private individuals (whether nationals, or aliens in the state's territory), and of officials acting without authorisation. It is apparent that the essential difference between original and vicarious responsibility in this sense is that whereas the former involves a state being in direct breach of legal obligations binding on it, and is accordingly a particularly serious matter, with the latter the state's responsibility is at one remove from the injurious conduct complained of: in such cases the state's responsibility calls for it to take certain preventive measures and requires it to secure that as far as possible the wrongdoer makes suitable reparation, and if necessary to punish him. But these preventive and remedial obligations of the state in cases of "vicarious" responsibility are themselves obligations for the breach of which (as by refusing to take the remedial action which is required) the state bears direct responsibility.

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<sup>8</sup> Reprinted from *Oppenheim's International Law*, Vol. 1, 9th ed., © Longman Group UK Ltd. and Mrs. Tomoko Hudson 1992, by permission of the publisher.

## STATE RESPONSIBILITY FOR ACTS OF STATE ORGANS

§159 Responsibility varies with organs concerned. States, being juristic persons, can only act through the institutions and agencies of the state, its officials and employees—commonly referred to collectively as organs of the state. Their acts or omissions when acting officially in their capacity as state organs are acts of the state, and the state bears responsibility for all such acts as involve a breach of the state's international obligations, even though in the consideration of the state the organ is independent, and irrespective of whether it is a superior or subordinate organ.

....

§160 Internationally injurious acts of Heads of States. Internationally injurious acts committed by Heads of State in the exercise of their official functions constitute international wrongs. . . . But a Head of State can, like any other individual, commit in his private life internationally injurious acts. The position of the Head of the State, who may in some cases be regarded as personifying the state and who enjoys considerable immunity from the jurisdiction of courts in foreign states, and often even in the courts of his own state, suggests that in international law a state should bear a degree of vicarious responsibility for internationally injurious acts committed by its Head of State in private life.

§161 Internationally injurious acts of members of governments. As regards internationally injurious acts of members of a government, a distinction must be made between such acts as are committed in an official capacity, and other acts. Acts of the first kind constitute international wrongs. . . . But members of a government can in their private life perform as many internationally injurious acts as private individuals. As they do not personify their states and are, for their private acts, under the jurisdiction of the ordinary courts of justice, there is no reason why their state should bear for internationally injurious acts committed by them in their private life a vicarious responsibility different from that which it has to bear for acts of private persons.

§162 Internationally injurious acts of diplomatic envoys. The position of diplomatic envoys as representatives of their home state gives great importance to internationally injurious acts committed by them on the territory of the receiving state. At the same time their diplomatic status excludes the jurisdiction of the receiving state over such acts. 1 International law therefore makes the home state in a sense responsible for all acts of an envoy injurious to the state or its subjects on whose territory he resides. But it depends upon the merits of the special case what measures beyond simple recall must be taken to satisfy the wronged state. Thus, for instance, a crime committed by the envoy on the territory of the receiving state may be such as to require that he be punished by his home state; in special circumstances and conditions the home state may be obliged to disown an act of its envoy, to apologise or express its regret for his behaviour, or to pay damages. Such injurious acts as an envoy performs at the command or with the authorisation of his home state, constitute international wrongs for which the home state bears original responsibility, and for which the envoy cannot personally be blamed.

§163 Internationally injurious activity of parliaments. As regards the internationally injurious activity of parliaments, it must be kept in mind that, important as may be the part parliaments play in the political life of a nation, they do not represent the state in its international relations with other states. They are nevertheless organs of the state, and if their acts involve injurious international consequences for other states those acts are attributable to the state so as to make it internationally responsible for them. In particular, the state bears full international responsibility for such legislative acts of parliaments as are contrary to international law and as have been finally incorporated as part of its municipal law. As regards individual members of parliament acting either in their capacity as such a member or in their private capacity, the state would seem to bear no international responsibility for their conduct.

§164 Internationally injurious acts of judicial organs. Denial of justice Internationally injurious acts committed by judicial personnel in their private life are in no way different from such acts committed by other individuals. But these functionaries may in their official capacity commit such acts, and the question is how far the responsibility of a state for acts of its judicial personnel can reasonably be extended given that, although often entirely independent of the government, they are nevertheless organs of the state and their acts accordingly attributable to the state.

A state will normally have an established procedure, usually through access to the ordinary courts but sometimes involving special tribunals, to which persons in the state who suffer injury may have recourse in order to seek redress. If the courts or other appropriate tribunals of a state refuse to entertain proceedings for the redress of injury suffered by an alien, or if the proceedings are subject to undue delay, or if there are serious inadequacies in the administration of justice, or if there occurs an obvious and malicious act of misapplication of the law by the courts which is injurious to a foreign state or its nationals, there will be a “denial of justice” for which the state is responsible (quite apart from the effect which such circumstances might have for the application of the local remedies rule). The state’s responsibility will at least require it to take the necessary action to secure proper conduct on the part of the court, and may extend to the payment of damages for the injury suffered as a result of the denial of justice. The failure adequately to punish a person who has caused injury to an alien has been regarded as constituting a denial of justice to the injured alien, whether the failure is due to action by the courts or, more often, by the government (*e.g.* by granting an amnesty or remitting a sentence imposed by a court).

Where, however, a court observes its own proper forms of justice and nevertheless pronounces a materially unjust judgment, it is controversial whether a denial of justice is thereby occasioned for which the state is internationally responsible. The judgment giving rise to the material injustice (itself a relative concept) may be the result of the proper application by the court of a law which provides for such a result (in which case it is the law which should properly be the object of complaint), or of an erroneous application by the court of a law which is itself unexceptional. In this latter case, if the error is not remedied on appeal, there is probably no international responsibility for a denial of justice unless the error led to a breach of a treaty obligation resting upon the state or, possibly, the result is so manifestly unjust as to offend against the standards of justice recognised by civilised nations. Even where there is no

irregularity or error of procedure or law a decision by a court may still engage the international responsibility of the state: this would occur, for example, where a judicial decision produces a result which is contrary to the state's treaty obligations.

§165 Internationally injurious acts of administrative officials and members of armed forces. In addition to the international responsibility which a state clearly bears for the official and authorised acts of its administrative officials and members of its armed forces, a state also bears responsibility for internationally injurious acts committed by such persons in the ostensible exercise of their official functions but without that state's command or authorisation, or in excess of their competence according to the internal law of the state, or in mistaken, ill-judged or reckless execution of their official duties. A state's administrative officials and members of its armed forces are under its disciplinary control, and all acts of such persons in the apparent exercise of their official functions or invoking powers appropriate to their official character are prima facie attributable to the state. It is not always easy in practice to draw a clear distinction between unauthorised acts of officials and acts committed by them in their private capacity and for which the state is not directly responsible. With regard to members of armed forces the state will usually be held responsible for their acts if they have been committed in the line of duty, or in the presence of and under the orders of an official superior.

The kind of acts of administrative officials and members of armed forces which are internationally injurious are such as would constitute international wrongs if committed by the state itself, or with its authorisation.

A state will not, however, normally be responsible for the acts of its officials committed while acting as agents for another state or on behalf of an international organisation. Where a person who holds an official administrative or military post commits, in an entirely private capacity unrelated to his official position, an act which injures a foreign national or state, his state has no greater responsibility for that act than it has in the case of an act by a private individual; conversely, a private individual may in certain circumstances be properly regarded as having acted as an agent of the state, which then is responsible for his acts in that capacity.

It must be emphasised that a state bears no responsibility for losses sustained by aliens through legitimate acts of administrative officials and military and naval forces. Individuals who enter foreign territory submit themselves to the law of the land, and their home state has no right to request that they should be treated otherwise than as the law of the land authorises the state to treat its own subjects, provided, of course, that law does not violate essential principles of justice, the minimum standards prescribed by international law for the treatment of aliens, or human rights obligations.' Therefore, since international law does not prevent a state from expelling aliens, the home state of an expelled alien cannot, as a rule, request the expelling state to pay damages for the losses sustained by him through having to leave the country. Therefore, further, a state need not make any reparation for losses sustained by an alien through legitimate measures taken by administrative officials and military forces in time of war, insurrection, riot, or public calamity, such as a fire, an epidemic outbreak of dangerous disease, and the like; although the

manner in which the state exercises its rights in such circumstances may be such as to involve its international responsibility.

### STATE RESPONSIBILITY FOR ACTS OF PRIVATE PERSONS

§165 State responsibility for acts of private persons. International law imposes the duty upon every state to exercise due diligence to prevent its own subjects, and such foreign subjects as live within its territory, from committing injurious acts against other states. But it is in practice impossible for a state to prevent all injurious acts which a private person might commit against a foreign state.

Accordingly, whereas the responsibility of states for official (or ostensibly official) acts of administrative officials and members of armed forces is extensive, their responsibility for acts of private persons is limited. Their duty is to exercise due diligence to prevent internationally injurious acts on the part of private persons, and, in case such acts have nevertheless been committed, to procure satisfaction and reparation for the wronged state, as far as possible, by punishing the offenders and compelling them to pay damages where required. Beyond this a state is not responsible for acts of private persons; there is in particular no duty for a state itself to pay damages for such acts if the offenders are not able to do it. If, however, a state has not exercised due diligence it can be made responsible and held liable to pay damages. The standard to be met by the requirement to exercise due diligence varies with the circumstances, which include the status of the aliens whose person or property are endangered.

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#### **Garay Hermosilla et al. v. Chile**

*Case 10.843, Inter-Am. C.H.R. 156,  
Annual Report 1997, OEA/Ser.L/V/II.95, doc. 7 rev. (1997)  
[Footnotes omitted]*

*[On 1978, the Solidarity Office of the Archbishop of Santiago, Chile, on behalf of relatives of seventy people who had been arrested and disappeared between the years 1974 and 1976, brought criminal charges against General Manuel Contreras Sepúlveda, Director of the Dirección de Inteligencia Nacional (DINA) for those arrests and subsequent disappearances. The Court that finally asserted jurisdiction over the case, the Second Military Tribunal of Santiago, denied the request to perform investigations of facts during 11 years. On 1989, the Tribunal ordered the definitive dismissal of the charges in application of Amnesty Decree Law 2191 issued by the military regime in 1978. The amnesty was issued to pardon the crimes committed by persons belonging to that regime between the years 1973 and 1978. Against the said resolution, an appeal of inapplicability was brought alleging the unconstitutionality of Decree Law 2191 and was submitted to the Supreme Court. The Supreme Court decided to*

*uphold the Decree Law ruling that the amnesty constituted an act of the Legislative Power with the effect of suspending the declaration of criminality under any other law. Then, as the penalty associated with the illicit acts was eliminated, any judicial action intended to prosecute them had to be definitively prevented or paralyzed. The aggrieved parties submitted before the Supreme Court a final appeal for clarification of the verdict, and its reversal. The Supreme Court confirmed its first decision.]*

79. What is at issue in this case is not the responsibility of the Government of Chile or of the other organs of public authority, but the international responsibility of the Chilean State.

80. During the proceedings under this case, it has been demonstrated, and the Government has at no time denied, that there was both active and passive involvement of agents of the Chilean State as authors and perpetrators of the deeds alleged by the petitioners.

81. The Government is in agreement that Decree 2191 is contrary to law; it recognizes the strict relationship between amnesty and impunity; it admits that the successive acts committed in violation of the right to justice represented a single and continuous act in violation of human rights, from the time the victims were seized until justice was denied, and has stated that the amnesty decree-law “represents within a single act a policy of massive and systematic violations of human rights that, in the cases of forced disappearance, begins with the abduction of the victim, continues with hiding him, then his death, persists with denial of the deed and concludes with the amnesty granted to public agents.”

82. The Government of Chile maintains that, as an organ of the Executive Power, it cannot be held responsible or liable for any of the violations alleged by the petitioners, because, with respect to the self-amnesty, the democratic Government has never decreed an amnesty law; and with respect to the revocation of that law, because it is impossible to do so, for the reasons stated; that this same limitation exists with respect to adapting its internal standards to those of the American Convention on Human Rights; that with respect to the application of the amnesty it can act only within the bounds of law and the Constitution which determine its competence, responsibilities and capacities.

83. The fact that Decree-Law 2191 was promulgated by the military regime cannot lead to the conclusion that it is impossible to separate that decree and its legal effects from the general practice of human rights violations of that time. While it is true that the Decree-Law was issued during the military regime, it continues to be applied whenever a complaint is brought before Chilean courts against an alleged violator of human rights. What has been denounced as incompatible with the Convention is the continuous legal consequence of the Decree-Law on self-amnesty.

84. While the Executive, Legislative and Judicial powers may indeed be distinct and independent internally, the three powers of the State represent a single and indivisible unit which is the State

of Chile and which, at the international level, cannot be treated separately, and thus Chile must assume the international responsibility for the acts of its public authorities that violate its international commitments deriving from international treaties.

85. The Chilean State cannot under international law justify its failure to comply with the Convention by alleging that the self-amnesty was decreed by a previous government, or that the abstention and failure of the Legislative Power to revoke that Decree-Law, or the acts of the Judicial Power confirming its application, have nothing to do with the position and responsibility of the democratic Government, since the Vienna Convention on the Law of Treaties provides in Article 27 that a State Party cannot invoke the provisions of its domestic law as a justification for non-compliance with a treaty.

86. The Inter-American Court has ruled that “under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”

87. The responsibility for the violations caused by the de facto Decree-Law 2191, which was promulgated by the military regime that seized power in an arbitrary and illegal manner, which was not revoked by the current Legislative power, and which is still applied by the Judicial power, lies squarely with the State of Chile, regardless of the regime that issued it or the branch of the State that applied it or made possible its application. There can be no doubt whatever that the Chilean State bears the international responsibility for deeds that, while they may have occurred under the military government, have still not been investigated or punished. Consistent with the principle of the continuity of the State, international responsibility exists independently of changes of government. In this respect, the Inter-American Court of Human Rights has said: “According to the principle of the continuity of the State in international law, responsibility exists both independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal. The foregoing is also valid in the area of human rights although, from an ethical or political point of view, the attitude of the new government may be much more respectful of those rights than that of the government in power when the violations occurred.”

....

### ***Questions***

1. What are the elements needed to attribute international responsibility to a State for an action or omission? Do the same criteria or reasoning apply to the actions of lower level government officers?
2. Can the actions of the judiciary be a source of international responsibility for a State? Can the actions of the legislative body incur the international responsibility of a State?

3. Can the actions of private individuals be a source of international State responsibility?
4. What differences can you identify between international state responsibility and domestic state responsibility?

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**2.     **ATTRIBUTION OF RESPONSIBILITY IN THE FRAMEWORK OF THE  
AMERICAN CONVENTION: THE DUTY TO RESPECT AND ENSURE IN  
ARTICLE 1.1****

**Article 1(1)  
Obligation to Respect Rights  
American Convention on Human Rights**

1. The States Parties to this Convention 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 for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

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**Velásquez Rodríguez v. Honduras**  
*Inter-Am. Ct. H.R., Judgment of July 29, 1988, (ser. C) No. 4 (1988)*

*[Angel Manfredo Velasquez, a Honduran student and labor activist, was abducted while driving his car in downtown Tegucigalpa on September 12, 1981. Eyewitnesses told his family that he was forcibly placed in a small van in a parking lot and driven away. His relatives sought to know his whereabouts through the filing of several writs of habeas corpus and criminal complaints, without any result. Velasquez's abduction was one of many taking place at that time in Honduras. All of those abductions, known as "disappearances", had a very typical common pattern. They started with the violent abduction of the victim, sometimes even during the day and in populated areas, by armed men, commonly dressed, who acted with apparent impunity, in non official vehicles with dark windows, with or without a false identification. Victims were usually taken to hidden and unofficial sites of detention where they were interrogated, tortured, and sometimes finally executed. Authorities systematically denied the very fact of the detention, whereabouts and destination of the victims to the victim's relatives, lawyers, and human rights defenders, as well as to the judges executing writs of habeas corpus. The population deemed as a*

*notorious fact that abductions were perpetrated by military officers, policemen or people under their direction. The systematic practice of “forced disappearances” always targeted people that Honduran authorities deemed dangerous for the state security.]*

160. This requires the Court to examine the conditions under which a particular act, which violates one of the rights recognized by the Convention, can be imputed to a State Party thereby establishing its international responsibility.

....

162. This article specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated.

....

164. Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any 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 Convention.

165. The first obligation assumed by the States Parties under Article 1(1) is “to respect the rights and freedoms” recognized by the Convention. 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. On another occasion, this Court stated:

“The protection of human rights, particularly the civil and political rights set forth in the Convention, 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. These are individual domains that are beyond the reach of the State or to which the State has but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power (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, para. 21).”

166. The second obligation of the States Parties is to “ensure” the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation 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.

167. 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.

168. The obligation of the States is, thus, much more direct than that contained in Article 2, which reads:

“Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

169. According to Article 1(1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention.

170. This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.

171. This principle suits perfectly the nature of the Convention, which is violated whenever public power is used to infringe the rights recognized therein. If acts of public power that exceed the State’s authority or are illegal under its own laws were not considered to compromise that State’s obligation under the treaty, the system of protection provided for in the Convention would be illusory.

172. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international

responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

173. Violations of the Convention cannot be founded upon rules that take psychological factors into account in establishing individual culpability. For the purposes of analysis, the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant - the violation can be established even if the identity of the individual perpetrator is unknown. 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. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1(1) of the Convention.

174. 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.

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 victims 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.

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 victim's 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.

....

### **Questions**

1. How has the Inter-American Court of Human Rights dealt with the notion of international responsibility under Article 1.1 of the American Convention? Do you agree with this interpretation of the Convention? Are there alternative ways of interpreting this provision of the treaty?

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### **3. CONSEQUENCES OF THE DECLARATION OF INTERNATIONAL STATE RESPONSIBILITY: REPARATIONS**

#### **Loayza Tamayo v. Peru**

*Inter-Am. Ct. H.R., Reparations, Judgment of November 27, 1998, (ser. C) No. 42 (1998)*

*[On February 6, 1993, Ms. María Elena Loayza-Tamayo, a Peruvian citizen and a professor at the Universidad San Martín de Porres, was arrested by officers of the National Counter-Terrorism Bureau (“DINCOTE”) of the Peruvian National Police Force on charges that she was a collaborator of the subversive group “Shining Path.” She remained incommunicado in the DINCOTE offices for ten days and was subjected to torture, cruel and degrading treatment. She also alleged that she was raped. During that time, she was not allowed to contact her family or attorney and she could not file a writ of habeas corpus because the Peruvian anti-terrorist legislation prohibited that remedy in cases of terrorism. Initially, María Elena Loayza-Tamayo was prosecuted before a military court on the charge of treason and was acquitted by the Special Tribunal of the Supreme Council of Military Justice. Rather than ordering her release, the military tribunal subsequently referred her case to the civil court system so that she could be tried for the crime of terrorism. On October 10, 1994, she was convicted of that crime by a “faceless” court and sentenced to serve 20 years’ imprisonment. The Inter-American Court of Human Rights found violations of the rights to personal liberty, humane treatment, and a fair trial, all in relation to the general duty to respect and ensure the exercise of rights protected by the American Convention, and ordered the State to make reparations to the victim.]*

## IX REPARATIONS

107. The Commission petitioned the Court to instruct the State that it was to “expressly recognize that the freedom it gave to the victims is permanent, unqualified and unrestricted.”

108. The State argued that such a claim “is irrelevant to the principle that informs the right to compensation and reparation that the Judgment establishes.” It added that the Commission’s petition “reveals an impermissible punitive intent [and that no] government can guarantee that an individual’s freedom will be without restriction or condition of any kind, since that depends entirely upon the conduct of the individual in question.”

109. In its Judgment on the merits, the Court ordered Peru to release the victim. In that Judgment, it is clear that the freedom so ordered is definitive and final, unconditional and unqualified. Hence, the Court understands that the State’s release of the victim on October 16, 1997, is the kind inferred from the Judgment and therefore believes it need not accede to the Commission’s request.

110. The victim requested that the Court order Peru to reinstate her in all public teaching positions she held and to use its good offices to have her reinstated in her previous positions within the private sector.

111. For its part, the Commission petitioned the Court to order the State to:

- a) Reinstatement of the victim in all her previous positions of employment, at the level and rank she had prior to being unlawfully deprived of her freedom;”
- b) Prevail upon the National School of Dramatic Arts and the Universidad de San Martín de Porres to reinstate the victim as a teacher in her areas of specialization; failing that, pay the victim a sum equivalent to the lost pay up to her retirement age;
- c) Give the victim the category and grade she would have had, had she not been detained and incarcerated or, failing that, pay her a sum equivalent to the remuneration that she will fail to receive on that account; and
- d) Re-enter the victim’s name in the records of the respective retirement plan retroactive to the date of her detention.

112. The State argued that the petition seeking the victim’s reinstatement in her public teaching positions was “not necessary” since, as shown by the December 17, 1997 Directorial Resolution 2273—which the victim herself had offered in evidence—she had already been reinstated in the teaching service as a professor teaching 24 hours of history and geography at the Rímac National

Girl's High School. The State argued that the victim should direct her other petitions to the School of Dramatic Arts and the Universidad de San Martín de Porres, which would evaluate the merit of her request. It added that Peruvian law did not guarantee civil servants a job until retirement.

113. It is the view of this Court that the State does have an obligation to make every effort within its power to have the victim reinstated in the teaching positions she held in public institutions at the time of her detention. Her salaries and other benefits should be equal to the full amount she was receiving for teaching in the public and private sectors at the time of her detention, adjusted to its value as of the date of this Judgment. The Court has had before it a resolution ordering the victim's reinstatement in the teaching service, so that Peru has already partially complied with this obligation.

114. The Court further considers that the State is under the obligation to re-enter the victim's name on the proper retirement records, retroactive to the date on which she was removed from those records, and to ensure that she enjoys the same retirement rights to which she was entitled prior to her detention.

115. However, judging from the evidence, particularly the medical reports on the victim's health (*supra* 75 and 76) and the victim's own statement, circumstances are such that, for the present, it would be difficult for her to fully re-immers herself in her former jobs.

116. The State, therefore, has an obligation to do everything necessary to ensure that the victim receives her salaries, social security and employment benefits as of the date of issuance of this Judgment and until such time as she is able to effectively re-join the teaching service. The Court believes the prudent course of action would be to use the domestic mechanisms that apply in cases of employment disability or any other suitable means that will ensure that this obligation is honored.

117. The Court believes that strictly speaking, the victim's claims regarding her career prospects and promotion would not be measures of restitution; it will, therefore, examine them when it evaluates the damages the victim is claiming to her "life plan"[*proyecto de vida*] (*infra* 144 *et seq*).

118. In their reparations briefs, both the victim and the Commission petitioned the Court to order Peru to take the measures necessary to expunge the victim's criminal, court and prison records.

119. The Commission also petitioned the Court to instruct Peru to vacate the proceedings and judgments delivered in the regular courts, provide the victim with the proper court records, and report the nullification of the proceedings and the victim's release in the "*El Peruano*" official journal wherein the decisions of the judicial branch of government are reported.

120. Peru argued that the petitions were irrelevant and immaterial and constituted interference in the jurisdiction of Peruvian authorities, inasmuch as the September 17, 1997 Judgment had confined itself to ordering release of the victim, who now enjoys “absolute and complete freedom.” The State further noted that its judicial branch was still considering a petition that the victim herself had filed seeking to have her police or criminal records expunged.

121. The Court has had before it one document issued by the Registry of Records and Convictions of the Supreme Court of Military Justice (*supra* 54) that concerns the first proceeding to which the victim was subjected. However, the Court does not have sufficient information in its possession to determine whether there are other records in which the victim figures.

122. Under Article 68 of the American Convention, the States Parties “undertake to comply with the judgment of the Court in any case to which they are parties.” Consequently, Peru is obligated to adopt all domestic legal measures that follow from the Court’s finding that the second trial to which the victim was subjected constituted a breach of the Convention. Hence, no conviction handed down in that second trial can have any legal effect, which is why all the respective proceedings and records are null and void.

123. The State’s release of the victim is not sufficient to fully redress the consequences of the human rights violations perpetrated against her, given the length of time that she remained in prison, the suffering she endured as a result of the cruel, inhuman and degrading treatment to which she was subjected, and the fact that she was held incommunicado during her incarceration, paraded in prison uniform before the mass media, held in solitary confinement in a small, unventilated cell with no natural light, beaten and subjected to other forms of abuse such as threatened drowning, intimidation with threats of further violence, and restricted prison privileges (*Loayza Tamayo Case*, Judgment of September 17, 1997. Series C No. 33, para. 58). The consequences of that treatment cannot be fully redressed or compensated.

124. Alternative forms of reparation have to be found, such as pecuniary compensation for the victim and, where appropriate, her next of kin. This compensation is mainly for injuries suffered previously, includes pecuniary as well as moral damages (*Garrido and Baigorria Case, Reparations, supra*, para. 43).

## X PECUNIARY DAMAGES

125. In the case of pecuniary damages, in their reparations briefs both the victim and the Inter-American Commission requested that the Court order Peru to pay the following amounts:

a) US\$29,724 (twenty-nine thousand seven hundred twenty-four United States dollars) plus the legal interest on that amount, representing the income that the victim ceased to receive because of the events that resulted in her incarceration.

On this matter, the State argued that for the duration of her detention, the victim had received a pension from the State as a former employee of the Ministry of Health. Hence, she was not left destitute. It could not be inferred, the State maintained, that had the victim not been detained, she would have continued to work at the same educational institutions where she was teaching at the time of her detention;

b) US\$13,912.56 (thirteen thousand nine hundred twelve United States dollars and fifty-six cents) for groceries;

c) US\$3,864.60 (three thousand eight hundred sixty-four United States dollars and sixty cents) for articles of personal hygiene;

d) US\$3,508.92 (three thousand five hundred eight United States dollars and ninety-two cents) for materials for making handmade goods;

e) US\$1,140.00 (one thousand one hundred forty United States dollars) for purchase of medications;

f) US\$3,168.00 (three thousand one hundred sixty-eight United States dollars) for wearing apparel and shoes;

g) S/2,500 (two thousand five hundred soles) in travel expenses incurred by next of kin to visit her at the Chorrillos Maximum Security Women's Prison to take groceries and other supplies to the victim;

h) S/23,158.30 (twenty-three thousand one hundred fifty-eight and thirty/one hundredths soles) for the medical and educational expenses of Paul Abelardo and Gisselle Elena Zambrano-Loayza, expenses that were paid by Olga Adelina and Carolina Loayza-Tamayo.

The State argued that education was a parental obligation and the amount spent on a child's education was for the parents to decide, in accordance with the provisions of the Civil Code and the Child and Adolescent Code. The State, therefore, was not obligated to pay those expenses. It added that under the Civil Code and the Child and Adolescent Code, in the absence of the parents it was the duty of the children's grandparents, uncles and aunts to see to their education.

i) US\$12,000.00 (twelve thousand United States dollars) for the income that Ms. Carolina Loayza-Tamayo ceased to receive when she undertook the victim's defense and resigned her position at the Ministry of Foreign Affairs;

moreover, both the victim and the Commission petitioned the Court to instruct the State to pay certain estimated amounts for the following items:

j) A prudent amount for “lost earnings” and expenses incurred by the victim’s next of kin to visit her at the prison;

k) A prudent amount for “lost earnings” and expenses incurred by her sister and attorney to visit the victim at the prison for the duration of her detention (some two hundred visits); and

l) Estimated sums of US\$18,000.00 (eighteen thousand United States dollars) and US\$14,400 (fourteen thousand four hundred United States dollars) for the future costs of the rehabilitation of the victim and her next of kin, respectively.

On this point, the State argued that the physical and mental condition of the victim and her next of kin prior to her detention had not been shown, so that this form of reparation would be absurd. It added that the current state of physical and mental health of those persons had also not been shown. Finally, it stated that this claim did not fit into the reparations ordered in the Judgment on the merits.

126. Peru also pointed out that the figures for the pecuniary damages claimed by the victim were given in dollars and not in Peru’s local currency. It argued that under its Budget Law, payment of remuneration in foreign currency is strictly prohibited. It also objected to the rate of exchange used to make the calculations, since the Peruvian “sol” had not remained fixed since 1993, the date on which the victim was detained, and was currently fluctuating between S/2.80 and S/2.82 to the dollar. Peru maintained, therefore, that the amount claimed, when expressed in dollars, would be less than the amount indicated in the victim’s brief.

127. As for the State’s objection to the currency in which the victim’s pecuniary claims were expressed, the Court notes that one effect of the reparations measures must be to preserve the real value of the amount received, so that it can achieve its compensatory intent. The Court previously held that “one of the easiest and most readily accessible ways to achieve this goal [is] the conversion of the amount received into one of the so-called hard currencies” (*Velásquez Rodríguez Case, Interpretation of the Compensatory Damages Judgment (Art. 67 American Convention on Human Rights)*, Judgment of August 17, 1990. Series C No. 9, para. 42). In its case law, the reiterated practice of the Court has been to use the United States dollar as the “hard” currency in which the compensatory damages are figured and has found that this safeguard protects the purchasing power of the amounts ordered. Hence, the practice of quoting the amounts in that currency -amounts which may then be paid in the local currency of the respondent state at the exchange rate on the day prior to payment- is consistent with the Court’s customary practice, one that it confirms in the instant Case. However, in some instances the same expenditures are quoted in soles in the charts of estimated costs that the victim submitted as a reference aid, and then quoted in an equal number of United States dollars in the body of the victim’s reparations brief, as if parity existed between the two currencies (*supra* 50). In these cases, the Court used the amounts shown on receipts and in other credible documents to arrive at the figures shown in the section on proven facts.

128. In the case of pecuniary damages for survivors of human rights violations, the Court has held that the compensation to be awarded depends on a number of factors, one of which is the time during which the victim remained unemployed (*El Amparo Case, Reparations (Art. 63(l) American Convention on Human Rights)*, Judgment of September 14, 1996. Series C No. 28, para. 28). That criterion applies here as well, inasmuch as the victim in the instant Case is alive.

129. Based on the information received, its own case law and the facts proven, the Court determines that the compensation for pecuniary damages in the instant case shall include the following:

- a) A sum corresponding to the salaries that the victim ceased to receive between the time she was detained and the date of the present Judgment. To compute the amount in question, the Court finds that at the time of her detention, the victim was receiving a combined salary of S/592.61 (five hundred ninety-two and sixty-one/one hundredths soles), which when calculated on the basis of the average of the selling and buying exchange rates in effect as of that date, yields a total of US\$339.60 (three hundred and thirty-nine United States dollars and sixty cents). The calculation will be made on the basis of 12-monthly salaries per year, plus a bonus of two months' salary for each year. The interest accruing up to the date of this Judgment will be added and, as the victim requested, no deduction whatever will be made for personal expenses, since, as the victim is alive, it must be concluded that either she or members of her family paid for those expenses for the period in question using other means. Consequently, the total for this item is US\$32,690.30 (thirty-two thousand six hundred ninety United States dollars and thirty cents);
- b) A sum for the victim's medical expenses during her incarceration, since the Court considers that there is sufficient evidence to show that the corresponding ailments began during her confinement, a fact not refuted by the State. The evidence presented to support the figure given by the victim for this item is not conclusive and, for the sake of equity, the Court considers the proper course of action to be to award the sum of US\$1,000 00 (one thousand United States dollars) for medical expenses;
- c) A sum corresponding to the travel expenses incurred by the next of kin to visit the victim during her incarceration. For equity's sake, the Court believes US\$500 00 (five hundred United States dollars) is an appropriate award for these expenses; and.
- d) An amount corresponding to the future medical expenses of the victim and her children, since the Court finds there is sufficient evidence to show that her ailments began during the victim's confinement, a fact not disproved by the State. For the sake of equity the Court considers US\$15,000.00 (fifteen thousand United States dollars) a fitting sum for the victim, and US\$5,000.00 (five thousand United States dollars) for each of her children.

130. On the other hand, the Court is dismissing the victim's claims for compensation of expenses to purchase groceries, articles of personal hygiene and toiletries, materials with which to do hand work, clothing, shoes, and the education of her children, expenses that were said to have been

defrayed, at least in part, by some members of her family. The Court finds that it has been shown that prior to her incarceration, the victim was paying those expenses with her own funds and would have had to pay those expenses even if she had not been incarcerated. Therefore, the reparation ordered for lost earnings also implicitly includes the expenses herein described.

131. The Court is also denying the claim seeking payment of an amount for the income that Ms. Carolina Loayza-Tamayo was alleged to have lost by being forced to give up the contract she had with the Ministry of Foreign Affairs, and another that she was about to conclude with the same Ministry, in order to devote herself to the victim's defense. The Court finds that there is no proof to support either of these claims or their causal nexus to the wrongful acts perpetrated against the victim in the instant case.

132. The Court finds that the "lost income" and visits of Ms. Carolina Loayza-Tamayo to the prison were representation-related expenses and will, therefore, examine their relevance when it deals with costs and expenses (*infra* 172).

133. Accordingly, the Court has decided to award US\$49,190.30 (forty-nine thousand one hundred ninety United States dollars and thirty cents) to Ms. María Elena Loayza-Tamayo as compensation for material damages, and US\$5,000.00 (five thousand United States dollars) to each of her children for medical expenses.

## XI MORAL DAMAGES

134. In her reparations brief, the victim argued that moral damages were incurred by reason of her deprivation of freedom under subhuman conditions; separation from her children, parents and siblings; the inhumane, humiliating and degrading treatment she suffered during her detention and isolation, and when she was exhibited to the press as a "terrorist criminal." The victim maintained that the pain inflicted during the period of her incarceration endures in the form of the psychological consequences. She added that her children and other next of kin were directly affected by the abuse she suffered and were socially stigmatized. She added that her sister, Carolina Loayza-Tamayo, suffered this injury directly as she became the target of the State's intimidation tactics and false accusations and was included on a list of attorneys under investigation.

135. The victim therefore requested that the Court order the State to pay the following compensation for moral damages: US\$50,000.00 (fifty thousand United States dollars) to her; US\$20,000.00 (twenty thousand United States dollars) to her parents; US\$15,000.00 (fifteen thousand United States dollars) to each of her children, and a lump sum of US\$35,000.00 (thirty-five thousand United States dollars) for her siblings.

136. For its part, the Commission petitioned the Court to instruct Peru to pay fair compensation to the victim and to her next of kin, based on the amount indicated by the victim in her

reparations brief.

137. The State maintained that to substantiate her claims for moral damages, the victim had used the same arguments she used to substantiate her claims for other heads of damages. It argued that in the proceedings into the merits, it was never proven that the victim had in fact been raped during her incarceration, or that she had been coerced into making self-incriminating statements, or that Peru had violated articles 8(2)(g) and 8(3) of the Convention. The State further maintained that in its Judgment on the merits, the Court had refrained from any pronouncement concerning the lack of independence and impartiality of the military courts. For these reasons, the State argued, the “alleged ‘moral damages’ being sought [...] do not fit the facts”; and it maintained that this was even truer in the case of the damages being claimed for the victim’s next of kin.

138. It is obvious to the Court that the victim suffered moral damages, for it is characteristic of human nature that anyone subjected to the kind of aggression and abuse proven in the instant Case will experience moral suffering. No evidence is required to arrive at this finding.

139. Taking into account the particular circumstances of the case, the Court considers the sum of US\$50,000.00 (fifty thousand United States dollars) to be fair compensation for the victim for the moral damages she suffered.

140. It has been shown that the victim’s children were approximately 12 and 16 years old when she was detained. Since at the time, the victim was supporting them and paying for their health care and education, the children were dependent upon their mother. The Court has also established that grievous violations were committed against the victim and must presume that they had an impact on her children, who were kept apart from her and were aware of and shared her suffering. Since, in the Court’s opinion, the State has not disproved these presumptions, Gisselle Elena and Paul Abelardo Zambrano-Loayza are entitled to receive the “fair compensation” referred to in operative paragraph six of the Judgment on the merits.

141. Accordingly, it is fair to award each of the victim’s children the sum of US\$10,000 00 (ten thousand United States dollars) in moral damages.

142. The Court can reasonably presume that Mr. Julio Loayza-Sudario and Ms. Adelina Tamayo-Trujillo de Loayza suffered moral damages because of what happened to the victim, as it is human nature that any individual should experience pain at his or her child’s torment. The State did not disprove this presumption. The Court considers, therefore, that each of the victim’s parent entitled to the sum of US\$10,000.00 (ten thousand United States dollars) as fair compensation for moral damages.

143. The same considerations apply to the victim’s siblings, who as members of a close family could not have been indifferent to Ms. Loayza-Tamayo’s terrible suffering, a presumption not disproved by the State. It is proper, therefore, to name the victim’s siblings as beneficiaries of the

fair compensation referred to in operative paragraph six of the Judgment on the merits. The Court considers that fair compensation for moral damages would be US\$3,000 00 (three thousand united States dollars) for each sibling.

## XII LIFE PLAN

144. The victim petitioned the Court for a ruling on the compensation, which might be due to her in the form of damage to her “life plan” and enumerated a number of factors that, in her judgment, should be taken into account to establish the scope of this head of damages and measure its consequences.

145. The State alleged that the request for compensation for damages to a life plan was inadmissible and noted that compensation of that nature was implicit in the other categories for which damages were sought, such as the “indirect or consequential damages” and “lost earnings”. It pointed out that the victim had already been re-instated as a history and geography teacher at the Rimac National Women’s High School (*supra 106.A.1*) and that she was free to apply to have her place in the Law School saved; it maintained that reinstatement at the San Martin de Porres Private University was a decision that only the organs of that institution could make. The State further argued that both the victim and the Commission had attributed the alleged damages caused to Ms. Loayza-Tamayo to her detention. Its contention was, however, that the State could not be held liable for those damages inasmuch as the authorities that intervened in the case in question did so in the legitimate exercise of their authority under the laws in force at that time.

146. The State’s argument that the authorities acted in the legitimate exercise of their authority is inadmissible. The Court itself has established that the acts of which Ms. Loayza-Tamayo was victim were violations of provisions of the American Convention.

147. The head of damages to a victim’s “life plan” has been examined both in recent doctrine and case law. This notion is different from the notions of special damages and loss of earnings. It is definitely not the same as the immediate and direct harm to a victim’s assets, as in the case of “indirect or consequential damages.” The concept of lost earnings refers solely to the loss of future economic earnings that can be quantified by certain measurable and objective indicators. The so-called “life plan,” deals with the full self-actualisation of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals.

148. The concept of a “life plan” is akin to the concept of personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom. An individual can hardly be described as truly free if he does not have options to pursue

in life and to carry that life to its natural conclusion. Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard.

149. In the case under study, while the outcome was neither certain nor inevitable, it was a plausible situation—not merely possible—within the likelihood given the subject’s natural and foreseeable development, a development that was disrupted and upset by events that violated her human rights. Those events radically alter the course in which life was on, introduce new and hostile circumstances, and upset the kinds of plans and projects that a person makes based on the everyday circumstances in which one’s life unfolds and on one’s own aptitudes to carry out those plans with a likelihood of success.

150. It is reasonable to maintain, therefore, that acts that violate rights seriously obstruct and impair the accomplishment of an anticipated and expected result and thereby substantially alter the individual’s development. In other words, the damage to the “life plan”, understood as an expectation that is both reasonable and attainable in practice, implies the loss or severe diminution, in a manner that is irreparable or reparable only with great difficulty, of a persons prospects of self-development. Thus, a person’s life is altered by factors that, although extraneous to him, are unfairly and arbitrarily thrust upon him, in violation of laws in effect and in a breach of the trust that the person had in government organs duty-bound to protect him and to provide him with the security needed to exercise his rights and to satisfy his legitimate interests.

151. For all these reasons, the claim seeking reparation, to the extent possible and by appropriate means, for the loss of options that the wrongful acts caused to the victim is entirely admissible. The reparation is thus closer to what it should be in order to satisfy the exigencies of justice: complete redress of the wrongful injury. In other words, it more closely approximates the ideal of *restitutio in integrum*.

152. It is obvious that the violations committed against the victim in the instant Case prevented her from achieving her goals for personal and professional growth, goals that would have been feasible under normal circumstances. Those violations caused irreparable damage to her life, forcing her to interrupt her studies and to take up life in a foreign country far from the context in which her life had been evolving, in a state of solitude, poverty, and severe physical and psychological distress. Obviously this combination of circumstances, directly attributable to the violations that this Court examined, has seriously and probably irreparably altered the life of Ms. Loayza-Tarnayo, and has prevented her from achieving the personal, family and professional goals that she had reasonably set for herself.

153. The Court recognizes the existence of grave damage to the “life plan” of Ms. Maria Elena Loayza-Tamayo, caused by violations of her human rights. Nevertheless’ neither case law nor doctrine has evolved to the point where acknowledgment of damage to a life plan can be translated into economic terms. Hence, the Court is refraining from quantifying it. It notes,

however, that the victim's recourse to international tribunals and issuance of the corresponding judgment constitute some measure of satisfaction for damages of these kinds.

154. The condemnation represented by the material and moral damages ordered on other points of this Judgment should be some compensation for the victim for the suffering these violations have caused her; still, it would be difficult to restore or offer back to her the options for personal fulfillment of which she has been unjustly deprived.

### **XIII OTHER FORMS OF REPARATION**

155. In her reparations brief, the victim petitioned the Court to order

a) That the State publicly apologize to her and to her next of kin by publishing press releases in the five major Peruvian newspapers, the "official journal" among them, and in newspapers with an international circulation;

b) That the State guarantee that her honor and the honor of her next of kin is restored and that it acknowledge, to the Peruvian public and to the international community, that it is responsible for the events of which she was the victim, and that it give public and mass circulation to the Judgment delivered on September 17, 1997.

156. The Commission did not raise this issue in its reparations brief.

157. The State indicated that when the victim was released, the mass media gave her release wide national coverage; the public was, therefore, informed of the facts and the publicity objective achieved. The State noted that the victim had herself submitted a video containing information about the news reports of her release order.

158. The Court considers that this Judgment, coupled with Judgment on the merits which found Peru responsible for human rights violations, constitute adequate reparation.

159. The victim requested that the Court instruct Peru to amend Decree-Law No. 25,475 (Terrorism) and Decree-Law No. 25,659 (Treason), as necessary.

160. For its part, the Commission petitioned the Court to order that Peru amend the pertinent provisions of those Decree-Laws and, in general, adopt the domestic legal measures necessary to avoid a repetition of violations of the kind proven in the instant case.

161. The State argued that amendment of Decree-Laws No. 25,475 and No. 25,659 would have no compensatory value. It maintained that it had introduced positive changes in its terrorism-related laws, including elimination of the practice of trial before "faceless" judges, creation of an *ad hoc* commission empowered to grant pardons, the possibility of executive

clemency for persons tried for and convicted of the crimes of terrorism and treason, and commutation of sentence for those who avail themselves of the Repentance Law.

162. In the Judgment on the merits of the instant Case, delivered on September 17, 1997 (*Loayza Tamayo Case, supra* 123, para. 68), the Court's finding was that Decree-Laws 25,474 and 25,659 were incompatible with Article 8(4) of the Convention. The case law of this Court is that States Parties to the Convention may not order measures that violate rights and freedoms recognized therein (*Suárez Rosero Case*, Judgment of November 12, 1997. Series C No. 35, para. 97).

163. The Decree-Laws in question refer to actions not strictly defined (*Loayza Tamayo Case, supra* 123, para. 68), were invoked in the military court and regular court proceedings, and caused the victim injury.

164. Consequently, with respect to Decree-Laws 25,475 and 25,659, the Court finds that the State must comply with its obligations under Article 2 of the Convention, which stipulates that:

[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

#### XIV THE DUTY TO TAKE DOMESTIC MEASURES

165. In her reparations brief, the victim petitioned the Court to request Peru to have proceedings instituted before the competent courts for the purpose of investigating, identifying and punishing the material and intellectual authors of the events that gave rise to the instant case and the accessories after the fact.

166. In its reparations brief, the Commission requested that the Court order that judicial proceedings be instituted and administrative measures taken to investigate the facts and ascertain the identity of those responsible for the inhumane, degrading and humiliating treatment suffered by the victim.

167. The State argued that Decree-Laws Nos. 26,479 and 26,492, ordered as part of the pacification process, granted a general amnesty to military, police and civilian personnel; hence, the request made by the victim and the Commission is inadmissible. According to the State, even if the individuals who detained and prosecuted the victim had incurred some administrative, civil or criminal responsibility those Decree-Laws precluded their prosecution at the present time, either judicially or administratively.

168. Under the American Convention, every person subject to the jurisdiction of a State Party is guaranteed the right to recourse to a competent court for the protection of his fundamental rights.

States, therefore, have the obligation to prevent human rights violations, investigate them, identify and punish their intellectual authors and accessories after the fact, and may not invoke existing provisions of domestic law, such as the Amnesty Law in this case, to avoid complying with their obligations under international law. In the Court's judgment, the Amnesty Law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru's argument that it cannot comply with the duty to investigate the facts that gave rise to the present Case must be rejected.

169. As this Court has held on repeated occasion, Article 25 in relation to Article 1(1) of the American Convention obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that, *inter alia*, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered. As this Court has ruled, Article 25 "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" (*Castillo Páez Case*, Judgment of November 3, 1997. Series C No. 34, paras. 82 and 83; *Suárez Rosero Case*, *supra* 162, para. 65; and *Paniagua Morales et al. Case*, *supra* 57, para. 164). That article is closely linked to Article 8(1), which 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, for the determination of his rights, whatever their nature.

170. Consequently, it is the duty of the State to investigate human rights violations, prosecute those responsible and avoid impunity. The Court has defined impunity as the failure to investigate, prosecute, take into custody, try and convict those responsible for violations of rights protected by the American Convention and has further stated that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives (*Paniagua Morales et al. Case*, *supra* 57, para. 173).

171. The State has an obligation to investigate the facts in the instant Case, to identify those responsible, to punish them, and to adopt the internal legal measures necessary to ensure compliance with this obligation (Article 2 of the American Convention).

## XV COSTS AND EXPENSES

172. In her reparations brief, the victim pointed out that Ms. Carolina Loayza- Tamayo, her sister and attorney, was her defense lawyer in her representations before Peruvian authorities and administrative bodies during the domestic proceedings. She estimated her fees at US\$15,000.00 (fifteen thousand United States dollars). The victim also estimated that her attorney had visited her approximately 200 times during her incarceration.

173. The victim added that her attorney also represented her before the Commission; that the latter had accredited her as an assistant in the proceedings before the Court; and that her sister

had used her own funds to pay the expenses involved in the proceedings before those two bodies of the inter-American system, including her airfare and the costs of the telephone, mail, fax and courier services. Given the foregoing, the victim requested the sum of US\$5,000.00 (five thousand United States dollars) for reimbursement of those expenses.

174. The Commission petitioned the Court to order payment of the expenses that Carolina Loayza-Tamayo had incurred in her legal representation of the victim *vis-à-vis* the Peruvian courts and the organs of the inter-American system; the itemization and calculations submitted by the victim in her brief were forwarded to the Court.

175. Peru pointed out that in its Judgment of September 17, 1997, the Court had decided that Peru was to reimburse the victim's next of kin for any expenses they may have incurred in their representations. The State argued that inasmuch as the Commission did not name Ms. Carolina Loayza-Tamayo as a victim, any request on her behalf was irrelevant and immaterial. Using this reasoning, Peru argued that the victim's claims at this stage of the proceedings were inadmissible. It further contended that the Judgment had ordered reimbursement of expenses incurred in representations before the Peruvian authorities, but not payment of professional fees.

176. Concerning these arguments, the Court considers that in the instant case, the costs must be examined in light of subparagraph (h) of Article 55(1) of its Rules of Procedure. Costs are an element of the reparations of which Article 63(1) of the Convention speaks, as they are a natural consequence of actions taken by the victim, her heirs or her representatives to obtain a Court resolution recognizing the violation committed and establishing its legal consequences. In other words, the activity in which they engaged to have recourse to an international court involves or can involve financial outlays and commitments for which the victim must be compensated when a judgment of condemnation is delivered.

177. In keeping with the applicable provisions, the Court considers that the costs to which Article 55(1) of its Rules of Procedure refers include the various outlays that the victim makes or pledges to make to accede to the inter-American system for the protection of human rights, and include the fees that are routinely paid to those who provide them with legal assistance. . Obviously, these expenses refer solely to those that are necessary and reasonable, according to the particularities of the case, and that are effectively made or pledged to be made by the victim or her representatives (*Garrido and Baigorria Case, Reparations supra* 84, para. 80).

178. It is important to point out that under Article 23 of the Rules of Procedure, the representatives of the victims or of their next of kin may independently submit their own arguments and evidence at the reparations stage. This recognition of their *locus standi* opens up the possibility of expenses associated with that representation. In practice, the legal assistance provided to the victim begins not at the reparations stage, but in proceedings before domestic judicial bodies, and then continues in the successive proceedings before the two bodies of the inter-American system for the protection of human rights, namely the Commission and the Court. Hence, the concept of costs being examined here also includes the costs involved in

proceedings before the domestic courts (*Garrido and Baigorria Case, Reparations, supra* 84, para. 81) and those seeking justice on an international plane, before two bodies: the Commission and the Court.

179. In exercise of this jurisdictional power, it is up to the Court to make a prudent assessment of the specific scope of the costs to which the judgment of condemnation refers, taking into account timely verification thereof, the circumstances of the specific case, the nature of the jurisdiction for the protection of human rights, and the characteristics of the respective proceedings, which are unique and different from those of other proceedings, both domestic and international. A reasonable amount of the costs incurred by the victim or her representatives and attorneys *vis-à-vis* Perú, the Inter-American Commission and this Court will be determined on the basis of equity (*Garrido and Baigorria Case, Reparations, supra* 84, para. 82).

180. Based on the foregoing, the Court is setting costs and fees at the sum of US\$20,000.00 (twenty thousand United States dollars), of which US\$15,000.00 (fifteen thousand United States dollars) are the fees of attorney Carolina Loayza Tamayo.

## XVI MANNER OF COMPLIANCE

181. The victim requested that:

- a) The compensation ordered in her favor be paid in cash;
- b) The compensation ordered for her daughter, her parents and her siblings be paid in cash;
- c) The compensation ordered for her son be deposited in a trust fund until he has reached the age of 21;
- d) Payment of the amounts ordered by the Court be made within ninety days of notification of this Judgment and be tax-exempt and, where appropriate, that interest be paid on the final amounts of the compensation, calculated from the date of the Judgment to the date of actual payment, using the bank interest rate in effect in Peru at the time the Judgment is delivered; and
- e) The Court oversee fulfillment of the reparations ordered and payment of the compensation, and order the instant Case closed only when full compliance has been established.

182. The State made no observations on these points.

183. The Court considers the victim's claims to be reasonable, save for those relating to the deadline for payment and the method of payment to the victim's son. As regards the deadline, the jurisprudence of the Court has consistently been to give States a period of six months in which to comply with the obligations established in reparations judgments.

184. As for the payment owed to Paul Abelardo Zambrano-Loayza, the latter is so close to majority age that the formalities required to set up a trust fund are unwarranted and could even obstruct execution of the Judgment and thus be contrary to the interests of justice. For this reason, the Court is ordering that the amount awarded to Paul Abelardo Zambrano-Loayza be deposited in a solvent banking institution of recognized standing, in an interest-bearing, fixed-term certificate of deposit, at the most favorable terms under banking practice in Peru. That certificate of deposit should mature on the date Mr. Paul Abelardo Zambrano-Loayza attains his majority.

185. To comply with this Judgment, the State shall execute the measures of restitution, pay compensatory damages, reimburse fees and costs and take the other measures ordered within the six-month period following the date of notification of this Judgment.

186. In the case of the compensatory damages, they shall be paid directly to the victim and to her adult next of kin; if any has died, payment shall be made to his or her heirs.

187. If within one year following the date of notification of this Judgment or maturity of the certificate of deposit described in paragraph 184, a beneficiary fails to appear to receive the payment he or she is due, the State shall put the amount owed, in United States dollars, in a trust fund in said individual's name, with a banking institution of recognized solvency in Peru and under the most favorable banking terms. If ten years after the trust fund's establishment said person or his or her have has not claimed the funds, the sum shall be returned to the State and this Judgment shall be considered honored.

188. The State may fulfill these obligations through payments in United States dollars or in an equivalent cash amount in the local currency of Peru. The rate of exchange used to determine the equivalent value shall be the selling rate for the United States dollar and the Peruvian currency quoted on the New York market on the day prior to the date of the payment.

189. The compensations paid shall be exempt from all taxes currently in existence or that may be enacted in the future.

190. Should the State be delinquent on any payment, it shall pay interest on the amount owed at the interest rate in effect in Peru's banking system for cases of delinquency.

191. In keeping with its consistent practice and its obligations under the American Convention, the court will oversee compliance with the judgment.

## **XVII OPERATIVE PARAGRAPHS**

192. Now therefore,

## **THE COURT**

### **DECIDES:**

#### **AS RESTITUTION MEASURES,**

Unanimously

1. That the State of Peru shall take all measures necessary to re-instate Ms. María Elena Loayza-Tamayo in the teaching service in public institutions, on the understanding that the amount of her salaries and other benefits shall be equal to the pay she was receiving for her teaching services in the public and private sectors at the time of her detention, appreciated to reflect its value as of the date of this Judgment.

Unanimously

2. That the State of Peru shall guarantee to Ms. María Elena Loayza-Tamayo her full retirement benefits, including those owed for the period transpired since the time of her detention.

Unanimously

3. That the State shall take all domestic legal measures necessary to ensure that no adverse decision delivered in proceedings against Ms. Maria Elena Loayza-Tamayo in the civil courts has any legal effect whatever.

#### **AS COMPENSATORY DAMAGES,**

By a vote of six to one

4. That the State of Peru shall pay, under the conditions and in the manner described in paragraphs 183 to 190 of this judgment, a total of US\$167,190.30 (one hundred sixty-seven thousand one hundred ninety United States dollars and thirty cents) or its equivalent in Peruvian currency, distributed as follows:

- a. US\$99,190.30 (ninety-nine thousand one hundred ninety United States dollars and thirty cents) or its equivalent in Peruvian currency, to Ms. María Elena Loayza-Tamayo;
- b. US\$15,000.00 (fifteen thousand United States dollars) or its equivalent in Peruvian currency to Gisselle Elena Zambrano-Loayza, and US\$15,000.00 (fifteen thousand United States dollars) or its equivalent in Peruvian currency to Paul Abelardo Zambrano-Loayza;

c. US\$10,000.00 (ten thousand United States dollars) or its equivalent in Peruvian currency to Ms. Adelina Tamayo-Trujillo de Loayza, and US\$10,000.00 (ten thousand United States dollars) or its equivalent in Peruvian currency to Mr. Julio Loayza-Sudario; and

d. US\$ 18,000.00 (eighteen thousand United States dollars) or its equivalent in Peruvian currency, to Carolina Maida Loayza-Tamayo, Delia Haydée Loayza-Tamayo, Olga Adelina Loayza-Tamayo, Giovanna Elizabeth Loayza-Tamayo, Rubén Edilberto Loayza-Tamayo and Julio William Loayza-Tamayo, with each receiving US\$3,000.00 (three thousand United States dollars) or its equivalent in Peruvian currency.

Judge de Roux-Rengifo partially dissenting.

#### **AS OTHER FORMS OF REPARATION,**

Unanimously

5. That the State of Peru shall adopt the internal legal measures necessary to adapt Decree-Laws 25,475 (Crime of Terrorism) and 25,659 (Crime of Treason) to conform to the American Convention on Human Rights.

#### **WITH RESPECT TO THE DUTY TO TAKE DOMESTIC MEASURES,**

Unanimously

6. That the State of Peru shall investigate the facts in the instant Case, identify and punish those responsible for those acts, and adopt all necessary domestic legal measures to ensure that this obligation is discharged.

#### **CONCERNING FEES AND COSTS.**

Unanimously

7. That the State of Peru shall pay, in the form of fees and costs and under the terms and in the manner described in paragraphs 183 to 190 of this Judgment, the sum of US\$20,000.00 (twenty thousand United States dollars) or its equivalent in Peruvian currency, to Ms. Carolina Maida Loayza-Tamayo.

#### **FURTHER, THE COURT,**

#### **DECIDES:**

Unanimously

8. That the restitution measures ordered in operative paragraphs 1, 2, and 3, the payment of compensatory damages ordered under operative paragraph 4, the reimbursement of fees and costs ordered in operative paragraph 7, the adoption of other forms of reparation ordered under operative paragraph 5, and the measures to fulfill the duty to take domestic measures, ordered under operative paragraph 6, shall be executed within six months of the date of notification of this Judgment.

Unanimously

9. That any payment ordered in the present Judgment shall be exempt from existing or future taxes or levies.

Unanimously

10. That it shall oversee fulfillment of this judgment.

### ***Questions***

1. Considering that, in principle, reparations are due to the victim(s) when there is a breach of an international obligation by a State party to a human rights treaty, is there a duty to “repair” the wrongdoing *vis à vis* the other State parties to the treaty? Can the mere declaration of international responsibility in a case be a form of reparation?

2. How would you distinguish between “life plan” and “moral damages”? Do you agree with the Court that a “life plan” cannot be subject to pecuniary compensation?

3. Assume that the “Duty to Take Domestic Measures” requires the State to derogate Decree-Laws Nos. 26,479 and 26,492. Would such derogation seek to compensate the victim in the case? If not, what injury would such derogation seek to remedy?

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**CHAPTER II**  
**INTERNATIONAL LAW AND DOMESTIC LAW**

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## A. INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC LAW

P. VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 16-18, 21-22* (3d. ed. 1998)<sup>1</sup>

[Footnotes omitted]

### 5. THE EFFECT OF THE CONVENTION WITHIN THE NATIONAL LEGAL SYSTEMS

#### 5.1 Dualism and Monism

It is primarily the task of the national authorities of the Contracting States to secure the rights and freedoms set forth in the Convention. To what extent the national courts can play a part in this, by reviewing the acts and omissions of those national authorities, depends mainly on the question of whether the provisions of the Convention are directly applicable in proceedings before those national courts. The answer to this question depends in turn on the effect of the Convention within the national legal system concerned. The Convention does not impose upon the Contracting States the obligation to make the Convention part of domestic law or otherwise to guarantee its national applicability and prevalence over national law.

In the context of the relationship between international law and municipal law there are two contrasting views. In the so-called *dualistic* view the international and the national legal system form two separate legal spheres, and international law has effect within the national legal system only after it has been “transformed” into national law *via* the required procedure. The legal subjects depend on this transformation for the protection of the rights laid down in international law; their rights and duties exist only under national law. This is the case, for instance, in the United Kingdom; since the Convention has not (yet) been “transformed” by Act of Parliament into national law, it cannot be invoked before a British court, at least not as such and independently. In another dualistic system, that of the Federal Republic of Germany, the Convention has been transformed by a federal law (*Zustimmungsgesetz*) according to Article 59(2) of the Constitution, thereby becoming part of the domestic law of the Federal Republic.

In a dualistic system, after the Convention has been approved and transformed into domestic law, the question remains which status it has within the national legal system. The answer to this question is to be found in national constitutional law. Under German constitutional law, for instance, the Convention has no priority over the Federal Constitution, nor is it of equal rank. It has, however, the rank of a federal statute. The consequences of this have been mitigated by

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<sup>1</sup> Reprinted from *Theory and Practice of the European Convention on the Human Rights*, P. Van Dijk et al., 3rd ed. 1998, ©1998 Klumber Law International, with permission of the publisher.

interpreting German statutes in line with the Convention; the German *Bundesverfassungsgericht* has even decided that priority should be given to the provisions of the Convention over subsequent legislation unless a contrary intention of the legislature could be clearly established. Even provisions of the Federal Constitution have to be interpreted in the light of the Convention.

In the so-called *monistic* view, on the other hand, the various domestic legal systems are viewed as elements of the all-embracing international legal system, within which the national authorities are bound by international law in their relations with individuals as well, regardless of whether or not the rules of international law have been transformed into national law. In this view the individual derives rights and duties directly from international law, so that in national proceedings he may directly invoke rules of international law, which must be applied by the national Courts and to which the latter must give priority over any national law conflicting with it.

However, even among the monistic systems many differences exist. Although as a general rule they accept the domestic legal effect of (approved) international treaties, the scope of this acceptance varies considerably. In the Netherlands, self-executing provisions of treaties and of decisions of international organisations (*i.e.* written international law) may be invoked before domestic courts and may set aside conflicting (*anterior* and *posterior*) statutory law, including provisions in the Constitution. In fact, the Dutch courts have actively made use of the Convention in setting aside or interpreting Acts of Parliament. In France, the *Court de Cassation*, relying upon Article 55 of the French Constitution, has accepted the prevalence of treaties (including EC-law) over national *lois* since 1975. The *Conseil d'Etat* has been much more hesitant, but finally, in 1989, accepted the supremacy of treaties over domestic legislation.

In the prevailing opinion the system resulting from the monistic view is not prescribed by international law at its present stage of development. International law leaves the States full discretion to decide for themselves in what way they will fulfil their international obligations and implement the pertinent international rules within their national legal system; they are internationally responsible only for the ultimate result of this implementation. This holds good for the European Convention as well, although the Court indicated that the system according to which the Convention has internal effect, is a particularly faithful reflection of the intention of the drafters. The consequence is that in some Contracting States no internal effect is assigned to the Convention, while in others it is so assigned.

In States in which the Convention has internal effect one must ascertain for each of its provision separately whether it is directly applicable—is self-executing—so that individuals may directly invoke such a provision before the national courts. The self-executing character of a Convention provision may generally be presumed when the content of such a provision can be applied in a concrete case without there being a need for supplementary measures on the part of the national authorities.

....

### 5.3 Implementation of Court Decisions

A pertinent question is to what extent Court decisions can be relied upon before a national court. In the abstract the answer to this question is similar to the one given concerning the implementation of the Convention within the national legal order: it is dependent upon the national legal order to what extent Court decisions can be invoked and can affect the outcome of national proceedings. The Court itself does not enforce any effect; its judgments are of a declaratory character. They establish whether the Convention has been violated, and may be accompanied by a decision under Article 50 about financial compensation. However, in a subsequent case the Court may have the opportunity to judge on the way in which its earlier judgment, and the interpretation it contains of one or more of the provisions of the Convention, has been taken into account.

The various Contracting States have different systems with regard to the effect to be given to Court decisions within their respective legal orders. Some even have adopted special legislative provisions in order to ensure the execution of Court decisions within the national legal order. A study prepared by the Committee of Experts for the improvement of procedures for the protection of Human Rights (DHPR) under the authority of the Steering Committee of Human Rights (CDDH) contains a survey of to what extent the national legal systems allow for review of domestic judicial decisions subsequent to a finding of a violation of the Convention by the Strasbourg organs. One of the conclusions is that '(t)here seems to exist a rather limited amount of relevant case-law in member-States. In this connection it should be noted that for four (of the six) States that have adopted legislation enabling review subsequent to a finding of a violation of the Convention, these provisions appear, as yet, never to have been applied in practice.' In our opinion, effective implementation of judgments of the Court within the national legal order is an important next step to be taken by the Contracting States, since it is an essential precondition for effectively ensuring that the rule of law is observed and enforced by giving relief to the applicants.

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**ROSALYN HIGGINS, PROBLEMS & PROCESS:  
INTERNATIONAL LAW AND HOW TO USE IT 209, 210 (1994)<sup>2</sup>**  
*[Footnotes omitted]*

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<sup>2</sup> Reprinted from *Problems and Process: International Law and How to Use it*, Rosalyn Higgins, 1994, © Oxford University Press 1994, by permission of the publisher.

## THE ROLE OF NATIONAL COURTS IN THE INTERNATIONAL LEGAL PROCESS

In the textbooks it is customary to find a chapter entitled “international law and national law.” In university courses on general international law, the lecture on international law and national law is invariably the very first of the year. I always give this lecture as the very *last* of the year, believing that it is quite unintelligible to students on their first day, and will remain so until they have covered the substantive ground that will give them their bearings in the debates on international and national law.

At the heart of any chapter on international and national law is always an explanation of the two theories of monism and dualism. Monists contend that there is but a single system of law, with international law being an element within it alongside all the various branches of domestic law. For the monist, international law is part of the law of the land alongside labour law, employment law, contract law, and so forth. Dualists contend that there are two essentially different legal systems, existing side by side within different spheres of action—the international plane and the domestic plane. Of course, whichever view you take, there is still the problem of which system prevails when there is a clash between the two. One can give answers to that question at the level of legal philosophy; but 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. The International Court of Justice has indicated that for it domestic law is a fact. On some matters even an international court will need to apply this law—for example, as the applicable law governing the redemption of bonds. But when the issue is whether an international obligation can be avoided or excused because of a deficiency or contradiction in domestic law, then for an international tribunal the answer is clear—it cannot, and the obligation in international law remains. The domestic court may be faced with a difficult question, when the domestic law which it is its day-to-day task to apply entails a violation of an international obligation. Different courts *do* address that problem differently. Leaving the theoretical aspects aside for a moment, it is as a practical matter difficult to persuade a national court to apply international law, rather than the domestic, if there appears to be a clash between the two. But it is more possible in some courts than in others. And, although I have sympathy with the views of those who think the monist-dualist debate passé, I also think it right that the difference in response to a clash international law and domestic law in various domestic courts is substantially conditioned by whether the country concerned is monist or dualist its approach.

I say “substantially” conditioned, because in reality there is usually little explanation or discussion of these large jurisprudential matters in the domestic court hearing. The response of the court to the problem is often instinctive rather than explicitly predicated. And, if the truth be told, the response is often somewhat confused and lacking in an intellectual coherence. The fact that not everything is dependent upon whether country accepts the monist or dualist view is evidenced by the fact that even within a given country, different courts may approach differently the problem of the relationship between international law and national law.

Related to this great jurisprudential debate is a further reality not to be found in the textbooks, but which must be mentioned. This is the reality of legal culture. In some jurisdictions international law will be treated as a familiar topic, one that both the judge and the counsel before him will expect to deal with on a routine basis, the introduction of which occasion no special comment or interest. Of course, this attitude is more to be expected in systems accepting the monist view. But I speak of very practical matters: the judge and lawyers in his court will have studied international law and will be familiar with it, just as they are familiar with other everyday branches of the law. But there is another culture that exists, in which it is possible to become a practicing lawyer without having studied international law, and indeed to become a judge knowing no international law. Psychologically that disposes both counsel and judge to treat international law as some exotic branch of the law, to be avoided if at all possible, and to be looked upon as if it is unreal, of no practical application in the real world. Of course, this attitude is mostly to be found in those countries that embrace (in so far as they think about it at all) the dualist system. It is a not unfair description of some courts in the United Kingdom. But the lack of background in international law (which is why I speak of it as a legal culture, as much as a question of legal philosophy) manifests itself in various ways, for there are individual cultures as well as national cultures. Some judges are simply rather contemptuous of everything to do with international law; which they doggedly regard as “unreal.” Others are greatly impressed by international law, but feeling insufficiency familiar with it seek at all costs to avoid making determinations upon it: strenuous efforts are made not to decide points of international law, but to locate the *ratio decidendi* of the judgment on more familiar ground. And yet others find international law potentially relevant and important and immerse themselves in it and are fully prepared to pronounce upon it.

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## **The ‘Receipt’ of International Law in the National Legal System**

### **Treaties**

It is a commonplace that different countries treat differently the “receipt” of international legal obligations. The more *monist* a country, the more will international legal obligations, whether arising under treaty or under customary international law, be treated as simply part of the law to be given effect and directly applied. The more *dualist* a country, the more difficulty there is in giving direct legal effect to international obligations without an intervening domestic legal act to accomplish that.

From the perspective of international law, an international obligation is an international obligation, whether it stems from treaty or from custom. And some monist domestic systems acknowledge this by giving *all* treaties the status of domestic law (sometimes indeed a superior status, equivalent to the law of the constitution), and simply treating customary international law as a law that can be directly invoked and applied, along with any other. Logic might have indicated that strongly dualist systems require all international law obligations (whether

emanating from treaty or otherwise) to have been “incorporated” by local affirming legislation before they can be given domestic legal effect. But in fact this approach is extremely rare—remarkably few dualist domestic systems refuse to apply general international law in the absence of domestic implementing legislation. They reserve the requirement of “translation” into domestic law for treaty obligations. Of course, *how* that is done, and, indeed, the decision as to whether it is required for all treaty obligations or only for some, is a matter for national determination. The extent to which treaty obligations may be examined or analysed in domestic courts, or give rise to claims in domestic courts, is a matter for domestic law. The existence of the treaty obligations as a commitment between the state parties thereto is a matter for international law.

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**Article 144**  
**Constitution of El Salvador**  
*reprinted in 6 Constitutions of the Countries of the World*  
*(Gisbert H. Flanz Ed., Oceana Publications Inc., 1998)*

The international treaties formalized by El Salvador with other states or international organisms, constitute laws of the Republic once they enter into effect, in conformity with the dispositions of the same treaty and of this Constitution.

**Article 16**  
**Constitution of Honduras**  
*reprinted in 8 Constitutions of the Countries of the World*  
*(Gisbert H. Flanz Ed., Oceana Publications Inc., 1997)*

All international treaties must be approved by the National Congress before their ratification by the Executive Power.

International treaties entered into by Honduras with other States form part of the domestic law as soon as they enter into force.

**Article 137**  
**The Supremacy of the Constitution**  
**Constitution of Paraguay**  
*reprinted in 14 Constitutions of the Countries of the World*  
*(Gisbert H. Flanz Ed., Oceana Publications Inc., 1993)*

The Constitution is the supreme law of the Republic. The Constitution, the international treaties, conventions, and agreements that have been approved and ratified by Congress, the laws dictated by Congress, and other related legal provisions of lesser rank make up the national legal system. This listing reflects the descending order of preeminence. . . .

**Article 141**  
**International Treaties**  
**Constitution of Paraguay**

International treaties that were properly concluded and approved by a law of Congress and the instruments of ratification which have been exchanged or deposited are part of the domestic legal system in keeping with the order of preeminence established under Article 136.

**Article 55**  
**Constitution of Peru**

*reprinted in 15 Constitutions of the Countries of the World*  
(Gisbert H. Flanz Ed., Oceana Publications Inc., 1995)

Treaties signed by the State and in force are part of national law.

**Questions**

1. How is international law “incorporated” into the domestic legal system of your country? Is international law considered domestic law after the process of ratification has been complied with? Is there any difference between the incorporation of international treaties and customary international law in your country?

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**B. SELF-EXECUTING TREATIES**

**Thomas Buergenthal, *Self-Executing and Non-Self-Executing***  
***Treaties in National and International Law, 235 Recueil des Cours 317 (1992)***<sup>3</sup>  
*[Footnotes omitted]*

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<sup>3</sup> Reprinted from *Self-Executing and Non-Self-Executing Treaties in National and International Law*, Vol. 235 of the *Recueil des Cours* 317, Thomas Buergenthal, 1992, ©Hague Academy of International Law 1992, with permission of the publisher.

## **B. Self-Executing Treaties in Domestic Law**

The mere fact, however, that in a given State treaties acquire the status of domestic law upon their ratification does not necessarily mean that a specific treaty or treaty provision will there be deemed capable of creating legal rights or obligations directly enforceable in the courts. Whether they do or not depends upon many factors. These tend to be lumped together by characterizing or labeling the treaty as “self-executing” or “non-self-executing”. If the treaty is said to be self-executing, it will be directly enforceable in the courts. Treaties or treaty provisions that are determined to be non-self-executing, do not without some further legislative or executive measure (in addition to the measures that approved the ratification of the treaty) give rise to legal rights or obligations enforceable in the domestic courts. Whether a treaty is or is not self-executing is a domestic law question in that domestic law determines whether the treaty creates rights that domestic courts are empowered to enforce in a State. The courts may and often do answer this question differently in different countries, depending upon their national constitutions, legal traditions, historical precedents and political institutions. Although certain types of treaties, usually those that call expressly for further domestic legislative measures or those that contain only very general or so-called programmatic commitments, will in most States be deemed non-self-executing, that is not always the case. It is therefore not unusual to find that one and the same treaty or treaty provision may be self-executing in one State and non-self-executing in another. Hence, the specific language of the treaty is not necessarily determinative. It is also not unusual for some provisions of a treaty to be self-executing and for others not.

In dualist States, where a duly ratified treaty is not a formal source of law and requires implementing legislation, all treaties could be said to be non-self-executing. One might be tempted to assume, therefore, that a non-self-executing treaty in monist States has the same domestic legal effect as a non-self-executing treaty in the dualist States. The assumption would be mistaken, however, because in most, if not all, monist States a non-self-executing treaty becomes domestic law when it has been duly ratified. That is to say, although a court may not be able to apply the treaty in a specific case to establish the legal right or obligation being asserted by one of the parties, the treaty is “law” to the same extent as a non-self-executing legislative provision is law. Yes, legislation and even constitutional provisions can be and are non-self-executing when they require additional regulatory or legislative enactments before they give rise to directly enforceable legal rights or obligations. But they can be a source of law for a variety of other purposes, such as authorizing or mandating the enactment of the regulatory or legislative measures necessary to make them directly applicable. Non-self-executing treaties enjoy that same normative status in many monist States. They are law or a source of law for a variety of domestic purposes, although in a particular case they may not be capable of creating directly enforceable legal rights or obligations.

In dualist States, by contrast, where all treaties require implementing legislation to become

domestic law, the treaty is not, in a formal sense, a source of law. Here it usually has no legal force as such despite the fact that it was duly ratified. In dualist States we should either avoid describing such a treaty as non-self-executing or, if we do so for simplicity's sake, we should be aware of the fact that there may be important differences between non-self-executing treaties in monist States and treaties in dualist States that have no formal domestic legal status.

It is important to emphasize, however, that merely because a treaty is not a source of law in a dualist State does not mean that it may not in that State have some effects or consequences that are legally significant. For example, the courts in a dualist State might take such a treaty into account in interpreting ambiguous domestic legislation dealing with the same subject. They will often do so on the theory that parliament, by adopting a law later in time or by not changing its domestic law upon the Government's ratification of the treaty, should not be presumed to have intended to violate the State's international obligations unless that intention is clearly manifested or the conflict is unavoidable. Here, in other words, the contents of the unincorporated treaty can be a relevant factor to be taken into account in interpreting and applying domestic law. The interpretative value of the ratified but unincorporated treaty may vary from one dualist country to another. Interestingly enough, in a monist State a treaty deemed to be non-self-executing will frequently also have a comparable interpretative value, but with greater reason, for here after all it is a formal source of law.

### **C. Self-Executing Treaties in International Law**

Thus far we have only dealt with the domestic law concept of self-executing and non-self-executing treaties. The concept, sometimes by different names, is known to international law as well, which explains why the title of these lectures refers to "self-executing treaties in national and international law." As we shall see, in some States the international and national concept of self-executing treaties is interrelated in the sense that the domestic determination whether or not the treaty is self-executing may depend upon its international characterization or the manner in which it has been interpreted on the international plane. Thus, for example, in some States the courts will find a treaty to be self-executing, absent some overriding domestic legal obstacles, if they conclude that the States parties to the treaty intended that its provisions be directly enforceable in their national courts or if an international or supranational tribunal has so held. For purposes of our analysis, however, it may be useful not to confuse the domestic law concept of self-executing treaties with its international law analogue. The two notions are conceptually quite different despite the fact that as a practical matter they may at times overlap.

International law recognizes that States may conclude a treaty which requires the contracting parties to ensure that all or some of its provisions have the status of directly applicable domestic law and be enforced as such by their national courts. But treaties seldom impose such a requirement because, in general, the parties to a treaty are interested in ensuring only that its substantive obligations be complied with, leaving it to each State to decide how that obligation will be executed on the domestic plane. One reason why most treaties adopt this approach is that, as we have seen, States are governed by different constitutional rules or employ different legal

techniques to implement treaties on the domestic plane. Moreover, most of the time it does not really matter to the States parties to a treaty how each of them complies with its provisions, whether they do so by statute, administrative regulation or judicial decrees; what matters is that they comply with the substantive obligations.

Suppose that the States parties decide that all or some provisions of a treaty should be accorded the force of directly applicable domestic law and that they so provide expressly in the treaty. Does this fact make the treaty self-executing on the domestic plane? As soon as the question is put in this fashion, it becomes clear that two very distinct issues are being confused: the international law obligation to make the treaty directly applicable and the domestic law power or competence of national courts to comply with the international law obligation. The question whether a provision of a treaty is directly enforceable domestic law or self-executing in a given State can ultimately only be answered by reference to the law of the particular country. In a dualist State the mere ratification of the treaty would not transform its provision into domestic law even if the States parties specified that status in the treaty. Here, additional domestic legislation would be required to comply with that treaty obligation. In some monist States, as we shall see, an express undertaking in the treaty to make it directly applicable will enable, but not necessarily compel, the domestic courts to characterize the treaty as self-executing; but there are other monist States where that result will not always be possible, notwithstanding the clear intention of the parties. In short, a treaty that, as a matter of international law, is deemed to be directly applicable is not self-executing ipso facto under the domestic law of the States parties to it. All that can be said about such a treaty is that the States parties thereto have an international law obligation to take whatever measures are necessary under their domestic law to ensure that the specific provisions of the treaty, not only its substantive obligations, are accorded the status of domestic law. Thus, for example, if the Court of Justice of the European Community concludes that a provision of the Community treaty is directly applicable Community law in all EC Member States, the United Kingdom, a classic dualist State, can ensure that result in Britain only by means of an appropriate statute, be it general or specific, whereas the courts of the Netherlands may be able to do so by simply characterizing the provision as self-executing under Dutch law. But if for some reason these courts should not be able to do so, the Government of the Netherlands would have to adopt special implementing legislation making the provision directly applicable, that is, self-executing in the Netherlands. Therefore, to avoid confusion, we will try in these lectures to use the terms “self-executing” and “non-self-executing” when dealing with the domestic application of treaties, reserving the concept of “directly applicable” to the international law obligation to make the provisions of the treaty self-executing on the domestic plane.

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## **THE CONCEPT OF SELF-EXECUTING TREATIES**

In those legal systems where treaties automatically acquire the status of domestic law upon their ratification, that is, in monist States, a specific treaty may nevertheless not be enforceable as such

in the courts. This is true with regard to treaties deemed to be non-self-executing. These are treaties that domestic courts consider not capable of being executed or applied without some additional implementing measures, be they legislative, executive or administrative. Hence, there is a tendency to define non-self-executing treaties as treaties requiring implementing legislation. A statement of this type is not really very helpful as a definition for it tells us nothing about the characteristics that make the treaty non-self-executing. All it tells us is that a non-self-executing treaty will not create legal rights and obligations enforceable in a domestic court, which is but another way of saying that a non-self-executing treaty is non-self-executing.

Although this tautology does not get us very far, it should be admitted that it is impossible to provide a satisfactory global and at once useful definition of what is meant by self-executing or non-self-executing treaties. This is so because the question whether a treaty is or is not self-executing is a question of domestic law and, hence, the answer to it may vary from State to State. It will vary in large measure because, depending upon the constitutional system in which domestic courts operate, different legal institutions and political considerations will determine whether the treaty can or cannot be applied without additional implementing measures. Moreover, in some States the “non-self-executing” label tends to be used by the courts in a rather indiscriminate fashion to embrace a variety of different grounds for refusing to enforce a treaty as domestic law, which is true in the United States, for example. These can be related to the treaty or be extraneous to it; they can concern issues of standing or justiciability; and they may be motivated by hostility to unfamiliar or “foreign” institutional or substantive legal innovations. It is important to recognize, therefore, that while it is often possible to identify these grounds, which is what we shall attempt to do, it is futile to attempt to subsume them in one all-embracing definition.

It is useful to recognize, moreover, that treaties are not the only normative instruments that can be non-self-executing in that they may need additional implementing measures to create directly enforceable legal rights and obligations. There are many such non-self-executing provisions in national constitutions and in national laws. The United States Constitution, for example, empowers the Congress of the United States “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” This provision authorizes the Congress to adopt patent and copyright legislation, but by itself it does not confer the right to a patent or copyright enforceable in a court of law. To do that, the provision requires implementing legislation. In that sense, the provision is non-self-executing, and a United States court has expressly so held. A similar result would obtain where the treaty or a legislative enactment calls for the promulgation of additional measures, be they legislative, executive or administrative in character, before a given right can be enforced in the courts. An American appellate tribunal put this matter as follows in a 1907 case:

“A statute may be so framed as to make it apparent that it does not become practically effective until something further is done, either by Congress itself or by some officer or commission entrusted with certain powers with reference thereto. The same may be said with regard to a treaty.”

In theory, therefore, the concept we are dealing with here is equally applicable in certain circumstances to purely domestic legislation as it is to a treaty, provided one or the other is so formulated as to require some additional legislative, executive or administrative action before individuals will be able to enforce it in the courts.

These two examples illustrate the least problematic aspect of the application of the doctrine of non-self-executing treaties. Clearly, it applies to instances where a treaty or one of its provisions, an article in a constitution or a law by its very terms plainly indicates that some additional measure is necessary before the provision can be deemed to create legal rights or obligations enforceable in a domestic court. But as soon as one moves away from this easy example, the problem becomes gradually more complex. Thus, some treaty provisions may require implementing legislation, not because they call for them expressly, but because they formulate general policy guidelines or create programmatic commitments without providing any specific legal standards for the courts to apply. Illustrative of this situation would be a law suit in a domestic court to compel the Government of that country to comply with a treaty provision in which “the states parties undertake to use their best efforts to promote international peace and understanding.” The law suit would fail in most States on the ground that the treaty provision is non-self-executing. What makes it so? There might be different reasons in different countries. It might be held that the court lacks a manageable legal standard by which to judge what specific obligations the Government assumed. A court might also hold that the individual plaintiff lacked standing to invoke the treaty provision because it did not appear to confer any rights on him. Yet another court might conclude that the issues being raised were political in character and, therefore, not within the power of the judiciary. In these and other instances, as we shall see, the courts may declare the treaty provision non-self-executing although the grounds for doing so may be very different or have little in common.

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**P. VAN DIJK ET AL., THEORY AND PRACTICE OF THE  
EUROPEAN CONVENTION ON HUMAN RIGHTS 22-26 (3d. ed. 1998)<sup>4</sup>**  
*[Footnotes omitted]*

## **6. ‘DRITTWIRKUNG’**

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<sup>4</sup> Reprinted from *Theory and Practice of the European Convention on Human Rights*, P. Van Dijk et al., 3rd ed. 1998, © Kluwer Law International 1998, with permission of the publisher.

*Drittwirkung* is a complicated phenomenon about which there are widely divergent views. At this place only those general aspects which are directly connected with the Convention will be dealt with. Hereafter, in the discussion of the separate rights and freedoms, certain aspects of *Drittwirkung* will be discussed insofar as the case-law of the Commission and the Court calls for it. For a detailed treatment of *Drittwirkung*, in particular also as to its recognition and effect under national law, reference may be made to the literature.

What does the term *Drittwirkung* mean? Two views in particular must be distinguished. According to the first view it means that the provisions concerning human rights also apply in legal relations between private parties, and not only in legal relations between an individual and the public authorities. According to the second view, *Drittwirkung* is defined as the possibility for an individual to enforce his fundamental rights against another individual. Advocates of the latter view therefore consider that *Drittwirkung* of human rights is present only if an individual in his legal relations with other individuals is able to enforce the observance of the law concerning human rights via some procedure or other.

As to the latter view, it may at once be submitted that no *Drittwirkung* of the rights and freedoms set forth in the Convention can be directly effectuated via the procedure set up by the Convention. In fact, in Strasbourg it is possible to lodge complaints only about violations of the Convention by one of the Contracting States; a complaint directed against an individual is inadmissible by reason of incompatibility with the Convention *ratione personae*. This follows from Articles 19, 24, 25, 31, 32 and 50 of the Convention, and has also been confirmed by the case-law of the Commission. As a consequence, an individual can bring up an alleged violation of his fundamental rights and freedoms by other individuals in Strasbourg only indirectly, viz. when a Contracting State can be held responsible for the violation in one way or another. In that case the investigation in the Strasbourg procedure concerns the responsibility of the State and not that of the private actor. It is, therefore, no surprise that the Strasbourg case-law provides little clarity as far as *Drittwirkung* is concerned. At best a kind of “indirect *Drittwirkung*” is recognised in cases where from a provision of the Convention—notably Articles 3, 10 and 11—rights are inferred for individuals which, on the basis of a positive obligation on the part of Contracting States to take measures in order to make their exercise possible, must also be enforced vis-à-vis third private parties.

The fact that in Strasbourg no complaints can be lodged against individuals need not, however, bar the recognition of *Drittwirkung* of the Convention, not even in the second sense referred to above. The possibility of enforcement which in this view is required does not necessarily have to be enforcement under international law, but may also arise from national law. In that context two situations must be distinguished. In the first place there are States where those rights and freedoms included in the Convention, which are self-executing, can be directly applied by the national courts. In those States the relevant provisions of the Convention can be directly invoked by individuals against other individuals insofar as their *Drittwirkung* is recognised by the national courts. Judgments of these national courts which conflict with the Convention, for which

indeed the Contracting State concerned is responsible under the Convention, may then be submitted to the Strasbourg organs via the procedure under Article 25 or via the procedure under Article 24. In addition there are those States in whose national legal systems the provisions of the Convention are not directly applicable. Those States, too, are obliged under the general guarantee clause of Article 1 of the Convention to protect the rights and freedoms set forth in the Convention. If one starts from the principle of *Drittwirkung*, such States also have to secure to individuals protection against violations of their fundamental rights by other individuals in their national law. If the competent national authorities default in this respect or if the applicable provisions of national law are not enforced, responsibility arises for the State concerned, a responsibility which may be brought up via the procedure under Article 25, or Article 24, of the Convention.

On the other hand, the existence of a supervisory system as described above does not in itself imply *Drittwirkung*. If in a given State individuals may directly invoke the Convention before the courts, this does not necessarily imply that the Convention is applicable to legal relations between private parties. And the nature, too, of the obligation arising from Article 1 of the Convention for those States in whose legal system the Convention is not directly applicable, is in itself not decisive for the question concerning that *Drittwirkung*. In fact, one cannot deduce from Article 1 whether the Contracting States are obliged to secure the rights and freedoms only in relation to the public authorities or also in relation to other individuals. For a possible *Drittwirkung*, therefore, other arguments have to be put forward.

What arguments for *Drittwirkung* can be inferred from the Convention itself? It is beyond doubt that the problem of *Drittwirkung* was not taken into account when the Convention was drafted, if it played any part at all in the discussions. One can infer from the formulation of various provisions that they were not written with a view to relations between private parties. On the other hand, the subject-matter regulated by the Convention—the fundamental rights and freedoms—lends itself eminently to *Drittwirkung*. Precisely on account of the fundamental character of these rights it is difficult to appreciate why they should deserve protection in relation to the public authorities, but not in relation to private parties. It is submitted that it is not very relevant whether the drafters of the Convention had in mind *Drittwirkung*. Of greater importance is what conclusions may be drawn for the present situation from the principles set forth in the Convention, and specifically in its Preamble. In the Preamble the drafters of the Convention gave evidence of the great value they attached to general respect for the fundamental rights and freedoms. From this emphasis on general respect an argument pro rather than contra *Drittwirkung* can be inferred. But, as has been said above, the drafters have not pronounced on this.

Neither do the separate provisions of the Convention constitute any clear arguments for or against *Drittwirkung*. Article 1 has already been discussed above. Article 13 is also mentioned in this context. From the last words of this article, viz. “notwithstanding that the violation has been committed by persons in their official capacity,” it is inferred by some that the Convention evidently also intends to provide a remedy against violations by individuals, whereas others

assert that those words merely indicate that the State is responsible for violations committed by its officials, or that Article 13 at all events does not afford an independent argument for *Drittwirkung*. From Article 17, too, it is sometimes inferred that the Convention has *Drittwirkung*. It is, however, doubtful whether such a general conclusion may be drawn from Article 17. That provision forbids not only the public authorities, but also individuals, to invoke the Convention for the justification of an act aimed at the destruction of fundamental rights of other persons. Such a prohibition of abuse of the Convention is quite another matter than a general obligation for individuals to respect the fundamental rights of other persons in their private legal relations.

Summarising one may conclude that *Drittwirkung* does not ensue imperatively from the Convention. On the other hand, nothing in the Convention prevents the States from conferring *Drittwirkung* upon the fundamental rights and freedoms within their national legal systems insofar as they lend themselves to it. In some States *Drittwirkung* of the rights and freedoms guaranteed by the Convention is already recognised, whilst in other States this *Drittwirkung* at least is not excluded in principle. Some have adopted the view that it may be inferred from the changing social circumstances and legal opinions that the purport of the Convention is going to be to secure a certain minimum guarantee to the individual also in his relations with other persons. It would seem that in the spirit of the Convention a good deal may be said for this view, although in the case of such a subsequent interpretation one must ask oneself whether one does not thus assign to the Convention an effect which may be unacceptable to (a number of) the Contracting States, and consequently is insufficiently supported by their implied mutual consent.

Meanwhile it will also depend in particular on the nature and the formulation of each separate right embodied in the Convention whether *Drittwirkung* can be assigned to it at all. In this context Alkema warns us that the nature of the legal relations between private parties may be widely divergent, and that consequently *Drittwirkung* is a multiform phenomenon, about which general statements are hardly possible.

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**Article 2**  
**Domestic Legal Effects**  
**American Convention on Human Rights**

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

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**Enforceability of the Right to Reply or Correction**  
**(Arts. 14(1), 1(1) and 2 of the American Convention on Human Rights)**

*Separate Opinion of Judge Rodolfo E. Piza Escalante,*  
*Inter-Am. Ct. H.R., Enforceability of the Right to Reply or Correction*  
*(Arts. 14(1), 1(1) and 2 of the American Convention on Human Rights),*  
*Advisory Opinion OC-7/86 of August 29, 1986, (ser. A) No. 7 (1986)*

23. The general duties assumed by the States Parties to the Convention for each one of the rights therein are, on the one hand,

“... 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... (Art. 1(1))”

and on the other hand,

“... to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights and freedoms (Art. 2).”

I believe that the request requires the Court to analyze the content and scope of both such duties, starting with the logical presumption that both refer to different hypotheses—otherwise it would not make sense to have separate provisions.

24. The draft that served as the basis for the American Convention only provided for the generic duties of Article 1(1) (see Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7 - 22 de noviembre de 1969, Actas y Documentos, OEA/Ser.K/XVI/1.2, Washington, D.C. 1978, Doc. 5, pp. 12 ss.); that of Article 2, an almost exact copy of Article 2(2) of the International Covenant on Civil and Political Rights, was the result of the Observations of the Government of Chile (Ibid., doc. 7, p. 38), supported by those of the Governments of the Dominican Republic (Ibid., doc. 9, p. 55) and Guatemala (Ibid., doc. 4, corr. 1, p. 107) and finally of a motion of Ecuador during the Conference (Ibid., p. 145). It was subsequently accepted by the Working Group of Commission I as Article 2(2) (Ibid., p. 152). This Article also had the support of the United States of America in a Declaration, (Ibid., Appendix A, p. 146) although for reasons which differ from those of the other countries, as will be explained. 25. The foregoing, combined with the very requirements of the International Law of Human Rights, requires that the obligation to respect and ensure those rights, as established in Article 1(1), is truly essential to the system of the Convention, and that it be precisely understood as an immediate and unconditional duty of the States, resulting directly from the Convention.

The very notion of protection on the international plane, although only as complementary or subsidiary to that of domestic law, requires that the States immediately commit themselves to respect and ensure those rights as an international obligation over and above the vicissitudes of their domestic legal system.

26. On the other hand, the duty to take the necessary measures to ensure fully the effectiveness of such rights on the domestic plane, as referred to in Article 2, can not be understood, in the system of the Convention, as a mere repetition of that which is already established in Article 1(1) because that would be the equivalent of rendering Article 2 meaningless. Nor can it be understood to be the equivalent of the simple generic duty to give such rights effect on the domestic plane, as part of any international obligation, because then it would have been unnecessary to ensure them under Article 1(1), and perhaps it would have been unnecessary to ensure them at all. The European Convention for the Protection of Human Rights and Fundamental Freedoms does not have a provision similar to Article 2 of the American Convention and yet it can not be supposed that due to the absence of this provision the same obligation does not exist for its States Parties.

27. On the other hand, the fact that this norm has been included in the Convention shows, very clearly in my opinion, that it has a marginal role in the Convention, which is to provide protection in the eventuality that Article 1(1) would be inoperable or at least insufficient. It was included not because of the limitations inherent under domestic law that would result in violations of Article 1(1) but rather by virtue of the fact that some rights—not all—need in and of themselves complementary standards or measures on the domestic plane in order to be immediately and unconditionally enforceable. In other words, in questions of those rights recognized by the Convention as immediate and unconditional, the duty of the States Parties to respect and to ensure them, in accordance with Article 1(1), is sufficient to make them immediate, unconditional and fully enforceable as rights of the Convention, which is the only area in which the Court exercises its jurisdiction. Some rights, however, due to their nature or to the wording of the Convention, lack this immediate and full enforceability unless domestic norms or other complementary measures grant it, as is the case for example with political rights (Art. 23) or those of judicial protection (Art. 25). These rights can not be effective solely by virtue of the norms that recognize them, because they are by their very nature inoperable without a very detailed normative regulation or, even, a complex institutional, economic and human machinery which gives them the effectiveness that they command as rights of the Convention on the international plane and not only as a question of the domestic legal system of each State. If there are no electoral codes or laws, voter rolls, political parties, means of publicity and transportation, voting centers, electoral boards, dates and time periods for the exercise of the right to vote, this right, by its very nature, simply can not be exercised; nor can the right to judicial protection be exercised unless there are courts to grant it and there are procedural standards that control and make it possible.

28. It is also for this reason that Article 2 wisely refers not only to normative provisions but also to “other measures” which clearly include the aforementioned institutional, economic and human

machinery. Article 2 does not refer to the administrative or judicial measures as such, because they simply constitute the application of the former measures and, in that sense, are included within the duties of respect and guarantee recognized by Article 1(1) and not within the duties of Article 2. This is true even in States with systems of binding precedents, as are those under the common law system, because it is obvious that in these States general law is created not by jurisdictional act but rather by the normative power of the courts, as set by their precedents.

29. This interpretation is also, in my opinion, the only one that is in accord with the legislative history of Article 2 of the Convention. The drafts that preceded the present Convention did not include a similar provision, not through inadvertence but rather because of the concern that the provision might be interpreted as a kind of escape valve from the immediate and unconditional obligations of Article 1(1). Thus, in the report of the rapporteur of the Inter-American Commission, Dr. Dunshee de Abranches, it is expressly stated:

“Under the constitutional system prevailing among the American States, the provisions of treaties are incorporated into municipal law through ratification, that is prior enactment of the competent legislative organ, without the need for a special law. Consequently, this paragraph is not needed in the Inter-American Convention. On the contrary, if it were placed in the Convention, it could justify the view that any State Party would not be obliged to respect one or more of the rights defined in the Convention but not covered by the domestic legislation; but would be so obliged only after passage of a special law on such right or rights. (Estudio Comparativo de los Pactos de las Naciones Unidas y de los Proyectos de Convenciones Americanas sobre Derechos Humanos, OEA/Ser.L/V/II.19/Doc. 18, p. 191, 1968).”

This concern resulted in the concrete observations of the Government of Chile (*supra* 24), in which it proposed the inclusion of Article 2, in the sense that:

“While it is true that generally speaking the statement made by the Rapporteur, Dr. Dunshee de Abranches, in the IACHR Document 18 to the effect that in the American states the provisions of treaties are incorporated into domestic law by virtue of ratifications may be borne out, it is not nonetheless certain that in various instances it will be necessary to adopt measures of a domestic nature to give effect to the rights, particularly in those cases in which the Preliminary Draft itself so indicates, in such terms as the following: “the law shall recognize equal rights for children born outside of wedlock and for those born in wedlock.” (Art. 16); or “the law shall regulate the manner...” (Art. 17); and other similar passages. The argument that inclusion of this clause in the Inter-American Convention might warrant allegation by a State that it was not obligated to respect one or more rights not contemplated in its domestic legislation is not supported by the terms of the Preliminary Draft; and it is even less likely to find support if the scope of the Convention is expressly established at the Conference (Actas y Documentos, *supra* 24, doc. 7, p. 38).”

30. I believe that the most basic duty is that of each State to immediately and unconditionally respect and ensure fundamental human rights, so that these rights are provided full protection on

the international legal plane, even if domestic rules do not grant them immediate enforceability. By virtue of the duty to respect fundamental human rights, the State can not directly violate them even if it has not recognized those rights in its domestic law; and by virtue of the duty to guarantee them, the State can not indirectly violate them by denying the executive protection and judicial “amparo” necessary to enforce them both with respect to public authorities as well as with respect to individuals, not even under the pretext that such remedies have not been provided by its domestic legal system. In other words, the mere lack of respect of such rights and the mere denial of executive or judicial protection would constitute direct violations of those rights with regard to the duty to respect and ensure them as established by Article 1(1) of the Convention, without the necessity of recourse to that duty of Article 2 to adopt the legislative or other measures necessary to make them effective on the domestic plane.

31. Therefore, Article 2 only has meaning, as an independent norm within the system of the Convention, in respect to those rights which by their nature must be developed through supplementary laws on the domestic plane. I do not refer, of course, to the so-called programmatic rights because these establish a different category of mandates, certainly legal, but unenforceable as such even under the terms of Article 2 of the Convention.

32. In line with the above, Article 2 can not be understood as conditioning the application of Article 1(1) in the sense that, for example, it was interpreted unilaterally and without any support in the Conference of San José by the Declaration of the United States of America (supra 24), when it was stated:

“The United States agrees that this article should be included in the draft Convention since it helps to clarify the legal effect of ratification on the domestic law of the respective parties. The article is sufficiently flexible so that each country can best implement the treaty consistent with its domestic practice. Some countries may choose to make the articles of the treaty directly effective as domestic law and this article would permit them to do so. The comments made by Chile suggest that its own practice may vary depending on the text of each article. Others may prefer to rely solely on domestic law to implement the articles of the treaty. In the U.S. we would interpret this article as authorizing us to follow the last course in the case of matters within Part I, the substantive portions, of the draft convention. That will permit us to refer, where appropriate, to our Constitution, to our domestic legislation already in existence, to our court decisions and to our administrative practice as carrying out the obligations of the Convention. It will also mean that we will be able to draft any new legislation that is needed in terms that can be readily and clearly assimilated into our domestic codes. In other words, it is not the intention of the U.S. to interpret the articles of the treaty in Part I as being self - executing (Buergethal & Norris, Human Rights: The Inter - American System, Chapter 1, Summary Minutes of the Conference of San Jose, Doc. 35 Corr. 1, November 16, 1969, p. 15).”

33. Irrespective of the validity of this interpretation or of a reservation of this nature in the concrete case of the United States of America—a determination of which would exceed the scope

of this advisory opinion—it does not appear to be acceptable as a general thesis, nor was it, in fact, the reason that Article 2 was included in the Convention. On the contrary, I believe that, pursuant to the Convention, the States that do not automatically incorporate international law into their domestic legal system are obligated to incorporate all of the rights recognized by the Convention by virtue of the duty to respect and ensure them pursuant to Article 1(1) and not by virtue of the duty to develop these rights in their domestic law as established in Article 2.

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**Ekmekdjian v. Sofovich**

*in* THOMAS BUERGENTHAL & DINAH SHELTON,  
**PROTECTING HUMAN RIGHTS IN THE AMERICAS 458 (4th ed. 1995)**<sup>5</sup>  
*[Footnotes omitted]*

*T. Buergenthal, "International Tribunals and National Courts: The Internationalization of Domestic Adjudication," in Recht zwischen Umbruch und Bewahrung-Festschrift für Rudolf Bernhardt, pp. 687, 695-73 (1995). . . .*

(...) This case—Ekmekdjian v. Sofovich—arose out of plaintiff's claim that he was unlawfully denied the right of reply in connection with a television program that he alleged to be morally offensive and damaging to him. The claim was based on article 14 of the American Convention on Human Rights, a treaty ratified by Argentina in 1984. The defendant argued that this provision was non-self-executing and that it had therefore not created a directly enforceable right of reply in Argentina. As a matter of fact, that was what the Argentine Supreme Court had held in an earlier case it decided in 1988, and what the lower court held in the instant case in dismissing it.

But instead of accepting this argument, the Supreme Court not only reversed the lower court; it also expressly overruled its earlier decision on the subject and held that the American Convention on Human Rights had created in Argentina a directly enforceable right of reply. In addition, the Court here also appears to have overruled some long established precedents applicable to the domestic status of treaties in Argentina.

The main focus of the Court in this case was Article 14(1) of the American Convention, which reads as follows:

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<sup>5</sup> Reprinted from *Protecting Human Rights in the Americas*, Thomas Buergenthal et al., 4th ed. 1995, © N.P. Engel Publisher 1995, with permission of the publisher.

“Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communications has the right to reply or to make correction using the same communications outlet, under such conditions as the law may establish.”

In its 1988 opinion, the Argentine Supreme Court had concluded that the phrase “under such conditions as the law may establish,” indicated the need for legislation to implement article 14, making the provision non-self-executing. In rejecting that view, the Supreme Court held in the instant case that the Convention had conferred a directly enforceable right of reply on individuals, that Argentina was required to give effect to that rights, and that its courts had the powers to do so (...).

The Supreme Court reached this conclusion in reliance on an advisory opinion of the Inter-American Court of Human Rights. In that case the Inter-American Court made the following finding regarding the meaning and scope of article 14(1): “That Article 14(1) of the Convention recognizes an internationally enforceable right to reply or to make a correction which, under Article 1(1) [of the Convention], the States Parties have the obligation to respect and to ensure the free and full exercise thereof to all persons subject to their jurisdiction.” (...)

In addressing the question it had to decide, the Argentine Supreme Court emphasized that its interpretation of the American Convention should be guided by the jurisprudence of the Inter-American Court. The latter having found that article 14(1) established a right of reply and that the last phrase of that provision did not affect its enforceability on the international plane, the Argentine Supreme Court concluded that this interpretation of article 14(1), read together with the obligations assumed by the States Parties in articles 1 and 2 of the Convention, required it to find that article 14(1) was directly enforceable under Argentine law. In that connection, the Supreme Court also held that the absence of Argentine legislation regulating the issues to which the last phrase of article 14(1) applied was no obstacle to its application in Argentina, because the Court itself had the power to deal with those issues by judicial decree.

“This Court considers that as far as concerns the measures necessary to give effect on the domestic plane to the objective of the [Convention], such measures must be deemed to embrace judicial decrees. In that manner the tribunal may determine the form in which this right [of reply], already recognized by the treaty, is to be exercised in concrete cases.”

In other words, rather than reading the last phrase of article 14(1) as a basis for characterizing the provision as being non-self-executing under Argentine law, the Supreme Court holds that it has an obligation under article 2 of the Convention to rectify the failure of the legislature to regulate the exercise of the right of reply and that the language of article 2 must be deemed to include appropriate judicial decrees among the “legislative or other measures” to which it refers.

The Argentine Supreme Court reached these conclusions after an extensive analysis of the

normative status of treaties under Argentine law. In the process, it departed dramatically from preexisting law on the subject. Prior to this decision, treaties and federal statutes had the same normative rank in Argentina, with the later in time prevailing in case of a conflict. In the instant case, the Supreme Court rejected this interpretation and held that duly ratified treaties could no longer be superseded by later statutes. It based this conclusion on the Vienna Convention on the Law of Treaties and on what appears to be a novel interpretation of the Argentine Constitution.

On the latter subject, the Supreme Court pointed out that under the Constitution of Argentina treaties are ratified by the executive branch after approval by the legislature. Hence, a subsequent effort by the legislature to depart from treaty obligations by the adoption of a law in conflict therewith would usurp the constitutional powers of the executive and violate the Constitution. Having thus established that the legislature lacked the power to override treaties, the Supreme Court noted that Argentina was a party to the Vienna Convention on the Law of Treaties, which provides in its article 27 that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” The fact that this provision was now part of the domestic law of Argentina and of a higher normative rank than ordinary federal legislation had the effect of requiring all organs of the State to accord normative priority to treaties and imposed on them the obligation to emit the necessary regulations to ensure that treaty provisions be fully implemented. Applying the latter conclusion to the instant case, the Supreme Court determined that the failure of the legislature to adopt the necessary rules to fully implement the provisions of article 14(1) of the American Convention imposed on the courts the obligation to give effect to it, provided they could do so by judicial decree.

Whether the various aspects of the Supreme Court’s analysis are convincing is less important than the manner in which it relied on the advisory opinion of the Inter-American Court and the Vienna Convention to decide the instant case. In this regard, it is to be noted that the conclusion of the Inter-American Court that article 14(1) established the right of reply and imposed an international obligation on the States Parties to give effect to it on the domestic plane, did not ipso jure require the Argentine Supreme Court to consider the provision to be self-executing or directly enforceable. The Inter-American Court did not address that issue. It only declared what the international obligation of the States Parties was under article 14(1). The Argentine Court could therefore have adopted the traditional dualist approach and left it to the political branches of government to comply with the State’s international obligations. Here it might even have buttressed such a holding by submitting that the views of the Inter-American Court of Human Rights were contained in an advisory Opinion and were thus not even binding. It chose instead to eschew formalism and view the relationship between international law and domestic law in a truly interactive or symbiotic way, blurring distinctions which in the past impeded the enforcement of international law by national courts. Since it knew what Argentina’s international obligations were, it thought it only proper to give effect to them.

The Argentine Court’s approach was further aided by its interpretation of the domestic normative significance of article 27 of the Vienna Convention on the Law of Treaties. If treaties and statutes enjoy the same normative rank in a State, with the later in time prevailing, then it would by no

means follow that the ratification of the Vienna Convention would change this constitutional equation: a later statute could still overcome a prior treaty. Arguably, there might be a stronger presumption that this result was not intended unless the legislature expressed its intention to override the treaty in an unambiguous manner. But when the treaty is accorded a higher normative rank than statutes within the domestic legal order, article 27 gains a special significance, for it must then be viewed as forming an integral part of any treaty that has been ratified by the State. In this fashion, the customary international law rule, which article 27 codifies, acquires a superior normative rank that gives national courts the power to prevent violations of treaty obligations they might otherwise be powerless to deter. It also deprives them of an excuse not to enforce a treaty.

....

### *Questions*

1. Who determines whether a treaty is self-executing? What are the criteria generally used to determine whether a treaty provision is self-executing? How would you interpret Article 2 of the American Convention regarding self-executing provisions?
2. In the event that a provision of a treaty requires domestic implementation measures in order to be applied domestically, do you think that a judicial decision could be considered such a measure, at least in a specific case (*see* discussion regarding the *Ekmekdjian* Case of the Argentina Supreme Court)?
3. Do you think that in those countries where human rights conventions have constitutional status, the “self-executing” character of a treaty provision is less relevant?

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**CHAPTER III**  
**THE RIGHT TO AN EFFECTIVE REMEDY**

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**A. THE RULE OF EXHAUSTION OF DOMESTIC REMEDIES AND ITS RELATIONSHIP TO THE RIGHT TO AN EFFECTIVE REMEDY<sup>1</sup>**

**Article 46  
American Convention on Human Rights**

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

a. That the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;

....

2. The provisions of paragraph[h] 1.a . . . of this article shall not be applicable when:

a. The domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;

b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

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**Article 35 – Admissibility criteria [former Article 26]**

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<sup>1</sup> This section reproduces the articles of the American Convention on Human Rights (hereinafter American Convention) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter European Convention on Human Rights or European Convention) dealing with exhaustion of domestic remedies. The corresponding article of the Optional Protocol to the Covenant of Civil and Political Rights provides:

Article 5

2. The Committee shall not consider any communications from an individual unless it has ascertain that:

b. the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

## European Convention for the Protection of Human Rights and Fundamental Freedoms

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law . . . .

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### **Velásquez Rodríguez v. Honduras**

*Inter-Am.Ct. H.R., Judgment of July 29, 1988 (ser. C) No. 4 (1988)*

*[For the facts of the case, see chapter I]*

50. The Government raised several preliminary objections that the Court ruled upon in its Judgment of June 26, 1987 (supra 16-23). There the Court ordered the joining of the merits and the preliminary objection regarding the failure to exhaust domestic remedies, and gave the Government and the Commission another opportunity to “substantiate their contentions” on the matter (Velásquez Rodríguez Case, Preliminary Objections, supra 23, para. 90).

51. The Court will first rule upon this preliminary objection. In so doing, it will make use of all the evidence before it, including that presented during the proceedings on the merits.

52. The Commission presented witnesses and documentary evidence on this point. The Government, in turn, submitted some documentary evidence, including examples of writs of habeas corpus successfully brought on behalf of some individuals (infra 120(c)). The Government also stated that this remedy requires identification of the place of detention and of the authority under which the person is detained.

53. In addition to the writ of habeas corpus, the Government mentioned various remedies that might possibly be invoked, such as appeal, cassation, extraordinary writ of amparo, ad effectum videndi, criminal complaints against those ultimately responsible and a presumptive finding of death.

54. The Honduran Bar Association in its brief (supra 35) expressly mentioned the writ of habeas corpus, set out in the Law of Amparo, and the suit before a competent court “for it to investigate the whereabouts of the person allegedly disappeared.”

55. The Commission argued that the remedies mentioned by the Government were ineffective because of the internal conditions in the country during that period. It presented documentation of three writs of habeas corpus brought on behalf of Manfredo Velásquez that did not produce results. It also cited two criminal complaints that failed to lead to the identification and punishment of those responsible. In the Commission’s opinion, those legal proceedings exhausted domestic remedies as required by Article 46(1)(a) of the Convention.

56. The Court will first consider the legal arguments relevant to the question of exhaustion of domestic remedies and then apply them to the case.

....

59. In its Judgment of June 26, 1987, the Court decided, *inter alia*, that “the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective” (Velásquez Rodríguez Case, Preliminary Objections, *supra* 23, para. 88).

60. Concerning the burden of proof, the Court did not go beyond the conclusion cited in the preceding paragraph. The Court now affirms that if a State which alleges non-exhaustion proves the existence of specific domestic remedies that should have been utilized, the opposing party has the burden of showing that those remedies were exhausted or that the case comes within the exceptions of Article 46(2). It must not be rashly presumed that a State Party to the Convention has failed to comply with its obligation to provide effective domestic remedies.

61. The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction (American Convention, Preamble).

62. It is a legal duty of the States to provide such remedies, as this Court indicated in its Judgment of June 26, 1987, when it stated:

“The rule of prior exhaustion of domestic remedies under the international law of human rights has certain implications that are present in the Convention. 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). (Velásquez Rodríguez Case, Preliminary Objections, *supra* 23, para. 91).”

63. Article 46(1)(a) of the Convention speaks of “generally recognized principles of international law.” Those principles refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness, as shown by the exceptions set out in Article 46(2).

64. Adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable. For example, a civil proceeding specifically cited by the Government, such as a presumptive finding of death

based on disappearance, the purpose of which is to allow heirs to dispose of the estate of the person presumed deceased or to allow the spouse to remarry, is not an adequate remedy for finding a person or for obtaining his liberty.

65. Of the remedies cited by the Government, habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty. The other remedies cited by the Government are either for reviewing a decision within an inchoate proceeding (such as those of appeal or cassation) or are addressed to other objectives. If, however, as the Government has stated, the writ of habeas corpus requires the identification of the place of detention and the authority ordering the detention, it would not be adequate for finding a person clandestinely held by State officials, since in such cases there is only hearsay evidence of the detention, and the whereabouts of the victim is unknown.

66. A remedy must also be effective - that is, capable of producing the result for which it was designed. Procedural requirements can make the remedy of habeas corpus ineffective: if it is powerless to compel the authorities; if it presents a danger to those who invoke it; or if it is not impartially applied.

67. On the other hand, contrary to the Commission's argument, the mere fact that a domestic remedy does not produce a result favorable to the petitioner does not in and of itself demonstrate the inexistence or exhaustion of all effective domestic remedies. For example, the petitioner may not have invoked the appropriate remedy in a timely fashion.

68. It is a different matter, however, when it is shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others. In such cases, resort to those remedies becomes a senseless formality. The exceptions of Article 46(2) would be fully applicable in those situations and would discharge the obligation to exhaust internal remedies since they cannot fulfill their objective in that case.

69. In the Government's opinion, a writ of habeas corpus does not exhaust the remedies of the Honduran legal system because there are other remedies, both ordinary and extraordinary, such as appeal, cassation, and extraordinary writ of amparo, as well as the civil remedy of a presumptive finding of death. In addition, in criminal procedures parties may use whatever evidence they choose. With respect to the cases of disappearances mentioned by the Commission, the Government stated that it had initiated some investigations and had opened others on the basis of complaints, and that the proceedings remain pending until those presumed responsible, either as principals or accomplices, are identified or apprehended.

70. In its conclusions, the Government stated that some writs of habeas corpus were granted from 1981 to 1984, which would prove that this remedy was not ineffective during that period. It

submitted various documents to support its argument.

71. In response, the Commission argued that the practice of disappearances made exhaustion of domestic remedies impossible because such remedies were ineffective in correcting abuses imputed to the authorities or in causing kidnapped persons to reappear.

72. The Commission maintained that, in cases of disappearances, the fact that a writ of habeas corpus or amparo has been brought without success is sufficient to support a finding of exhaustion of domestic remedies as long as the person does not appear, because that is the most appropriate remedy in such a situation. It emphasized that neither writs of habeas corpus nor criminal complaints were effective in the case of Manfredo Velásquez. The Commission maintained that exhaustion should not be understood to require mechanical attempts at formal procedures; but rather to require a case-by-case analysis of the reasonable possibility of obtaining a remedy.

73. The Commission asserted that, because of the structure of the international system for the protection of human rights, the Government bears the burden of proof with respect to the exhaustion of domestic remedies. The objection of failure to exhaust presupposes the existence of an effective remedy. It stated that a criminal complaint is not an effective means to find a disappeared person, but only serves to establish individual responsibility.

....

75. Although the Government did not dispute that the above remedies had been brought, it maintained that the Commission should not have found the petition admissible, much less submitted it to the Court, because of the failure to exhaust the remedies provided by Honduran law, given that there are no final decisions in the record that show the contrary. It stated that the first writ of habeas corpus was declared void because the person bringing it did not follow through; regarding the second and third, the Government explained that additional writs cannot be brought on the same subject, the same facts, and based on the same legal provisions. As to the criminal complaints, the Government stated that no evidence had been submitted and, although presumptions had been raised, no proof had been offered and that the proceeding was still before Honduran courts until those guilty were specifically identified. It stated that one of the proceedings was dismissed for lack of evidence with respect to those accused who appeared before the court, but not with regard to General Alvarez Martínez, who was out of the country. Moreover, the Government maintained that dismissal does not exhaust domestic remedies because the extraordinary remedies of amparo, rehearing and cassation may be invoked and, in the instant case, the statute of limitations has not yet run, so the proceeding is pending.

76. The record (infra Chapter V) contains testimony of members of the Legislative Assembly of Honduras, Honduran lawyers, persons who were at one time disappeared, and relatives of disappeared persons, which purports to show that in the period in which the events took place, the legal remedies in Honduras were ineffective in obtaining the liberty of victims of a practice

of enforced or involuntary disappearances (hereinafter “disappearance” or “disappearances”), ordered or tolerated by the Government. The record also contains dozens of newspaper clippings which allude to the same practice. According to that evidence, from 1981 to 1984 more than one hundred persons were illegally detained, many of whom never reappeared, and, in general, the legal remedies which the Government claimed were available to the victims were ineffective.

77. That evidence also shows that some individuals were captured and detained without due process and subsequently reappeared. However, in some of those cases, the reappearances were not the result of any of the legal remedies which, according to the Government, would have been effective, but rather the result of other circumstances, such as the intervention of diplomatic missions or actions of human rights organizations.

78. The evidence offered shows that lawyers who filed writs of habeas corpus were intimidated, that those who were responsible for executing the writs were frequently prevented from entering or inspecting the places of detention, and that occasional criminal complaints against military or police officials were ineffective, either because certain procedural steps were not taken or because the complaints were dismissed without further proceedings.

79. The Government had the opportunity to call its own witnesses to refute the evidence presented by the Commission, but failed to do so. Although the Government’s attorneys contested some of the points urged by the Commission, they did not offer convincing evidence to support their arguments. The Court summoned as witnesses some members of the armed forces mentioned during the proceeding, but their testimony was insufficient to overcome the weight of the evidence offered by the Commission to show that the judicial and governmental authorities did not act with due diligence in cases of disappearances. The instant case is such an example.

80. The testimony and other evidence received and not refuted leads to the conclusion that, during the period under consideration, although there may have been legal remedies in Honduras that theoretically allowed a person detained by the authorities to be found, those remedies were ineffective in cases of disappearances because the imprisonment was clandestine; formal requirements made them inapplicable in practice; the authorities against whom they were brought simply ignored them, or because attorneys and judges were threatened and intimidated by those authorities.

81. Aside from the question of whether between 1981 and 1984 there was a governmental policy of carrying out or tolerating the disappearance of certain persons, the Commission has shown that although writs of habeas corpus and criminal complaints were filed, they were ineffective or were mere formalities. The evidence offered by the Commission was not refuted and is sufficient to reject the Government’s preliminary objection that the case is inadmissible because domestic remedies were not exhausted.

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**Akdivar and Others v. Turkey**

*Eur. Ct. H.R., Judgment of September 16, 1996, Reports 1996 IV (1996)*

*<<http://www.echr.coe.int>>*

*[The applicants, Turkish nationals, alleged that on November 10, 1992, Turkish security forces attacked the village of Kelekci in South-East Turkey destroying their homes and forcing them to evacuate the village. At the time of the alleged facts, South-East Turkey was in the midst of severe civil strife involving the PPK, an irregular armed group, and the Turkish security forces. In their application, petitioners complained of breaches of Articles 3, 5, 6, 8, 13, 14, 18 and 25(1) of the European Convention on Human Rights and of Article 1 of Protocol No 1 to that Convention. The State argued that petitioners had not exhausted their domestic remedies before filing the application in the international system.]*

2. *The Court's assessment*

(a) *General principles*

65. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 26 of the Convention (art. 26) obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. Consequently, States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. The rule is based on the assumption, reflected in Article 13 of the Convention (art. 13) - with which it has close affinity -, that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions of the Convention are incorporated in national law. In this way, it is an important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (see the *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24, p. 22, para. 48).

66. Under Article 26 (art. 26) normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged. The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (see, inter alia, the *Vernillo v. France* judgment of 20 February 1991, Series A no. 198, pp. 11-12, para. 27, and the *Johnston and Others v. Ireland* judgment of 18 December 1986, Series A no. 112, p. 22, para. 45).

Article 26 (art. 26) also requires that the complaints intended to be made subsequently at

Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see the *Cardot v. France* judgment of 19 March 1991, Series A no. 200, p. 18, para. 34).

67. However, there is, as indicated above, no obligation to have recourse to remedies which are inadequate or ineffective. In addition, according to the “generally recognised rules of international law” there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal (see the *Van Oosterwijck v. Belgium* judgment of 6 November 1980, Series A no. 40, pp. 18-19, paras. 36-40). The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature as to make proceedings futile or ineffective (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 64, para. 159, and the report of the Commission in the same case, Series B no. 23-I, pp. 394-97).

68. In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see, inter alia, the Commission’s decision on the admissibility of application no. 788/60, *Austria v. Italy*, 11 January 1961, Yearbook, vol. 4, pp. 166-168; application no. 5577-5583/72, *Donnelly and Others v. the United Kingdom* (first decision), 5 April 1973, Yearbook, vol. 16, p. 264; also the judgment of 26 June 1987 of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case, Preliminary Objections, Series C no. 1, para. 88, and that Court’s Advisory Opinion of 10 August 1990 on “Exceptions to the Exhaustion of Domestic Remedies” (Article 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Series A no. 11, p. 32, para. 41). One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of.

69. The Court would emphasise that the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 26 (art. 26) must be applied with some degree of flexibility and without excessive formalism (see the

above-mentioned Cardot judgment, p. 18, para. 34). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see the above-mentioned Van Oosterwijck judgment, p. 18, para. 35). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants.

*(b) Application of Article 26 (art. 26) to the facts of the case*

70. As regards the application of Article 26 (art. 26) to the facts of the present case, the Court notes at the outset that the situation existing in South-East Turkey at the time of the applicants' complaints was - and continues to be - characterised by significant civil strife due to the campaign of terrorist violence waged by the PKK and the counter-insurgency measures taken by the Government in response to it. In such a situation it must be recognised that there may be obstacles to the proper functioning of the system of the administration of justice. In particular, the difficulties in securing probative evidence for the purposes of domestic legal proceedings, inherent in such a troubled situation, may make the pursuit of judicial remedies futile and the administrative inquiries on which such remedies depend may be prevented from taking place.

*i. Remedy before the administrative courts*

71. The Court observes that the large number of court decisions submitted by the Government demonstrate the existence of an innovative remedy in damages before the administrative courts which is not dependent on proof of fault (see paragraphs 28-30 above). Undoubtedly these decisions illustrate the real possibility of obtaining compensation before these courts in respect of injuries or damage to property arising out of the disturbances or acts of terrorism.

The applicants, on the other hand, have suggested that this remedy is not available in respect of the criminal acts of members of the security forces. However, they have not tested this assumption by introducing proceedings before the administrative courts.

In the Court's view, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see the Van Oosterwijck judgment cited above in paragraph 67, p. 18, para. 37). Nevertheless, like the Commission, the Court considers it significant that the Government, despite the extent of the problem of village destruction (see paragraph 13 above), have not been able to point to examples of compensation being awarded in respect of allegations that property has been purposely destroyed by members of the security forces or to prosecutions having been brought against them in respect of such allegations. In this connection the Court notes the evidence referred to by the Delegate of the Commission as regards the general reluctance of the authorities to admit that this type of illicit behaviour by members of the security forces had

occurred (see paragraph 63 above). It further notes the lack of any impartial investigation, any offer to cooperate with a view to obtaining evidence or any ex gratia payments made by the authorities to the applicants.

72. Moreover, the Court does not consider that a remedy before the administrative courts can be regarded as adequate and sufficient in respect of the applicants' complaints, since it is not satisfied that a determination can be made in the course of such proceedings concerning the claim that their property was destroyed by members of the gendarmerie.

*ii. Remedy before the civil courts*

73. As regards the civil remedy invoked by the respondent Government, the Court attaches particular significance to the absence of any meaningful investigation by the authorities into the applicants' allegations and of any official expression of concern or assistance notwithstanding the fact that statements by the applicants had been given to various State officials (see paragraphs 19-20 above). It appears to have taken two years before statements were taken from the applicants by the authorities about the events complained of, probably in response to the communication of the complaint by the Commission to the Government (see paragraph 22 above).

In assessing this remedy the Court must take account of the fact that the events complained of took place in an area of Turkey subject to martial law and characterised by severe civil strife. It must also bear in mind the insecurity and vulnerability of the applicants' position following the destruction of their homes and the fact that they must have become dependent on the authorities in respect of their basic needs. Against such a background the prospects of success of civil proceedings based on allegations against the security forces must be considered to be negligible in the absence of any official inquiry into their allegations, even assuming that they would have been able to secure the services of lawyers willing to press their claims before the courts. In this context, the Court finds particularly striking the Commission's observation that the statements made by villagers following the events of 6 April 1993 gave the impression of having been prepared by the gendarmes (see paragraph 23 above).

74. Nor can the Court exclude from its considerations the risk of reprisals against the applicants or their lawyers if they had sought to introduce legal proceedings alleging that the security forces were responsible for burning down their houses as part of a deliberate State policy of village clearance.

75. Accordingly, as regards the possibility of pursuing civil remedies, the Court considers that, in the absence of convincing explanations from the Government in rebuttal, the applicants have demonstrated the existence of special circumstances which dispensed them at the time of the events complained of from the obligation to exhaust this remedy.

*iii. Conclusion*

76. The Court therefore concludes, in light of the above, that the application cannot be rejected for failure to exhaust domestic remedies.

77. The Court would emphasise that its ruling is confined to the particular circumstances of the present case. It is not to be interpreted as a general statement that remedies are ineffective in this area of Turkey or that applicants are absolved from the obligation under Article 26 (art. 26) to have normal recourse to the system of remedies which are available and functioning. It can only be in exceptional circumstances such as those which have been shown to exist in the present case that it could accept that applicants address themselves to the Strasbourg institutions for a remedy in respect of their grievances without having made any attempt to seek redress before the local courts.

....

### **Questions**

1. Have Inter-American and European case law developed similar standards with respect to the domestic remedies that petitioners must exhaust before bringing a complaint to the international system? Is this a “rigid” rule that must be applied similarly in every case? If not, what elements should be taken into account when analyzing the exhaustion of domestic remedies in a particular case?
2. Who bears the burden of proving that domestic remedies have been exhausted? Does the distribution of the burden of proof on the exhaustion of domestic remedies favor petitioners bringing cases to the international system? Elaborate on your answer.
3. Although Article 35 of the European Convention does not expressly set out any exceptions to the rule of exhaustion, does the “special circumstances” standard have a similar scope as in paragraph 2 of Article 46 of the American Convention? Are there any other situations in which applicants are excused from exhausting domestic remedies?
4. In the preceding cases, how would you decide if the applicant successfully argued, on the merits, a violation of the right to an effective remedy as protected by article 25 of the American Convention or article 13 of the European Convention? In practice, is there any difference between the scope of “effective remedy,” which must be exhausted procedurally, and that of the more substantive “right to an effective remedy,” ensured in international human rights treaties? Should there be?
5. How did the Inter-American Court, in the *Velásquez Rodríguez* case, avoid the problem raised in the previous question? Is there another approach that could be developed in international bodies’ case law in order to distinguish between “effective remedy” under the prior exhaustion rule and the more substantive “right to an effective remedy”? What about requiring applicants at

the admissibility stage to establish a *prima facie* case of ineffective remedy and, at the merits stage, to bear a higher burden of proof as to the violation of the right to an effective remedy?

### *Comment*

As developed in the Inter-American and European case law, only effective remedies are required to be exhausted. The scope of “effective remedy” under the rule of prior exhaustion is closely linked to the obligation of States to provide and ensure an effective remedy to individuals whose rights are imperiled. As noted earlier, exhaustion of domestic remedies is an admissibility requirement, whereas the determination of a violation of a right is a substantive issue to be addressed in the merits of the case. Thus, a finding that excuses an applicant from exhausting domestic remedies because of their ineffectiveness may constitute, in practice, an anticipatory decision on the violation of the right to an effective remedy. International bodies have faced and continue to face the dilemma of avoiding such an anticipatory decision when deciding on exhaustion of domestic remedies, especially in cases where violations of fundamental human rights occur with the involvement of State agents and the respondent State fails to seriously investigate the violations or compensate the victims.

The case law of both the Inter-American and European Systems has been somewhat tentative and inconsistent. In the case of the Inter-American bodies, three approaches have developed: 1) deciding the issue of exhaustion and the right to an effective remedy on the basis of the same facts, thereby overlapping the analyses of both issues<sup>2</sup>; 2) referring the analysis on exhaustion of domestic remedies to the merits of the case to avoid prejudging on the substantive issue<sup>3</sup>; and 3) making an initial finding, at the admissibility stage, of a *prima facie* case and leaving the substantive considerations of the effectiveness of remedies to be decided on the merits.<sup>4</sup> The last two approaches have been followed mainly in the context of a new practice of the Inter-

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<sup>2</sup> See *Dianna Ortiz v. Guatemala*, Case 10.526, Inter-Am. C.H.R. 332, Annual Report 1996, OEA/Ser.L/V/II.95, doc. 7 rev. (1997); *João Canuto de Oliveira v. Brazil*, Case 11.287, Inter-Am. C.H.R. 379, Annual Report 1997, OEA/Ser.L/V/II.98, doc 7 rev. (1998); *Rodolfo Robles Espinoza et al. v. Peru*, Case 11.317, Inter-Am. C.H.R. 787, Annual Report 1998, OEA/Ser.L/II.102, doc 6 rev. (1999).

<sup>3</sup> See *Victor Rosario Congo v. Ecuador*, Case 11.427, Inter-Am. C.H.R. 257, Annual Report 1996, OEA/Ser.L/V/II.95, doc. 7 rev. (1997); *Alvaro Moreno Moreno v. Colombia*, Case 11.019, Inter-Am. C.H.R. 416, Annual Report 1997, OEA/Ser.L/V/II.98, doc 7 rev. (1998); *Rolando and Anastasio Hernández Hernández v. Mexico*, Case 11.543, Inter-Am. C.H.R. 648, Annual Report 1998, OEA/Ser.L/II.102, doc 6 rev. (1999).

<sup>4</sup> See *Francisco Guarcas Cipriano v. Guatemala*, Case 11.275, Inter-Am. C.H.R. 128, Annual Report 1997, OEA/Ser.L/V/II.98, doc 7 rev. (1998); *Walter David Bulacio v. Argentina*, Case 11.752, Inter-Am. C.H.R. 47, Annual Report 1998, OEA/Ser.L/II.102, doc 6 rev. (1999); *Ramón Mauricio García-Prieto Giralt*, Case 11.697, Inter-Am. C.H.R. 112, *idem supra*.

American Commission in which it first adopts a separate decision on the admissibility of the case and then a final ruling on the merits. In its most recent jurisprudence, the European Court of Human Rights similarly has followed different approaches to address this issue, namely: 1) deciding on the effectiveness of remedies when addressing exhaustion of domestic remedies within the context of preliminary objections raised by the respondent State, thereby considering it unnecessary to address the potential violation of the right to an effective remedy in the merits;<sup>5</sup> 2) joining the analysis of this issue to the merits of the case;<sup>6</sup> and 3) finding, on the basis of the same facts, that remedies need not be exhausted and that there is a violation of the right to an effective remedy.<sup>7</sup>

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## **B. SCOPE OF THE RIGHT TO AN EFFECTIVE REMEDY<sup>8</sup>**

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<sup>5</sup> See *Akdivar and Others v. Turkey*, Eur. Ct. H.R., Judgment of September 16, 1996, Reports 1996 IV (1996), <<http://www.echr.coe.int>>.

<sup>6</sup> See *Gündem v. Turkey*, Eur. Ct. H.R., Judgment of May 25, 1998, Reports 1998 III (1998), <<http://www.echr.coe.int>>; *Tanrikulu v. Turkey*, Eur. Ct. H.R., Judgment of July 8, 1999 (1999), <<http://www.echr.coe.int>>.

<sup>7</sup> See *Aksoy v. Turkey*, Eur. Ct. H.R., Judgment of December 18, 1996, Reports 1996 VI (1996), <<http://www.echr.coe.int>>; *Assenov and Others v. Bulgaria*, Eur. Ct. H.R., Judgment of October 28, 1998, Reports 1998 VIII (1998), <<http://www.echr.coe.int>>; *Çakici v. Turkey*, Eur. Ct. H.R., Judgment of July 8, 1999 (1999), <<http://www.echr.coe.int>>.

<sup>8</sup> This section reproduces the articles of the American and European Conventions on Human Rights with regard to the right to an effective remedy. The corresponding provision of the Covenant on Civil and Political provides:

Article 2

....

3. Each State Party to the present 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;

**Article 25**  
**American Convention on Human Rights**

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 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 thereto 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.

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**Article 13**  
**European Convention for the Protection of Human Rights and Fundamental Freedoms**

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.

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**Gustavo Carranza v. Argentina**  
*Case 10.087, Inter-Am. C.H.R. 254,*  
*Annual Report 1997, OEA/Ser.L/V/II.9, doc. 7 rev. (1998)*  
*[Footnotes omitted]*

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(c) To ensure that the competent authorities shall enforce such remedies when granted.

2. The petitioner had instituted suit in the provincial courts seeking the nullification of a decree issued by the previous military government that had ordered his removal in 1976 as a lower court judge of the Province of Chubut, as well as the recovery of material and moral damages resulting therefrom.

3. His case was declared “non-justiciable” by the Superior Court of Chubut on July 1, 1986, invoking jurisprudence of the Supreme Court of Argentina in a similar case (*Sansó, Gerónimo v. National Government*, July 3, 1984) which held that the courts were not competent to rule on the fairness, wisdom or efficacy of the measures ordering the removal of magistrates, the claim underlying this litigation, as these were eminently political acts of a *de facto* government.

4. He appealed that decision to the Supreme Court of Argentina, which dismissed his appeal on February 24, 1987, on the ground that the petitioner had not presented any new arguments meriting review of the criteria set forth by the Superior Court of Chubut regarding the lack of competence of the Judiciary to adjudicate matters of such a nature.

....

37. The 1853 Constitution of Argentina, which was in effect at the time the military seized power on March 24, 1976, states that “Judges of the Supreme Court and of the lower courts of the Nation shall retain their seats so long as they observe proper conduct.”

38. As for the dismissal of the judges, articles 45, 51 and 52 of the Constitution regarding impeachment stipulate that federal judges may only be removed by a procedure wherein the Chamber of Deputies approves the articles of impeachment, and the Senate conducts the trial; in both cases, a vote of two thirds of the members present in the chamber is required. There are three grounds for impeachment: misconduct, criminal conduct in the exercise of one’s functions and common crimes. The rules established by the Constitution of Chubut, which should have been applied to the petitioner, follow the same principles.

39. In the case in question, the procedure stipulated in the Constitution of Chubut to dismiss judges was violated. The *de facto* government installed in the Argentine Republic on March 24, 1976, not only deposed the constitutional authorities but also took upon itself the functions of a “constitutional power” by partially repealing the Constitution “insofar as it was contrary to the norms sanctioned by the *Military Junta*.”

40. In that context, Law 21,258 was enacted, which declared judges to be “on probation” and authorized the new members of the national and provincial executive powers to confirm them or not, at their discretion, provided said judges “swore allegiance to the basic objectives established by the *Military Junta* through the ‘*Bylaws for the National Reorganization Process*’”.

41. The Argentine constitutional system --like that of other democracies--upholds the principle of

the irremovability of judges. This system creates stability on the bench; if a judge is to be removed, then such removal must be done in strict accordance with the procedure established in the Constitution, as a safeguard of the democratic system of government and the rule of law.

The principle is based on the very special nature of the function of the courts and to guarantee the independence of the Judiciary vis-à-vis the other branches of government and political-electoral changes.

42. Democratic systems recognize the so-called “delegated powers” of the branches of government that is a product of their classic three-way separation. The appointment and removal of magistrates by the Legislature, under the conditions stipulated in the Constitution, is one of those powers.

43. Other examples of such powers expressly reserved for a given branch of government under the Constitution are, *inter alia*, the authority to declare war, ratification of treaties, declaration of a state of siege, recognition of foreign governments or their representative, appointment and removal of ministers and ambassadors, and the authority to declare something to be in the public domain.

44. The political question doctrine is premised on the existence of those powers of the branches of government. According to that doctrine, the Judiciary will abstain from reviewing certain acts when such a decision presupposes an eminently political judgment that is exclusively reserved for a given branch of government, whether it be the executive or legislative. However, such doctrine also recognizes that those acts can only be judicially reviewed with respect to their extrinsic conformity to the Constitution, that is, if they were passed by the competent body, following constitutional procedure, and without any express violation of some material rule in the Constitution.

45. It is not for the Commission to pass judgment on the wisdom or efficacy of a judicial doctrine *per se*, unless its application results in a violation of any of the rights protected by the American Convention. In the instant case, however, the Commission notes that the effect of the political question doctrine has been to preclude a decision on the merits of the petitioner’s claims. The State has quoted several United States cases (*Marbury v. Madison*, *Baker v. Carr*) to support its position with respect to this case, so certain clarifications are considered necessary.

.....

53. In any event, it is clear from the above considerations that the doctrine was conceived as based on the constitutional separation of powers. In the instant case, the doctrine was used by the courts of a democratic government in Argentina to justify the actions of a *de facto* government, following a practice that began in the aftermath of the 1930 military dictatorship that ruled that country.

....

58. The removal of magistrates by order of the competent body and in accordance with established constitutional procedure is one thing, but the “dismissal of a magistrate” by an illegitimate authority without competence, with utter disregard for the procedure prescribed by the Constitution, is quite another. The first under internal legislation, might well be non-justiciable, but the second would be unconstitutional and unlawful, and it is up to the Courts to review it and declare so.

59. Indeed, the Argentine courts which invoked the political question doctrine should actually have been bound by that same doctrine to review petitioner’s case, since the matter clearly does not fall within the requisites of non-justiciability under *Baker v. Carr* which is quoted by those same courts, and cited by the State in its reply to the petition.

....

63. The Commission does not have competence to declare *per se* that a national law or court ruling is either unconstitutional or unlawful, as it has stated previously. However, it does have a fundamental authority to examine whether the effects of a given measure in any way violate the petitioner’s human rights recognized in the American Convention. This practice is consistent with precedents set by the European Commission of Human Rights.

64. In this case, the decision of the Supreme Court of Chubut, which declared the petitioner’s claim non-justiciable, became *res judicata* when the Supreme Court of Justice of Argentina disallowed the special extraordinary appeal filed by the petitioner seeking reversal of the provincial tribunal’s decision. This precluded any decision on the merits of the petitioner’s claim that in 1976 the military authorities had unlawfully dismissed him from his position as a judge.

65. The petitioner’s complaint before the Commission does not seek his reinstatement to the post of judge or a decision concerning the illegality of his removal in 1976. The petitioner claims specifically that the lack of a judicial decision on the merits of the claim in reference, through application of the political question doctrine, caused the violation of his rights to legal guarantees and to legal protection recognized by the American Convention.

....

C. *The right to judicial protection (Article 25)*

69. Article 25 of the American Convention establishes . . . .

70. In this case, the petitioner sought from the jurisdictional body provided for by law a judicial remedy that would protect him from alleged acts in violation of his individual rights--that is,

illegal removal from his position as judge--and that would afford him suitable redress. The petitioner did in fact have free access to such recourse and the right to defend his claim during the proceedings. The Commission observes that this possibility is what distinguishes this case from cases in the region stemming from the so-called "amnesty laws". In the case regarding the amnesty laws, some of the petitioners directly lost their right to legal recourse; with respect to other petitioners, the procedure for developing judicial remedies was thwarted.

71. The Commission nevertheless understands that the right to effective judicial protection provided for in Article 25 is not exhausted by free access to judicial recourse. The intervening body must reach a reasoned conclusion on the claim's merits, establishing the appropriateness or inappropriateness of the legal claim that, precisely, gives rise to the judicial recourse. Moreover, that final decision is the basis for and origin of the right to legal recourse recognized by the American Convention in Article 25, which must also be covered by indispensable individual guarantees and state obligations (Articles 8 and 1(1)).

72. In the case of the petitioner, the intervening judicial tribunal denied a judicial remedy, declaring that "the matters interposed in the claim of fs 44/60 were non-justiciable." In this regard, the Argentine State has alleged that this declaration is a decision, compatible with Article 25 of the American Convention, by the tribunal concerning the claim, despite the fact that it recognizes that the Argentine judicial branch was incompetent to grant the petitioner the relief sought. The Commission believes that the effect of this determination by the judiciary made it impossible for the petitioner to have an effective judicial remedy that would protect him against alleged violations of his right to stability as a judge, provided by the Constitution of Chubut at the time he was dismissed, and to an eventual compensation.

73. In the first place, the logic of every judicial remedy--including that of Article 25--indicates that the deciding body must specifically establish the truth or error of the claimant's allegation. The claimant resorts to the judicial body alleging the truth of a violation of his rights, and the body in question, after a proceeding involving evidence and discussion of the allegation, must decide whether the claim is valid or unfounded. Otherwise the judicial remedy would become inconclusive.

74. In the second place, in addition to being inconclusive, the judicial remedy would be patently ineffective. This is because, by not allowing recognition of the violation of rights, in the event such violation had been confirmed, it would not be apt for protecting the individual whose right had been impaired or for providing him suitable redress. The Inter-American Court has established that Article 25(1) incorporates the principle recognized in international law on human rights of the effectiveness of the procedural instruments or means for guaranteeing such rights. As the Court has already pointed out, according to 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 under their jurisdictions....

According to this principle, 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. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances in a given case, cannot be considered effective.

75. Effective recourse means recourse suitable for protecting the rights violated. The absence of this indispensable condition in the petitioner's case is shown by the intervening judicial body's statement that ". . . there is no legal jurisdiction with regard to the matters set forth in the record, and it is not appropriate to decide thereon." If there is no legal jurisdiction and if it is not appropriate to decide, then there can be no protection. Consequently there is no effective legal remedy under the terms of Article 25 of the American Convention.

76. Article 46.2 of the American Convention also recognizes the need for effective legal remedies by establishing certain cases that justify nonapplicability of the requirement for exhaustion of domestic remedies (46.1.a), precisely due to those remedies' ineffectiveness.

77. In the third place, the Commission observes that Article 25(2)(a) expressly establishes the right of any person claiming judicial remedy to "have his rights determined by the competent authority provided for by the legal system of the state." To determine the rights involves making a determination of the facts and the alleged right--with legal force--that will bear on and deal with a specific object. This object is the claimant's specific claim. When in this case the judicial tribunal denied the claim and declared "the matters interposed to be non-justiciable" because "there is no legal jurisdiction with regard to the matters set forth and it is not appropriate to decide thereon," it avoided a determination of the petitioner's rights and analyzing his claim's soundness, and as a result prevented him from enjoying the right to a judicial remedy under the terms of Article 25.

78. Finally, mention should be made of Article 29 of the American Convention, which establishes the following:

No provision of this Convention shall be interpreted as:

. . . . b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party.

79. The right to judicial recourse is broad and expressly recognized in the Constitution, in the legislation, and in the jurisprudence of Argentina. The right to due process under domestic legislation is provided for in Article 18 of the Constitution, and this has been recognized repeatedly by the highest judicial tribunal. Precisely, and directly connected with this case, it has established that “the constitutional guarantee of defense in judgment assumes the possibility of appearing before the courts of justice and obtaining from them a useful judgment concerning the rights of the litigants.”

80. The right to judicial recourse expressed in Article 25 of the American Convention is a fundamental tool for the protection of individual rights in the framework of the American Convention’s object and purpose. It is so important that the Inter-American Court has concluded that not even the imposition of states of emergency--which did not exist in Argentina at the time the petitioner’s judicial recourse was denied-- “cannot entail the suppression or ineffectiveness of the judicial guarantees that the Convention requires States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency”, or to control the legality of measures adopted by the executive body due to the state of emergency.

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**Leander v. Sweden**  
*116 Eur. Ct. H.R. (ser. A) (1987)*  
<<http://www.echr.coe.int>>

*[The applicant was refused temporary employment as a museum technician at the Navy Museum of Karlskrona in the south of Sweden because certain secret information in the National Police register allegedly made him a security risk. The position in the museum, which was adjacent to a naval base, involved access to restricted security areas; therefore, employment with that institution required candidates to pass a background security check. The applicant requested the Swedish Government to disclose the information recorded on him by the National Police. However, the disclosure of such information was rejected. In his petition to the European Court, the applicant alleged the violation of articles 8 and 10 of the European Convention on Human Rights. Additionally, he argued a violation of the right to an effective remedy ensured in article 13 of that treaty since he was allowed neither to comment upon the information released to the museum’s authorities nor to appeal the decision of the government refusing to disclose that information to him.]*

77. For the interpretation of Article 13 (art. 13), the following general principles are of relevance:

(a) 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 (see, *inter alia*, the above-mentioned *Silver and Others* judgment, Series A no. 61, p. 42, § 113);

(b) the authority referred to in Article 13 (art. 13) need not be a judicial authority but, if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective (*ibid.*);

(c) although no single remedy may itself entirely satisfy the requirements of Article 13 (art. 13), the aggregate of remedies provided for under domestic law may do so (*ibid.*);

(d) Article 13 (art. 13) does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms (see the *James and Others* judgment of 21 February 1986, Series A no. 98, p. 47, § 85).

78. The Court has held that Article 8 (art. 8) did not in the circumstances require the communication to Mr. Leander of the information on him released by the National Police Board (see paragraph 66 above). The Convention is to be read as a whole and therefore, as the Commission recalled in its report, any interpretation of Article 13 (art. 13) must be in harmony with the logic of the Convention. Consequently, the Court, consistently with its conclusion concerning Article 8 (art. 8), holds that the lack of communication of this information does not, of itself and in the circumstances of the case, entail a breach of Article 13 (art. 13) (see, *mutatis mutandis*, the above-mentioned *Klass and Others* judgment, Series A no. 28, pp. 30-31, § 68).

For the purposes of the present proceedings, an "effective remedy" under Article 13 (art. 13) must mean a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret checks on candidates for employment in posts of importance from a national security point of view. It therefore remains to examine the various remedies available to the applicant under Swedish law in order to see whether they were "effective" in this limited sense (*ibid.*, p. 31, § 69).

79. There can be no doubt that the applicant's complaint have raised arguable claims under the Convention at least in so far as Article 8 (art. 8) is concerned and that, accordingly, he was entitled to an effective remedy in order to enforce his rights under that Article as they were protected under Swedish law . . . .

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**Chahal v. United Kingdom**

*Eur. Ct. H.R., Judgment of November 15, 1996, Reports 1996 V (1996)*

*[The first applicant, a Sikh separatist leader, had been detained in custody for deportation purposes since August 1990 when the Home Secretary decided he was a threat to national security. Due to the national security elements of his case, he was refused appeal. However, his case was reviewed by an advisory panel, to which the applicant was given an opportunity to make written and oral representations, yet he was neither permitted representation by legal counsel nor allowed access to the panel's final report. Additionally, the applicant filed for political asylum and was refused. Although the denial was quashed by the High Court, the Home Secretary maintained the refusal of asylum and proceeded with deportation. The applicant applied for judicial review of both decisions. Domestic courts ruled that, given the national security elements present in the applicant's case, their power of review was restricted because only the government had access to the information and evidence necessary to decide whether the harm to the person concerned outweighs the national security considerations. Relying on Articles 3, 5 and 13 of the Convention, Mr Chahal complained that his deportation to India would expose him to a real risk of torture or inhuman or degrading treatment, that his detention pending deportation had been too long and that he had no effective domestic remedy for his Convention claims because of the national security elements in his case. He and the other three applicants (his wife and children) also complained that his deportation would breach their right to respect for family life under Article 8, for which there was similarly no effective domestic remedy.]*

140. In addition, the applicants alleged that they were not provided with effective remedies before the national courts, in breach of Article 13 of the Convention (art. 13), which reads . . . .

141. The applicants maintained that the only remedy available to them in respect of their claims under Articles 3, 5 and 8 of the Convention (art. 3, art. 5, art. 8) was judicial review, the advisory panel procedure (see paragraphs 29 and 60 above) being neither a “remedy” nor “effective”.

They submitted, first, that the powers of the English courts to put aside an executive decision were inadequate in all Article 3 (art. 3) asylum cases, since the courts could not scrutinise the facts to determine whether substantial grounds had been shown for belief in the existence of a real risk of ill-treatment in the receiving State, but could only determine whether the Secretary of State's decision as to the existence of such a risk was reasonable according to the “Wednesbury” principles (see paragraph 66 above).

This contention had particular weight in cases where the executive relied upon arguments of national security. In the instant case, the assertion that Mr Chahal's deportation was necessary in the interests of national security entailed that there could be no effective judicial evaluation of the risk to him of ill-treatment in India or of the issues under Article 8 (art. 8). That assertion

likewise prevented any effective judicial control on the question whether the applicant's continued detention was justified.

142. The Government accepted that the scope of judicial review was more limited where deportation was ordered on national security grounds. However, the Court had held in the past that, where questions of national security were in issue, an "effective remedy" under Article 13 (art. 13) must mean "a remedy that is effective as can be", given the necessity of relying upon secret sources of information (see the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 31, para. 69, and the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 32, para. 84).

Furthermore, it had to be borne in mind that all the relevant material, including the sensitive material, was examined by the advisory panel whose members included two senior judicial figures - a Court of Appeal judge and a former president of the Immigration Appeal Tribunal (see paragraph 29 above). The procedure before the panel was designed, on the one hand, to satisfy the need for an independent review of the totality of the material on which the perceived threat to national security was based and, on the other hand, to ensure that secret information would not be publicly disclosed. It thus provided a form of independent, quasi-judicial scrutiny.

143. For the Commission, the present case could be distinguished from that of *Vilvarajah and Others* (cited at paragraph 73 above, p. 39, paras. 122-26) where the Court held that judicial review in the English courts amounted to an effective remedy in respect of the applicants' Article 3 (art. 3) claims. Because the Secretary of State invoked national security considerations as grounds for his decisions to deport Mr Chahal and to detain him pending deportation, the English courts' powers of review were limited. They could not themselves consider the evidence on which the Secretary of State had based his decision that the applicant constituted a danger to national security or undertake any evaluation of the Article 3 (art. 3) risks. Instead, they had to confine themselves to examining whether the evidence showed that the Secretary of State had carried out the balancing exercise required by the domestic law (see paragraph 41 above).

144. The intervenors (see paragraph 6 above) were all of the view that judicial review did not constitute an effective remedy in cases involving national security. Article 13 (art. 13) required at least that some independent body should be appraised of all the facts and evidence and entitled to reach a decision which would be binding on the Secretary of State.

In this connection, Amnesty International, Liberty, the AIRE Centre and JCWI (see paragraph 6 above) drew the Court's attention to the procedure applied in such cases in Canada. Under the Canadian Immigration Act 1976 (as amended by the Immigration Act 1988), a Federal Court judge holds an *in camera* hearing of all the evidence, at which the applicant is provided with a statement summarising, as far as possible, the case against him or her and has the right to be represented and to call evidence. The confidentiality of security material is maintained by requiring such evidence to be examined in the absence of both the applicant and his or her representative. However, in these circumstances, their place is taken by a security-cleared

counsel instructed by the court, who cross-examines the witnesses and generally assists the court to test the strength of the State's case. A summary of the evidence obtained by this procedure, with necessary deletions, is given to the applicant.

145. The Court observes that Article 13 (art. 13) guarantees the availability at 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. The effect of this Article (art. 13) 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 (art. 13) (see the *Vilvarajah and Others* judgment cited at paragraph 73 above, p. 39, para. 122).

Moreover, it is recalled that in certain circumstances the aggregate of remedies provided by national law may satisfy the requirements of Article 13 (art. 13) (see, *inter alia*, the above-mentioned *Leander* judgment, p. 30, para. 77).

146. The Court does not have to examine the allegation of a breach of Article 13 taken in conjunction with Article 5 para. 1 (art. 13+5-1), in view of its finding of a violation of Article 5 para. 4 (art. 5-4) (see paragraph 133 above). Nor is it necessary for it to examine the complaint under Article 13 in conjunction with Article 8 (art. 13+8), in view of its finding concerning the hypothetical nature of the complaint under the latter provision (art. 8) (see paragraph 139 above).

147. This leaves only the first applicant's claim under Article 3 combined with Article 13 (art. 13+3). It was not disputed that the Article 3 (art. 3) complaint was arguable on the merits and the Court accordingly finds that Article 13 (art. 13) is applicable (see the above-mentioned *Vilvarajah and Others* judgment, p. 38, para. 121).

148. The Court recalls that in its *Vilvarajah and Others* judgment (*ibid.*, p. 39, paras. 122-26), it found judicial review proceedings to be an effective remedy in relation to the applicants' complaints under Article 3 (art. 3). It was satisfied that the English courts could review a decision by the Secretary of State to refuse asylum and could rule it unlawful on the grounds that it was tainted with illegality, irrationality or procedural impropriety (see paragraph 66 above). In particular, it was accepted that a court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take (*ibid.*, para. 123).

149. The Court further recalls that in assessing whether there exists a real risk of treatment in breach of Article 3 (art. 3) in expulsion cases such as the present, the fact that the person is perceived as a danger to the national security of the respondent State is not a material consideration (see paragraph 80 above).

150. It is true, as the Government have pointed out, that in the cases of *Klass and Others* and *Leander* (both cited at paragraph 142 above), the Court held that Article 13 (art. 13) only required a remedy that was “as effective as can be” in circumstances where national security considerations did not permit the divulging of certain sensitive information. However, it must be borne in mind that these cases concerned complaints under Articles 8 and 10 of the Convention (art. 8, art. 10) and that their examination required the Court to have regard to the national security claims which had been advanced by the Government. The requirement of a remedy which is “as effective as can be” is not appropriate in respect of a complaint that a person’s deportation will expose him or her to a real risk of treatment in breach of Article 3 (art. 3), where the issues concerning national security are immaterial.

151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3 (art. 3), the notion of an effective remedy under Article 13 (art. 13) requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (art. 3). This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.

152. Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective (see the above-mentioned *Leander* judgment, p. 29, para. 77).

153. In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts’ approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security (see paragraph 41 above). It follows from the above considerations that these cannot be considered effective remedies in respect of Mr Chahal’s Article 3 (art. 3) complaint for the purposes of Article 13 of the Convention (art. 13).

154. Moreover, the Court notes that in the proceedings before the advisory panel the applicant was not entitled, *inter alia*, to legal representation, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed (see paragraphs 30, 32 and 60 above). In these circumstances, the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13 (art. 13).

155. Having regard to the extent of the deficiencies of both the judicial review proceedings and the advisory panel, the Court cannot consider that the remedies taken together satisfy the requirements of Article 13 in conjunction with Article 3 (art. 13+3).

Accordingly, there has been a violation of Article 13 (art. 13).

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**Thomas and another v. Baptiste and others**

*Privy Council, Appeal no. 60 of 1998*

*17 March 1999*

*[Footnotes omitted]*

*[Thomas was arrested in February 1993 and charged with murder. He was convicted and sentenced to death in November 1995. In March 1998, he lodged a petition with the Inter-American Commission on Human Rights alleging violations of the American Convention on Human Rights. The Advisory Committee on the Power of Pardon met but no reprieve was forthcoming and a warrant was read for the appellant's execution. Thomas then filed a motion for constitutional relief and on the same day the Inter-American Court of Human Rights requested information in connection with his petition and asked that his execution be stayed. Subsequently, Jamadar J allowed the motion for constitutional relief and commuted the sentence of death. The Court of Appeal allowed the respondents' appeal, dismissing the constitutional motion and restoring the sentence of death. In the second case, Hillaire was arrested in February 1991 and charged with murder. He was convicted and sentenced to death in May 1995. The Court of Appeal dismissed his appeal in November 1996. In October 1997, he lodged a petition with the Commission that was accepted two years later. Subsequently, the advisory committee met but no reprieve was forthcoming and a warrant was read for Hillaire's execution. Hillaire then filed a motion for constitutional relief which was dismissed by Kangaloo J and his appeal to the Court of Appeal was dismissed. Subsequently, both appellants appealed to the Judicial Committee of the Privy Council to determine, inter alia, whether the carrying out of a death sentence lawfully imposed was rendered unconstitutional by the length and conditions of detention.]*

*Due Process*

. . . The words "due process of law" were introduced into a New York statute in 1887 for the purpose of protecting the individual from being deprived of life, liberty, or property by act of the legislature alone. Madison had the same object when he drafted what became the Fifth Amendment to the Constitution of the United States of America. The due process clauses in the Fifth and Fourteenth Amendments underpin the doctrine of the separation of powers in the United States and serve as a cornerstone of the constitutional protection afforded to its citizens. Transplanted to the Constitution of the Republic of Trinidad and Tobago 1976, the due process clause excludes legislative as well as executive interference with the judicial process.

But the clause plainly does more than this. It deliberately employs different language from that found in the corresponding provisions of the Universal Declaration and the European convention. They speak merely of 'the sentence of a court of competent jurisdiction.' The due process clause requires the process to be judicial; but it also requires it to be 'due.' In their Lordships' view 'due process of law' is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather it invokes the concept of rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law . . . .

The clause thus gives constitutional protection to the concept of procedural fairness. . . .

Their Lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a treaty, in Trinidad and Tobago as in England, is an act of the executive government, not of the legislature. It follows that the terms of the treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under authority of the legislature. When so enacted, the courts give effect to the domestic legislation, not to the terms of the treaty. . . It is sometimes argued that human rights treaties form an exception to this principle. It is also sometimes argued that a principle which is extended to afford the subject constitutional protection against the exercise of executive power cannot be invoked by the Executive itself to escape from obligations which it has entered into for his protection. Their Lordships mention these arguments for completeness. They do not find it necessary to examine them further in the present case.

. . . .

### *Delay*

Thomas spent two years and eight months in custody before conviction and a further two years and seven months after it, making a total of five years and three months before the warrant was read. Hilaire spent four years and three months in custody before conviction and a further three years and two months after it, making a total of seven years and five months before the warrant was read. These periods can be compared with those in *Fisher v. Minister of Public Safety and Immigration* . . . where the board held that pre-trial delay could not be taken into account save in exceptional circumstances. In that case the board affirmed the sentence despite the passage of three years and five months from arrest to conviction and a further two years and six months after it, making a total of five years and eleven months.

Their Lordships do not accept that the periods of detention with which they are concerned have been so prolonged that it would now be unconstitutional to carry out the death sentence in the case of either appellant. Taking post-conviction delay first, in neither case was the three-and-a-half-year period allowed for in *Pratt v A-G for Jamaica* exceeded. By the time the death warrants were read Thomas had spent about the same time on death row as Fisher, and Hilaire only a few

months more. As for the pre-trial delay, Thomas' trial was not unreasonably delayed, and the total time which he spent in custody was less than that spent by Fisher. Hilaire's trial by contrast was unduly delayed, and no explanation for the delay has been forthcoming. Their Lordships are, however, constrained to repeat what was laid down by the board in *DPP v. Tokai* . . . that the constitution affords the accused a right to a fair trial not a right to a speedy trial or to a trial within a reasonable time. Where the delay would render the trial unfair the trial judge has power to stay the proceedings; and where he does not do so he is bound to direct the jury with regard to all matters arising from the delay which are favourable to the defence. Any failure on his part to do so may be corrected on appeal, constitutional redress being reserved for the exceptional case where the measures available to the trial judge, including his power to order a stay, are insufficient to ensure the fairness of the trial. There is no evidence that the long delay in bringing Hilaire to trial made his trial unfair, and accordingly it is impossible to conclude that it contravened his constitutional rights.

. . . .

### **Questions**

1. Read and compare the language of Articles 25 of the American Convention and 13 of the European Convention. Do you find any difference in the scope of protection afforded by those provisions?
2. Read carefully the *Carranza* report adopted by the Inter-American Commission and the *Leander* and *Chahal* cases decided by the European Court. Do the American and European Conventions ensure an "independent" right to an effective remedy? The European Court has established that Article 13 applies when an individual has an "arguable claim" of being the victim of a violation of the rights enshrined in the European Convention. How would you define "arguable claim"? Does it mean that if a conventional right has not been violated the Court would not review the potential violation of the right to an effective remedy independently? See the *Leander* case and compare the following holding of the European Court in the *Gündem* case:

The Court for its part considers that the evidence gives rise to serious doubts as to whether the applicant has made out a factual basis for his allegation that his house and property had been purposely destroyed by the security forces. In the circumstances of the case, including the absence of an opportunity for the Commission to test directly with him the statements taken by the Human Rights Association, the Court is not satisfied that he had an arguable claim that the Convention provisions invoked by him had been violated. . . Accordingly, the Court finds no violation of Article 13 in the present case.<sup>9</sup>

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<sup>9</sup> *Gündem v. Turkey*, Eur. Ct. H.R., Judgment of May 25, 1998, Reports 1998 III (1998), <<http://www.echr.coe.int>>. In this case, the petitioner complained that his home and possessions had been severely damaged in the course of attacks conducted by State security forces and village guards on two

In looking at the *Carranza* report, does the application of Article 25 require the existence of an “arguable claim” of a violation of a conventional right or any other right protected by domestic laws?

3. While Article 13 of the European Convention refers to a “national authority,” Article 25 of the American Convention alludes to a “competent court or tribunal,” in paragraph 1, and to a “competent authority provided for by the legal system of the State,” in paragraph 2(a). Do these conventions require Contracting States to ensure a remedy before a court in order to comply with the obligations provided in the above-mentioned provisions? Assuming that “authority” entails mechanisms other than courts, is there any requirement that an “authority” must satisfy in order to ensure an effective remedy?

4. Do the American and European Conventions require that States provide for a “specific remedy” or do States enjoy a degree of discretion in devising domestic remedies? Is it enough for a Contracting State to provide an individual with access to a court or authority to attain the standard of effectiveness required by international human rights treaties? What if it provides access to a court or “national authority” with a limited scope of review?

5. In *Carranza*, the Inter-American Commission decided that the doctrine of political questions was not appropriately applied in the petitioner’s case. Does such a review fall within the competence of the Commission or, alternatively, by making such a ruling does the Commission act as a “fourth instance” court of appeal? Looking at the Commission’s reasoning with respect to the violation of Article 25, do its findings suggest that in any case where the substance of a complaint is not examined by a court in application of a doctrine of limited review, a violation of the right to an effective remedy should be found?

6. Should the scope of the obligation contained in Articles 13 and 25 vary according to the right that has allegedly been violated? Should it be “more protective” in cases of violations of the right to life and personal integrity? See *Chahal* in this section and *Abella, Kurt, Yasa, and Bautista Arellana* in section 4.

7. Read the *Thomas and Another v. Baptiste and Others* ruling decided by the Privy Council. Assume that this case has been submitted to the Inter-American Court of Human Rights and you are the judge drafting the decision. How would you respond to the State if it argued that the victims had not had access to a remedy to protect a treaty right because the right to an effective remedy in itself is not ensured by the Constitution and international treaties are not directly

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occasions, as a result of which he had to leave his home. He also argued that he had been denied an effective remedy with regard to his claim that the security forces had purposely destroyed his property and his right to seek compensation. The Court, following the Commission’s findings, concluded that the petitioner had not proved the facts alleged, thereby rejected the violation of the rights not to be treated inhumanely, to security of person, to respect for his private and family life, and to enjoyment of property. As noted in the paragraph selected, the Court also decided that there was no violation of article 13.

remedy in itself is not ensured by the Constitution and international treaties are not directly incorporated into domestic law?

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**C. THE RIGHT TO AN EFFECTIVE REMEDY AND ITS RELATIONSHIP TO THE RIGHT TO CHALLENGE THE LEGALITY OF DETENTION (HABEAS CORPUS)**

***Comment***

The language of Articles 7(6) and 25 of the Convention and the earlier jurisprudence of the Inter-American Court have suggested that the right to challenge the legality of detention - *habeas corpus*- falls within the more specific scope of Article 7(6). However, more recent jurisprudence of the Court has shown a trend toward finding violations of both Article 7(6) and 25 of the American Convention whenever the applicant has not enjoyed access to effective habeas corpus in order to protect his or her right to personal liberty. Apart from the *Suárez Rosero* case reproduced *infra*, the Court followed a similar approach in *Castillo Paéz* and *Cesti Hurtado*.<sup>10</sup>

The European Court, on the other hand, has developed a stricter interpretation of similar provisions of the European Convention - Articles 5(4) and 13-, as shown in the *Nikolova* case.

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**Article 7(6)  
American Convention on Human Rights**

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.

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<sup>10</sup> *Castillo Páez v. Perú*, Judgment of November 3, 1997, (ser. C) No. 34 (1997); *Cesti Hurtado v. Perú*, Judgment of September 29, 1999, (ser. C) No. 56 (1999).

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**Article 5(4)**  
**European Convention for the Protection of Human Rights and Fundamental Freedoms**

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.

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**Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6)**  
**of the American Convention on Human Rights)**

*Inter-Am. Ct. H.R., Habeas Corpus in Emergency Situations*  
*(Arts. 27(2) and 7(6) of the American Convention on Human Rights),*  
*Advisory Opinion OC-8/87 of January 30, 1987 (ser. A) No. 8 (1987)*

32. Article 25(1) of the Convention provides that . . .

The above text is a general provision that 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. Since “*amparo*” can be applied to all rights, it is clear that it can also be applied to those that are expressly mentioned in Article 27(2) as rights that are non-derogable in emergency situations.

33. In its classical form, the writ of *habeas corpus*, as it is incorporated in various legal systems of the Americas, is a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered. The Convention proclaims this remedy in Article 7(6) . . . .

34. If the two remedies are examined together, it is possible to conclude that “*amparo*” comprises a whole series of remedies and that *habeas corpus* is but one of its components. An examination of the essential aspects of both guarantees, as embodied in the Convention and, in their different forms, in the legal systems of the States Parties, indicates that in some instances *habeas corpus* functions as an independent remedy. Here its primary purpose is to protect the personal freedom of those who are being detained or who have been threatened with detention. In other circumstances, however, *habeas corpus* is viewed either as the “*amparo of freedom*” or as an integral part of “*amparo*.”

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**Suárez Rosero v. Ecuador**

*Inter-Am.Ct. H.R., Judgment of November 12, 1997, (ser. C) No. 35 (1997)*

*[On June 23, 1992, Mr. Suarez Rosero was arrested by the National Police of Ecuador neither with an arrest warrant and nor in flagrante delicto. For thirty six days he was kept incommunicado, after which he was allowed visits by family members and an interview with his lawyer. A court then issued a preventive detention order against the petitioner and afterward he was charged with transporting drugs for the purpose of destroying them and hiding the evidence. Twice, without success, he requested that the preventive detention be revoked. He also filed a writ of habeas corpus with the Supreme Court of Ecuador which was dismissed more than fourteen months later. After being detained for almost four years without conviction, Mr. Rosero was finally released in April 1996. In September of 1996, he was found guilty as an accessory to the crime of illegal trafficking in narcotic and drugs and psychotropic substances, and convicted to two years in prison. He alleged the violation of Articles 5, 7, 8, 11, 17, 25, 1.1, and 2 of the American Convention.]*

61. The Commission claimed that Ecuador violated Articles 7(6) and 25 of the American Convention when it denied Mr. Suárez-Rosero the right of habeas corpus. On that point, the Commission claimed that the inordinate time of fourteen and a half months between Mr. Suárez-Rosero's filing the writ of habeas corpus on March 29, 1993, and the ruling on the writ is patently incompatible with the reasonable time provided for in Ecuador's own legislation. It further claimed that the State had therefore failed in its obligation to provide effective judicial recourse. Lastly, the Commission maintained that such recourse was denied for purely procedural reasons, that is, because the petitioner had not indicated the nature of the proceeding or the location of the court that had ordered the detention, nor the place, date or cause of the detention. Such formal requirements are not established in Ecuadorian Law.

62. Ecuador did not contest those arguments in its answer to the application.

63. This Court shares the Commission's view that the right enshrined in Article 7(6) of the American Convention is not exercised with the mere formal existence of the remedies it governs. Those remedies must be effective, since their purpose, in the terms of Article 7(6), 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 has also held that

[i]n 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 persons 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, inhuman or degrading punishment or treatment. (*Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 35).

64. As indicated above (*supra*, para. 34(r)) the Court deems it to have been proven that the writ of habeas corpus filed by Mr. Suárez-Rosero on March 29, 1993, was disposed of by the President of the Supreme Court of Justice of Ecuador on June 10, 1994, that is, more than 14 months after it was filed. This Court also deems it to have been proven that the application was ruled inadmissible, on the ground that Mr. Suárez-Rosero had omitted certain information, whereas, under Ecuadorian Law, such information is not a prerequisite for admissibility.

65. Article 25 of the American Convention provides that everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal. The Court has ruled that this provision

constitutes one of the basic pillars not only of the American Convention, but of the very rule of law in a democratic society in the sense of the Convention.

Article 25 is closely linked to the general obligation contained in Article 1(1) of the American Convention, in assigning protective functions to the domestic law of states Parties. The purpose of habeas corpus is not only to ensure respect for the right to personal liberty and physical integrity, but also to prevent the person's disappearance or the keeping of his whereabouts secret and, ultimately, to ensure his right to life (*Castillo Páez Case*, Judgment of November 3, 1997. Series C No. 34, paras. 82 and 83).

66. On the basis of the foregoing, and especially since Mr. Suárez-Rosero did not have access to simple, prompt and effective recourse, the Court finds that the State violated the provisions of Article 7(6) and 25 of the American Convention.

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**Nikolova v. Bulgaria**

*Eur. Ct. H.R., Judgment of March 25, 1999, Reports 1999 II (1999)*

<<http://www.echr.coe.int>>

*[The applicant, a cashier and accountant working in a State-owned enterprise, was arrested, charged with misappropriation of funds in large amounts and detained on remand. She filed appeals against her detention all of which were dismissed. While in detention she had to undergo surgery due to a sudden pain in her gall bladder. After the surgery took place a medical examination showed that she needed a convalescence period which was incompatible with her conditions in detention; therefore, her detention was discontinued and she was put under house arrest. The Court found a violation of Article 5 § 3 and 5 § 4 of the European Convention on the basis that the applicant, after being arrested, was not brought to a judge or other officer authorized by law to exercise judicial power, and that the review on the lawfulness of her detention failed to take into consideration substantive arguments submitted by the petitioner. The applicant also argued a violation of Article 13 of the European Convention.]*

#### IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

67. The applicant asserted that the impossibility of obtaining any redress for the violation of her rights under Article 5 §§ 3 and 4 of the Convention gave rise to a violation of Article 13 . . . .

68. The Government did not comment. The Delegate of the Commission stated that this complaint was subsumed under the issues examined in the light of Article 5 § 4 of the Convention and that it was therefore not necessary to deal with it separately.

69. According to the Court's established case-law Article 5 § 4 of the Convention constitutes a *lex specialis* in relation to the more general requirements of Article 13. In the present case the facts underlying the applicant's complaint under Article 13 of the Convention are the same as those examined under Article 5 § 4. Accordingly, the Court need not examine the allegation of a violation of Article 13 in view of its finding of a violation of Article 5 § 4 (see the *Chahal v. the United Kingdom* judgment of 15 November 1996, Reports 1996-V, p. 1865, § 126, and p. 1870, § 146).

. . . .

#### **Questions**

1. Do you agree with the more restrictive interpretation construed by the European Court as to the relationship between the right to challenge the legality of detention and the right to an effective remedy? Do you think that the approach followed by the European Court is based on the fact that Article 5(4) ensures the right to access to a court, while article 13 only guarantees access to a national authority that does not necessarily have to be a tribunal?

2. Should the scope of Articles 7(6) and 25 of the American Convention be construed in a similar fashion to the one adopted by the European System? Why? Would your answer be different in a

forced disappearance case where the responsible State failed to provide effective habeas corpus, to establish the victim's whereabouts, to investigate the identity of the perpetrators of the disappearance, and to compensate the victim's next of kin?

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**D. THE RIGHT TO AN EFFECTIVE REMEDY IN CASES DEALING WITH VIOLATIONS OF THE RIGHT TO LIFE, PERSONAL INTEGRITY, OR OTHER FUNDAMENTAL RIGHTS**

**Abella v. Argentina**

Case 11.137, Inter-Am. C.H.R. 271,  
Annual Report 1997, OEA/Ser.L/V/II.98, doc. 7 rev (1998)  
[Footnotes omitted]

*[On January 23, 1989, 42 armed persons, most of whom were members of a political party called Movimiento Todos por la Patria -MTP-, launched an attack on a military barrack located at La Tablada, in Buenos Aires province. The attack precipitated a combat of approximately 30 hours' duration between the attackers and Argentine military personnel which resulted in the deaths of 29 of the attackers and several State agents. The Inter-American Commission in its report established that, after the fighting had ceased, State agents participated in the summary execution of nine of the attackers who were captured alive. Moreover, it proved that several attackers arrested in La Tablada, as well as other members of the MTP detained outside the barrack and individuals who turned themselves in voluntarily to the authorities, were tortured physically and psychologically. Subsequently, those persons, members of the MTP as well as thirteen attackers captured at La Tablada, were tried for the crime of sedition, convicted and given prison terms that ranged from 10 years to life. Since the law under which they were prosecuted failed to ensure the right to appeal their conviction, the Commission also found a violation of article 8 § 2.h of the American Convention. Finally, the Commission ruled that the State failed to fulfill its obligation to investigate the summary executions and torture of the attackers at La Tablada barrack and to ensure the right of petitioners to an effective remedy as provided by articles 1.1 and 25 of the American Convention.]*

*i. Simple and effective remedy (article 25(1)) and the duty to investigate*

399. In its observations, the State challenges the conclusions of the Commission concerning the State's failure to fulfil its obligation to investigate provided for in Article 1(1) and the violation of the right to an effective remedy enshrined in Article 25(1) of the Convention.

400. The State of Argentina claims that it has fulfilled its obligation to conduct an independent, complete and impartial investigation of each one of the events in respect of which a complaint was made to the appropriate jurisdictional organs. In the State's view, the independence, impartiality and comprehensiveness of the investigation cannot be determined exclusively on the basis of whether or not a person has been convicted, ignoring the possibility that the complaints might be false, or that, despite the efforts made, the acts have not been established or, where they have been established, the parties responsible have not been identified.

401. In support of its arguments, the State reiterates that the competent judicial authorities in each case ordered the opening of individual dossiers to investigate each one of the charges alleged by the petitioners and in other cases even filed charges themselves. Despite having become private complainants, the petitioners adopted a passive attitude and following the dismissal of the cases on account of the time that had elapsed, they failed to appeal the decisions to a higher court. These facts, in the State's opinion, "should not be interpreted as a failure to fulfil its duty to independently investigate the alleged violations of human rights but as an indication of the lack of objection on the part of the complainants".

402. The State also challenges the Commission's conclusion about the deficiencies of the investigation of the events which occurred in the RIM 3 barracks in La Tablada, particularly with regard to the lack of description of the investigation carried out in the place where the events occurred, the absence of photographs of the corpses, the inadequacy of the autopsies conducted and the manner in which the corpses of the attackers were treated in the hours and days following the recapture of the barracks.

403. In this connection, the State appears to be questioning the probative value which the Commission assigned to the report published by Amnesty International, in so far as "it cannot be assumed that it was prepared as thoroughly as a report of the Inter-American Commission on Human Rights would be". The State goes on to indicate that even where the criminal procedural legislation in force at the time the events occurred requires an autopsy to be carried out only when the causes of death cannot be determined from an external examination, the court responsible for the preliminary investigation in any case gave instructions for an autopsy to be conducted. It also states that the Forensic Department of the Ministry of National Justice took pictures of each one of the corpses and these photographs were added to the corresponding dossier. As for the investigation in the place where the events had taken place, the State claims that, given the limited number of forensic doctors and the numerous tasks which they were required to perform, it was not the norm in the country for such doctors to carry out their duties in the place where the death occurs, a task which is the responsibility of the crime prevention authorities.

404. The State alleged that the report of Amnesty International used by the Commission as well as the other elements of proof presented by the petitioners to establish the inadequacy of the investigations conducted in the internal jurisdiction, only refers to six of the twenty-eight autopsies carried out on the attackers and identifies alleged flaws in two of them. For this reason,

it is not possible to draw any general conclusions. The State then discusses in great detail the Commission's views on the deficiencies identified in the autopsies carried out on the attackers, defending the results of the autopsies from the toxicological, radiological, fingerprint and odontological perspectives. Finally, the State indicated that the petitioners' claim that the corpses of the attackers had been left in the open air in high temperatures for one week was inconsistent with what had really transpired. According to the State, the records show that in case number 1722 the judicial morgue received the corpses on 24 January 1989; the putrefaction alleged, therefore, would be due to the fact that the corpses had been exposed to the heat common to this period of the year and to the fact that it was impossible to collect them immediately because of the prolonged fighting.

405. In reviewing the observations presented by the State of Argentina, the Commission wishes to make a few comments for the purpose of clarifying certain questions raised by the State and to define the framework of its competence in order to consider elements of proof not submitted at the appropriate stage in the proceedings.

406. The Commission will refer, firstly, to the probative value which it attaches to the report of Amnesty International, which was apparently challenged by the State as one of the elements of proof to support several conclusions contained in report 22/97, particularly those relating to the inadequacy of the autopsies carried out on the corpses of the attackers, as well as the treatment which the attackers received in the days following the recapture of the RIM 3 barracks in La Tablada.

407. The Inter-American Court has recognized the authority of an international organ to freely evaluate proof, stating that "for an international tribunal, the criteria for evaluating proof are less formal than in internal legal systems". Consequently, probative elements which are different from direct proof, such as circumstantial evidence, clues, presumptions, press articles and, where relevant, reports of non-governmental organizations may be used, provided that the conclusions drawn therefrom are consistent with the facts and corroborate the testimony or events alleged by the complainants. Assigning this power of discretion to an international organ is particularly relevant, "in cases involving the violation of human rights in which the State cannot allege as its defence the complainant's inability to provide proof which, in many cases, cannot be obtained except with the State's cooperation".

408. Taking these principles into consideration and in the face of the near absolute silence of the State, the Commission based part of its considerations in the present case on the report of Amnesty International. That report, in addition to corroborating the substance of the petitioners' complaints, permitted conclusions to be drawn that were consistent with the facts, in so far as it was based on information gathered directly at the place where the events took place and immediately after their occurrence.

409. On the other hand, it must be emphasized that the results of the autopsies carried out on the corpses of the attackers were at the disposal of the Argentine State during the entire proceedings

in this case and that, for reasons which the Commission is unaware, the State declined to provide those elements of information at the appropriate stage of the proceedings, despite repeated complaints by the petitioners. In view of the technical nature of the observations made by the State, the Commission has no way of ascertaining at this stage of the proceedings if its affirmations are consistent with the truth; nor does it have the possibility of transmitting the arguments of the State to the petitioners, which would give them an opportunity to challenge its conclusions.

410. The Commission understands, however, that even if it were to take into consideration the observations of the State on this point, that would not be sufficient to demonstrate that the State had fulfilled its obligation provided for in Article 1.1 of the American Convention to carry out an immediate, exhaustive and impartial investigation of the circumstances in and reasons for which several of the attackers of the RIM 3 barracks in La Tablada lost their lives.

411. In principle, with regard to the State's argument that the petitioners failed to appeal the decision to dismiss the case, the Commission points out that the case was weak in the first place because the State failed to investigate, and therefore an appeal would have been useless. The Commission must reiterate the conclusions in that regard contained in its report 22/97.

412. Moreover, the Commission agrees with the State that the fact that no one has been convicted in the case or that, despite the efforts made, it was impossible to establish the facts does not constitute a failure to fulfil the obligation to investigate. However, in order to establish in a convincing and credible manner that this result was not the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth, the State must show that it carried out an immediate, exhaustive and impartial investigation.

413. In previous cases, the Commission has applied the criteria established in the "principles governing the effective prevention and investigation of extralegal, arbitrary or summary executions", which were adopted by the Economic and Social Council of the United Nations in resolution 1989/65 in order to determine whether or not a State has fulfilled its obligation to investigate immediately, exhaustively and impartially the summary executions of persons under its exclusive control. In accordance with these principles, the investigation of cases of this nature must be aimed at determining the cause, manner and time of death, the person responsible and the procedure or practice which might have led to the events. The investigation will distinguish between death from natural causes, death by accident, suicide and homicide.

414. The principles mentioned have been complemented by the adoption of the "Manual on the effective prevention and investigation of extralegal, arbitrary or summary executions", which states that the principal objective of an investigation is to "ascertain the truth about events leading to the suspicious death of a victim". The Manual provides that the persons conducting the investigation must take the following minimum steps:

- (a) Identify the victim;

- (b) Recover and preserve probative elements related to the death in order to assist in any future trial of the persons responsible;
- (c) Identify any possible witnesses and obtain statements from them concerning the death;
- (d) Determine the cause, manner, place and time of death, as well as any modality or practice that might have led to the death;
- (e) Distinguish between natural death, accidental death, suicide and homicide;
- (f) Identify and apprehend the person or persons who might have participated in the execution;
- (g) Bring the perpetrator or perpetrators suspected of having committed a crime to a competent court established by the law.

415. In order to guarantee that an exhaustive and impartial investigation of an extralegal, arbitrary or summary execution will be carried out, the manual provides that “one of the most important aspects of [the investigation] is the gathering and analysis of the evidence”. Consequently, “the persons responsible for the investigation of a presumed extrajudicial execution must also have access to the place in which the corpse was discovered, as well as to the place in which the death might have occurred”. According to the standards established in the Manual, the procedure for gathering evidence must fulfil certain criteria, some of which are listed below:

- (a) The area surrounding the corpse must be secured. Access to the area must be permitted only to investigators and their staff;
- (b) Color photographs of the victim must be taken, since, in comparison with black and white photos, color photographs may reveal in greater detail the nature and circumstances of the death of the victim;
- (c) Both the interior and exterior of the place must be photographed, as well as any physical evidence;
- (d) A record must be made of the position of the corpse and of the condition of the clothing;
- (e) A note should be taken of the following factors which serve to determine the time of death:
  - (i) temperature of the body (warm, cool, cold);
  - (ii) position of corpse and degree of discoloration;
  - (iii) rigidity of corpse; and
  - (iv) State of decomposition.

(...)

(j) All evidence of the existence of weapons, such as firearms, projectiles, bullets and shells or cartridges, must be collected and preserved. Where appropriate, efforts must be made to find the residue from shots fired and/or to detect metal fragments.

416. The Commission notes that the information contained in the file does not show, or at least it has not been adequately proven by credible and convincing evidence, that, within the framework of the judicial investigations carried out in the internal jurisdiction, an attempt was made to identify all the corpses of the attackers or to determine the cause, the manner, place, and time of their death. In this connection, the Commission must emphasize that, even though the State in its observations challenged the conclusions of report 22/97 with respect to the autopsies of two attackers, at no time did it provide complete information about the results of the autopsies carried out on the other attackers, nor did it provide copies of the autopsy reports.

417. In the case before the Commission, the petitioners complained that there was negligence in the process of identifying the corpses of the victims, pointing out that, in some cases, the corpses were handed over in boxes containing the remains of more than one person. Specifically, they claimed that the corpses of five persons, whose identities are unknown, remained in this condition. These complaints, far from being denied by the State, are corroborated by their own observations, in which the State itself recognizes that, even eight years after the events, at least two of the corpses have not yet been identified.

418. The petitioners have alleged, moreover, that the corpses were left out in the open air in high temperatures over a period of several days, as a result of which it was difficult to carry out the autopsies and that, as a direct consequence of that, it was impossible to properly establish the cause, manner and time of death of the attackers. In its observations, the State challenges these facts stating that in case No. 1722 94 was established that the corpses of the attackers were received in the Judicial Morgue on 24 January 1989. The putrefaction of the corpses, in its view, was the result of the exposure over 27 hours to the high temperatures that are typical of the month of January in the place where the events took place. Also, the State defends the result of the autopsies which had been questioned in report 22/97 of this Commission, pointing out that, in some cases, the total carbonization (Francisco Provenzano) and in others the putrefaction of the corpses (Pablo Martín Ramos) made it impossible to establish with any degree of certainty the causes and time of death of the victims.

419. Without entering into a detailed review of the technical aspects of the autopsies, the Commission finds it necessary to point out that the State's claims in its observations that it was impossible to establish the cause, time and manner of death of the victims, are not sufficient to justify this serious omission. The argument that the corpses "could not be used for any serious study" due to the putrefaction caused by their exposure to heat for 27 hours does not stand up to serious scrutiny. Firstly, not all the corpses were exposed to high temperatures for the aforementioned period of time, since not all the attackers died at the same time. On the contrary,

as the Commission believes it has already demonstrated, several of the attackers survived until the time of their surrender and are alleged to have been killed subsequent thereto. Secondly, the Commission does not find convincing the observation of the State that exposure to the sun of some corpses for more than 24 hours led to a degree of putrefaction which made it absolutely impossible to establish the cause, manner and time of death.

420. The Commission is of the view that, while in some cases there might have been difficulties in establishing these factual elements on the basis of the autopsy results--for example, in the case of the carbonized corpses--this information could have been supplemented if the State had carried out the appropriate investigation in the place where the events took place. The petitioners have indicated on repeated occasions that the judge did not visit the scene of the crime to gather evidence, as required by the law, and that he allowed the military to do so, contrary to his jurisdictional responsibility. Similarly, the report of Amnesty International states that in the investigations carried out at the place where the events took place, there was a failure to collect essential evidence to establish the time, place and manner in which the 29 attackers who perished in the events of January 1989 in the RIM 3 barracks at La Tablada had lost their lives. This claim is corroborated by the very statements of the judge who acknowledged that, upon inspecting the barracks, the competent judicial authorities had omitted to determine the position of the bodies, identify and attribute the weapons which were alleged to have been found beside the corpses of the assailants (the weapons had apparently been removed from the scene of the crime by the military), or to reconstruct the events.

421. The shortcomings of the investigations carried out in the place where the events took place as denounced by the petitioners were never denied by the State during the proceedings in the present case before the Commission. On the contrary, in its response of January 1995, the State affirmed that "the judge had been able to go to the headquarters of RIM 3 only on 24 January 1989, after the surrender. He had made a visual inspection of the unit and had immediately given orders for the detained persons to be transferred..." The State's observations on report 22/97 do not provide any substantive elements to refute the claims of the complainants and merely state that, in view of their heavy workload, it was not the norm in the country for forensic doctors to visit the place where the deaths occurred, a task which was performed by the crime prevention authorities. The State added that the Forensic Department of the National Justice System took photographs of each one of the corpses and that autopsies were conducted on the bodies of the attackers who had lost their lives in the events at La Tablada.

422. The minimum requirements for conducting investigations in the place where the events took place, in cases of this nature, are expressly provided for in the norms of the Code of Criminal Procedure in force in Argentina at the time when the events which gave rise to the complaint took place. Indeed, article 184 of the Code provides that the crime prevention authorities are required to gather evidence and other background material at the place where the incident took place and to take whatever urgent steps are considered necessary to establish the facts. The Code also provides that the authorities should ensure that no changes whatsoever might be made in the evidence or in the scene of the crime. Article 185 indicates that the intervention of the

investigative authorities should cease as soon as the judge responsible for the proceedings visits the scene of the crime. Once the investigation is finished, the instruments and other material related to the crime must be immediately placed at the disposal of the said judge. Article 209 of the same Code provides that, in the case of death due to injuries, the nature, location and number of injuries must be recorded, as well as the position in which the corpse was found. Finally, article 211 provides that the judge should attempt before anything else was done to collect the weapons, instruments and any other materials which might be linked to the crime.

423. Based on the evidence contained in the record of this case and the fact that the State of Argentina has failed to refute it at this stage of the proceedings, the Commission is of the opinion that the State is responsible for its inaction. Indeed, the State failed to carry out an immediate and exhaustive investigation in the place where the incident took place, despite the fact that it was under an obligation to do so, including by its domestic legislation. Because of this, essential evidence, such as the place where the corpses were found, the position of the corpses and information as to whether or not weapons were found near to the bodies of the attackers, was not immediately collected after the barracks had been retaken. The Commission recognizes that in certain situations of conflict, the collection of evidence may be difficult; however, in the case under review, the Argentine State cannot justify its inaction in such circumstances, since, after the fighting had ended and the barracks recaptured, it had absolute control over the means of proof and of the place where the evidence was located.

424. Had the State gathered this evidence, together with the appropriate treatment of the corpses and the conduct of proper autopsies, it would have been able to demonstrate in a conclusive manner the cause, manner, place, and time of death of the attackers who lost their lives in the RIM 3 barracks at La Tablada. However, by its own inaction, the State failed to fulfil its obligation to carry out an immediate, exhaustive and impartial investigation in accordance with the provisions of article 1(1) of the American Convention. Consequently, and based on the preceding paragraphs, the Commission reaffirms its conclusions contained in its report 22/97.

425. The State of Argentina also alleges in its observations that the petitioners had access to an effective remedy within the scope of its internal jurisdiction. In this connection, it reiterates that in the proceedings initiated to investigate the presumed violations of the right to life and personal integrity of several of the attackers of the La Tablada barracks--the so called "parallel proceedings"--, the complainants had the opportunity to participate actively in the various proceedings, to be heard and to present evidence. Despite having established themselves as individual complainants, the petitioners failed to appeal the decisions handed down in the cases. Consequently, in the State's view, the complainants cannot denounce to the Commission a violation of the right guaranteed in article 25(1), since adequate and effective remedies existed which they chose not to exhaust, thereby permitting the sentences handed down in the cases in question to remain firm.

426. Moreover, the State claims that it has carried out exhaustive, complete and impartial investigations of all the complaints brought by the petitioners and that, consequently, it provided

a simple and effective remedy to the victims in fulfillment of the provisions of article 25(1) of the Convention.

427. On this point, the Commission must emphasize that the State's observations do not provide any new element that would lead the Commission to reconsider the conclusions set out in its report 22/97. The Commission reiterates that, within the framework of its jurisprudence, in cases of arbitrary deprivation of life, the effective remedy which the State must guarantee to the family of the victims includes the immediate, exhaustive and impartial investigation of the facts in order to establish who the guilty parties are, apply the appropriate penalties and repair the damage caused.

428. In the case under review, the Commission determined that the Argentine State failed to carry out an investigation which fulfilled these criteria, and that it must be concluded therefore that the State violated the right of the victims to have recourse to the effective remedy provided for in article 25(1) of the American Convention.

429. Article 25(1) of the American Convention provides . . . .

430. The Commission concludes that the victims in this case did not have access to an effective remedy in Argentina, which must include a complete, serious and impartial investigation of such acts. Therefore, the State has violated article 25(1) of the American Convention in relation with Article 1(1) of that instrument.

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**Kurt v. Turkey**

*Eur. Ct. H.R., Judgment of May 25, 1998, Reports 1998 III (1998)*

*<<http://www.echr.coe.int>>*

*[The applicant's house was burned down, together with others, during an operation carried out by security forces in her village in south-east Turkey. During the military operation, the villagers were gathered together by soldiers in the schoolyard while the soldiers looked for the applicant's son who was hiding in his aunt's house. After finding him, the soldiers took him into custody. The following day the applicant saw her son, who showed traces of having been beaten, surrounded by soldiers and village guards. After that day, her son has never been seen again and his whereabouts are unknown. The applicant applied to the Bismil public prosecutor to discover her son's whereabouts. She received an immediate response from the provincial gendarme headquarters denying that her son had been taken into custody and stating that he had been kidnapped by the PKK. Then, the applicant applied to the National Security Court in Diyarbakir*

*which replied that her son was not in their custody records. The applicant applied again to the Bismil public prosecutor, but she was referred to the gendarmerie. She then approached the Diyarbakir Human Rights Association and made a statement about her son's disappearance. As a consequence, some of the applicant's relatives were taken to the gendarmerie and questioned on the subject. Later, the Bismil public prosecutor issued a decision of non-jurisdiction on the grounds that a crime had been committed by the PKK. Finally, an application was submitted to the European Commission.]*

#### *V. Alleged violation of article 13 of the Convention*

135. The applicant, with whom the Commission agreed, asserted that the failure of the authorities to conduct an effective investigation into her son's disappearance gave rise to a breach of Article 13 of the Convention. The Government challenged this contention.

....

136. The applicant endorsed the reasoning of the Commission in finding a violation of Article 13 (see paragraph 138 below). She maintained further that not only did the inadequacy of the official investigation into her complaint result in her being denied access to an effective remedy in respect of her son's disappearance but that this failure on the part of the authorities was indicative of the lack of an effective system of remedies in the respondent State to address the occurrence of serious violations of Convention rights.

137. The Government reaffirmed that when the applicant first contacted the public prosecutor she never intimated that she feared that her son had been unlawfully detained or that his life was at risk. She simply wanted to ascertain whether he had been taken into custody. No complaint was lodged against the authorities. They reiterated that in the circumstances best endeavours had been made to try to trace his whereabouts. Enquiries were made (see paragraphs 39–43 above) and statements were taken by gendarmes from villagers on 23 February and 7 December 1994 which reinforced the official view that the applicant's son had either been kidnapped by the PKK or had left the village to join the terrorists (see paragraph 38 above). There was therefore no basis on which to find a violation of Article 13.

138. The Commission found that the applicant had brought the substance of her complaint to the attention of the public prosecutor. However, her petitions received no serious consideration. The public prosecutor was not prepared to inquire further into the report issued by the gendarmes that her son had not been detained; no statements were taken from the soldiers or village guards who were involved in the military operation in the village and the inadequacy and ineffectiveness of the investigation were further compounded by the fact that the task of taking witness statements from villagers was entrusted to the gendarmes against whom the complaint had been made (see paragraph 38 above). For these reasons the Commission found that the authorities were in breach of Article 13.

139. The Court recalls that Article 13 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. The effect of Article 13 is thus to require the provision of a domestic remedy 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 Convention obligations under this provision.

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 by Article 13 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 the omissions of the authorities of the respondent State (see the above-mentioned Aksoy judgment, p. 2286, § 95; the above-mentioned Aydin judgment, pp. 1895-96, § 103; and the above-mentioned Kaya judgment, pp. 325-26, § 89).

140. In the instant case the applicant is complaining that she has been denied an "effective" remedy which would have shed light on the whereabouts of her son. She asserted in her petitions to the public prosecutor that he had been taken into custody and that she was concerned for his life since he had not been seen since 25 November 1993. In the view of the Court, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 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 relatives to the investigatory procedure (see, *mutatis mutandis*, the above-mentioned Aksoy, Aydin and Kaya judgments at p. 2287, § 98, pp. 1895-96, § 103 and pp. 329-31, §§ 106 and 107, respectively). Seen in these terms, the requirements of Article 13 are broader than a Contracting State's obligation under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible.

141. For the reasons given earlier (see paragraphs 124 and 126 above), Mrs Kurt can be considered to have had an arguable complaint that her son had been taken into custody. That complaint was never the subject of any serious investigation, being discounted in favour of an unsubstantiated and hastily reached explanation that he had been kidnapped by the PKK. The public prosecutor had a duty under Turkish law to carry out an investigation of allegations of unlawful deprivation of liberty (see paragraph 58 above). The superficial approach which he took to the applicant's insistence that her son had not been seen since being taken into custody cannot be said to be compatible with that duty and was tantamount to undermining the effectiveness of any other remedies that may have existed (see paragraphs 56-61 above).

142. Accordingly, in view in particular of the lack of any meaningful investigation, the Court finds that the applicant was denied an effective remedy in respect of her complaint that her son had disappeared in circumstances engaging the responsibility of the authorities.

There has therefore been a violation of Article 13.

....

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**Yasa v. Turkey**

*Eur. Ct. H.R., Judgment of September 2, 1998, Reports 1998 VI (1998)*

*<<http://www.echr.coe.int>>*

*[The applicant ran a newspaper kiosk where he sold certain pro-Kurdish newspapers such as Özgür Gündem. He was attacked and his uncle killed in armed attacks by unidentified assailants. Petitioners alleged that the attacks were part of a campaign orchestrated against some pro-Kurdish newspapers with the connivance or even direct participation of state agents. The domestic criminal investigations initiated by these events failed to identify those responsible for the attacks. Before the European Court, the applicant argued the violation of articles 2 and 13 of the European Convention on Human Rights.]*

112. The Court observes that Article 13 of the Convention guarantees the availability at a national level of a remedy to enforce the Convention rights and freedoms, as secured in the domestic legal order. 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 an “arguable complaint” under the Convention 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. Nevertheless, the remedy required by Article 13 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 (see the Aksoy judgment cited above, p. 2286, § 95; the Aydin judgment cited above, p. 1895, § 103; and the Kaya judgment cited above, pp. 329-30, § 106).

113. In the instant case, the Court has concluded that it has not been proved beyond all reasonable doubt that the attacks on the applicant and his uncle were carried out by State agents (see paragraph 97 above). That fact, however, does not necessarily mean that the complaint under Article 2 is not arguable (see, among other authorities, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52, and the Kaya judgment cited above, pp. 330–31, § 107). The Court’s conclusion as to the merits does not relieve the State of the obligation to carry out an effective investigation into the substance of the complaint, which, for the reasons mentioned above (see paragraph 106), was arguable.

114. It is also necessary to reiterate that the nature of the right that is alleged to have been

infringed has implications on the extent of the obligations under Article 13. Given the fundamental importance of the right to protection of life, Article 13 imposes, without prejudice to any other remedy available under the domestic system including the payment of compensation where appropriate, an obligation on States to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible and in which the complainant has effective access to the investigatory procedure (see, *mutatis mutandis*, the Kaya, Aksoy and Aydin judgments cited above, § 107, § 98, and § 103 respectively).

115. The Court reiterates that the authorities had an obligation to carry out an effective investigation into the circumstances of the attacks (see paragraph 107 above). However, five years after those attacks took place, the investigations have still not produced any results. For the reasons set out above (see paragraphs 98–108 above), the respondent State cannot be considered to have conducted an effective criminal investigation as required by Article 13, the requirements of which are stricter still than the investigatory obligation under Article 2 (see the Kaya judgment cited above, pp. 330–31, § 107 – see paragraphs 98, 112 and 114 above).

Consequently, there has been a violation of Article 13.

....

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**Bautista de Arellana v. Colombia**

*Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (October 27, 1995)*

*<<http://sim.law.uu.nl>; <http://www.unhchr.ch>>*

*[Nydia Bautista de Arellana was abducted from her family home in Bogota by eight armed men dressed as civilians. Her father immediately filed complaints with the Attorney-General's Office. He also inquired as to her whereabouts in police and military offices and with intelligence services, without success. The case was then referred to the competent judge. At that time, the body of a woman, who had been shot in the head, was found in another department of Colombia. Since police officers assigned to the investigation were unable to identify the victim's identity, the case was suspended. Later on, the dead woman was identified as Ms. Bautista de Arellana. Early in 1991, a sergeant of the Military's Intelligence and Counterintelligence Unit testified that Ms. Bautista de Arellana had been abducted and killed by members of his brigade who acted either with the consent or under the orders of the highest commanding officer, then Colonel Alvaro Velandia Hurtado. Immediately thereafter, Nydia's father filed a request to institute disciplinary proceedings against those held to be responsible for his daughter's disappearance. He also filed an administrative complaint, seeking compensation, against the Ministry of Defense. Before the Human Rights Committee, petitioners argued a violation of articles 2, 6, 7, 9, and 14 of the International Covenant of Civil and Political Rights.]*

8.1 The Human Rights Committee has examined the present case on the basis of the material placed before it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 In its submission of 14 July 1995, the State party indicates that Resolution 13 of 5 July 1995 pronounced disciplinary sanctions against Messrs. Velandia Hurtado and Ortega Araque, and that the judgment of the Administrative Tribunal of Cundinamarca of 22 June 1995 granted the claim for compensation filed by the family of Nydia Bautista. The State party equally reiterates its desire to guarantee fully the exercise of human rights and fundamental freedoms. These observations would appear to indicate that, in the State party's opinion, the above-mentioned decisions constitute an effective remedy for the family of Nydia Bautista. The Committee does not share this view, because purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.

....

8.6 The author has finally claimed a violation of article 14, paragraph 3(c), on account of the unreasonable delays in the criminal proceedings instituted against those responsible for the death of Nydia Bautista. As the Committee has repeatedly held, the Covenant does not provide a right for individuals to require that the State criminally prosecute another person. See the decisions on cases No. 213/1986 (H.C.M.A. v. the Netherlands), adopted 30 March 1989, paragraph 11.6; No. 275/1988, (S.E. v. Argentina), adopted 26 March 1990, paragraph 5.5; Nos. 343-345/1988 (R.A., V.N. et al. v. Argentina), adopted 26 March 1990, paragraph 5.5.. The Committee nevertheless considers that the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the perpetrators of such violations have been identified.

....

10. Under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the family of Nydia Bautista with an appropriate remedy, which should include damages and an appropriate protection of members of N. Bautista's family from harassment. In this regard, the Committee expresses its appreciation for the content of Resolution 13, adopted by the National Delegate for Human Rights on 5 July 1995, and of the judgment of the Administrative Tribunal of Cundinamarca of 22 June 1995, which provide an indication of the measure of damages that would be appropriate in the instant case. Moreover, although the Committee notes with equal appreciation the promulgation of Presidential Decree No. 1504 of 11 September 1995, the Committee urges the State party to expedite the criminal proceedings leading to the prompt prosecution and conviction of the persons responsible for the abduction, torture and death of Nydia Bautista. The State party is further under an obligation to ensure that similar events do not

occur in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.

....

### *Questions*

1. According to the jurisprudence you have read, is the scope of the right to an effective remedy broader in cases of deprivation of life or in cases where other violations of fundamental rights, such as the right not to be tortured, are implicated?

2. If a State conducts a thorough investigation but fails to identify and punish those criminally responsible for perpetrating a killing or an act of torture, should a violation of the right to an effective remedy still be found? Read the corresponding paragraphs of *Abella* and compare them to the following reasoning of the Inter-American Court in *Velásquez Rodríguez*:

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 victim's 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.

According to what standard will the effectiveness of the investigation be established?

3. In para. 140 of the *Kurt* Case, the European Court stated that when a person has disappeared *at the hands of the authorities*, the concept of the right to an effective remedy entails a thorough and effective investigation capable of leading to the identification and punishment of those responsible. In the *Yasa* Case, however, the Court concluded that, though it was not proved that the deprivation of the victim's life was perpetrated by State agents, the State still had an obligation to carry out a thorough and effective investigation in order to identify and punish those responsible. Finally, the Commission in the *Abella* case only referred to the existence of an arbitrary deprivation of life. Should the scope of the right to an effective remedy be different in cases where the acts complained of have been perpetrated by State agents than in cases where they have been perpetrated by private actors or common criminals?

4. Assume that a State provides monetary compensation to the families of the victims of a massacre. Has the State fulfilled its obligation to ensure the right to an effective remedy? Read carefully the European cases, the *Bautista Arellana* Case decided by the Human Rights Committee, and the following excerpts from a report adopted by the Inter-American Commission on Human Rights in the *Alvaro Moreno Moreno* case:

102. The violations of Articles 1, 8 and 25 were perfected when the Colombian State failed to carry out domestic investigations and proceedings sufficiently rigorous to counteract the cover-up. As the Commission noted above, in this case involving the execution of Mr. Moreno by Police agents, the State was required to carry out a criminal investigation and to criminally sanction the individuals responsible for the violations committed.

103. However, as the Commission found above, the criminal proceedings in this case have not been effective and have not advanced in a timely manner. Thus, six years after the facts, the criminal case remains in the investigative stage, and no individual responsible for the violations has been formally charged, much less criminally sanctioned. The case has been transferred from one prosecutorial body to another, causing unnecessary delay and difficulty in the proceedings. The Human Rights Unit of the Office of the Prosecutor General has held jurisdiction over the case for more than two years. Yet, the Commission has still received no information indicating that the case will move out of the investigative stage in the near future.

....

113. The cover-up carried out by State Police agents and the failure of the criminal proceedings to investigate in a serious and timely manner have provided those responsible for the death of Mr. Moreno with impunity. As a result, the State is responsible for its failure to provide Mr. Moreno's family with access to effective legal recourse and judicial protection, in violation of Articles 8 and 25 of the American Convention. The State has also failed to comply with its obligation, pursuant to Article 1(1), to investigate human rights violations and to sanction those responsible, where

possible.

114. The Commission notes, as a final matter, that the Colombian State has complied with part of its obligation pursuant to Article 1(1) by providing monetary compensation to Mr. Moreno's family members. However, the family members of Mr. Moreno and the petitioners in this case before the Commission continue to press for justice, including the investigation and sanction of those responsible for Mr. Moreno's death. The Commission must point out that the payment of monetary compensation does not discharge the State's responsibility pursuant to Article 1(1) in a case such as this one where the family members of the victim legitimately demand the criminal investigation and sanction of the persons responsible for the violations committed.

Why do you think the human rights bodies have developed such a broad interpretation of the right to an effective remedy in cases dealing with the violation of the right to life?

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**E. THE RIGHT TO AN EFFECTIVE REMEDY AND ITS RELATIONSHIP TO THE RIGHT TO A FAIR TRIAL**

**Article 8(1)  
American Convention on Human Rights**

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, labour, fiscal or any other nature.

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**Article 6(1)  
European Convention for the Protection of Human Rights and Fundamental Freedoms**

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. . . .

***Comment***

In some Latin American and European countries codes of criminal procedure allow victims of a

crime to participate as private prosecutors in proceedings initiated to investigate the perpetration of that offense.<sup>11</sup> Also, a victim may join the proceedings as a civil party and request that the criminal court establish compensation if the perpetrator is identified and convicted.<sup>12</sup> If the victim decides not to join the criminal proceedings as a civil party, he or she can sue the perpetrator in a civil court in order to establish civil liability and recover damages for the injuries suffered as a consequence of the crime. Also, when the damages have been caused by a State agent, victims may sue the State itself to recover compensation.<sup>13</sup>

Although criminal and civil actions are generally independent, there are certain situations in which they become intertwined. First, when the criminal and civil actions are initiated separately,<sup>14</sup> the decision on the civil proceedings is suspended until the criminal court pronounces its judgment.<sup>15</sup> Differing domestic legislation determines, if the accused is acquitted, whether victims may proceed with the civil complaint. Second, the criminal court's verdict of guilty is "res judicata" in the civil action. Third, if the criminal court establishes that the crime -

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<sup>11</sup> In general, criminal law in civil law countries provides for two type of offenses: public action and private action offenses. The difference is mainly based on the fact that in public action offenses the State is responsible for their prosecution, while in private action offenses the prosecution cannot be initiated unless the victim gives his or her consent. An example of the first type of offenses is homicide; an example of the second one is rape. Although the participation of the victim is required in private action offenses, in some countries, for example, France, Argentina, El Salvador, Paraguay, Guatemala, Costa Rica, and Venezuela, domestic legislation also allows victims to participate as private prosecutors in criminal proceedings regarding public action offenses. However, the participation of the victim in those cases has certain limitations such as the victim's action not being independent from the prosecution's action.

<sup>12</sup> Some countries, such as Peru and Colombia, only permit a victim to join the criminal proceedings as a civil party to recover damages. Therefore, the participation of the victim is limited to the civil claim and excluded from all the issues relating to the criminal action.

<sup>13</sup> In certain countries State liability can be based on fault or strict liability. As to the second standard, liability is based on the fact that the State has a duty to ensure public order and the well-being of the population; therefore, when the State is unable to perform these functions, independently of the existence of negligence on its part, it must compensate for the damages caused as a consequence of its actions or omissions.

<sup>14</sup> In a case where only a civil action has been initiated, the civil court must refer the file to a criminal court and suspend its decision on the case if it finds that certain facts could constitute a criminal offense. The final decision in a civil claim, however, does not have any consequence in a subsequent criminal action.

<sup>15</sup> However, some exceptions apply to this principle such as when the accused dies, the trial has been conducted in absentia - without his or her presence - or when the statute of limitation to prosecute the criminal action has run out.

the objective happening of the event- never occurred, victims are prevented from contesting that fact in a subsequent civil action. Finally, if the crime is not properly investigated in the criminal proceedings so that the perpetrators are not identified, it becomes very difficult for the victims to initiate a civil action against unidentified persons.

The possibility of victims participating in criminal proceedings as private prosecutors and the resulting interaction between criminal and civil actions raise several issues regarding the relationship between the right to a fair trial and the right to an effective remedy. Human rights tribunals have dealt with those issues in different ways. In some cases, they consider that since victims have the right to participate in criminal proceedings under domestic legislation, the failure of the State to carry out a thorough criminal investigation to identify the perpetrators of a crime constitutes a violation of the right to a fair trial - access to a court - and a violation of the right to an effective remedy as well. They also have found violations of the rights to a fair trial and to an effective remedy when the criminal courts have not reached a final decision within a reasonable time or other due process guarantees have not been ensured within the criminal proceedings. An alternative approach, followed particularly by the European Court, is to find a violation of the right to a fair trial without ruling on the potential violation of the right to an effective remedy.

In other cases, where the criminal investigation has not been actively prosecuted by the State and those responsible for the perpetration of the crime have not been identified, they have found that the victims' rights to access to a court for the determination of their civil rights, that is to say their right to compensation, and to an effective remedy have been violated. The rationale for these rulings is based on the fact that the failure of the State to conduct a thorough criminal investigation prevents victims from obtaining monetary compensation, either before the criminal court or in a subsequent civil action. Likewise, they have reached similar decisions in cases where the criminal investigation failed to establish the occurrence of the crime. The European Court has recently developed a more restrictive approach by suggesting that victims will not be able to argue the violation of the right to access to court for the determination of their civil rights as long as they cannot prove the ineffectiveness of the civil court after they file a claim. Therefore, it has concluded that the failure of the State to carry out a thorough criminal investigation must be analyzed in the context of the right to an effective remedy only.

The following case law shows the approaches followed by the Inter-American and European Human Rights Systems with respect to these issues.

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**Raquel Martín de Mejía v. Perú**  
*Case 10.970, Inter-Am. C.H.R. 157,*  
*Annual Report 1995, OEA/Ser.L/V/II.91, doc. 7 rev. (1996)*

*[Footnotes omitted]*

*[Fernando Mejía, a lawyer, journalist and political activist lived with his wife, Raquel, a teacher, in Oxapampa, Department of Pasco. One night, as part of an “antisubversive campaign,” a group of armed men with their faces covered by ski masks burst into Mejías’ home and abducted Mr. Mejía. That same night, one of the abductors came back to Mejías’ home and raped Mrs. Mejía on two occasions. In order to discover her husband’s whereabouts, she filed a writ of habeas corpus and sought support from the Mayor of Oxapampa and the Provincial Prosecutor, all without success. Three days later, Fernando Mejía’s body was found. Raquel Mejía filed a deposition with the local police and, later, brought criminal charges of homicide and abuse of authority on behalf of her husband. An investigation was initiated and the intervening prosecutor filed formal charges against the former subprefect of Oxapampa and other unidentified members of the military who were carrying out military operations at the time the alleged facts took place. The former subprefect fled the area. Twice the criminal court requested that the Military Political Chief of the region identify the officers who participated in the “antisubversive campaign.” During this time, Mrs. Mejía received threatening phone calls and was intimidated in order to force her to desist from the investigation. Finally, she left the country and was granted political asylum in Sweden. Given the political persecution she suffered, she did not file any complaints with regard to the sexual assault that she suffered.]*

b. The impossibility for Raquel Mejía to access domestic recourses for remedying the violations of her husband’s human rights and of her own constitutes a violation of Article 25 and 8(1), in relation to Article 1(1) of the Convention.

Article 25 and 8(1) of the Convention respectively provide as follows . . . .

The Commission has had opportunity to pronounce on the interpretation of these articles in previous cases in which the scope of the right to effective recourse in the context of the provisions of the American Convention was established.

Concerning Article 1(1), the Commission, citing the Inter-American Court of Human Rights in the Velásquez Rodríguez case, has stated:

the second obligation of the States Parties is that of “ensuring” the free and full exercise of the rights recognized in the Convention to all persons subject to their jurisdiction... Consequently, the States must prevent, investigate and punish any violation of the rights recognized by the Convention... The Court expanded this concept in various subsequent paragraphs of the same judgment, for example: “The decisive factor is to determine whether a particular violation of the rights recognized by the Convention has taken place with the support or the tolerance of the public authorities or whether the latter have acted in such a way that the violation has occurred without any prevention or with impunity.” “The State has the juridical duty to prevent, to the extent it reasonably can, human rights violations, to purposefully investigate with the means at its disposal, such violations as

may be committed within the sphere of its jurisdiction in order to identify those responsible, apply to them the appropriate penalties and ensure adequate compensation for the victim”; “... if the State apparatus acts in such a way that the violation remains unpunished and the victim’s full rights are not restored to him to the extent possible, it can be affirmed that the State has failed to perform its duty to ensure free and full exercise of said rights to all persons under its jurisdiction.” Regarding the obligation to investigate, the Commission notes that this must be “...for a purpose and be assumed by the State as a specific juridical duty and not as a simple matter of management of private interests that depends on the initiative of the victim or his family in bringing suit or on the provision of evidence by private sources, without the public authority effectively seeking to establish the truth...”

The obligation contained in Article 1(1) is a necessary corollary of the right of every individual to recourse to a tribunal to obtain judicial protection when he believes he has been a victim of violation of any of his human rights. If this were not so, the right to obtain effective recourse set forth in Article 25 would be absolutely without content.

In this connection, the Inter-American Court of Human Rights has observed as follows: [In the terms of the Convention] the States Parties undertake to make effective judicial recourses available to human rights violations victims (Article 25), recourses that must be substantiated in accordance with the rules of due process (Article 8(1)), all within the general obligation on the same States to ensure the free and full exercise of the rights recognized in the Convention to all persons under their jurisdiction (Article 1(1)).

The Commission considers that the right to a recourse set forth in Article 25, interpreted in conjunction with the obligation in Article 1(1) and the provisions of Article 8(1), must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the constitution or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation.

In this way, when a human rights violation is the outcome of an act classified as criminal, the victim is entitled to obtain from the State a judicial investigation that is conducted “purposefully with the means at its disposal... in order to identify those responsible [and] apply to them the appropriate penalties...”

Purposeful investigation, in the Commission’s view, implies that the competent State authority “will develop the possibilities of judicial remedy”, i.e. that it will undertake the investigation “as a specific juridical duty and not as a simple matter of management of private interests that depends on the initiative of the victim or of his family in bringing suit or on the provision of evidence by private sources, without the public authority effectively seeking to establish the truth...” Thus, the obligation to investigate purposefully means in practice that the State will act with due diligence, i.e. with the existing means at its disposal, and will endeavor to arrive at a

decision. However, when the State has performed its obligation to diligently investigate the matter, the fact that the investigation does not produce a positive result or the decision is not favorable to the petitioner does not per se demonstrate that the latter has not had access to a recourse. According to Article 25 of the Convention, the right to judicial protection includes the obligation of the State to guarantee the enforcement of any remedy when granted.

In this way, within the context of the Convention the term “recourse” must be understood in a broad sense and not be limited to the meaning that this word has in the legal terminology of the States’ procedural legislation.

The American Convention requires the States to offer effective recourses to human rights violations victims. The formal existence of such recourses is not sufficient to demonstrate their effectiveness; to be effective, a recourse must be adequate and efficacious. Adequate means that the function of the recourse in a State’s domestic legal system must be appropriate for protecting the juridical situation affected. A recourse is efficacious when it is capable of producing the result for which it was designed.

Whether the existence or not of an effective recourse is established in a concrete case and taking into consideration the special features of each legislation, the Commission understands that, in those States where determination of the civil reparation of injury caused by an unlawful act is subject to establishment of same in a criminal trial, the instituting of criminal action and the subsequent furthering of the proceedings by the State is the adequate recourse required by the victim.

In the case under analysis, the Commission, on the basis of the facts reported, presumed that Raquel Mejía had not had access to an effective recourse that would have remedied the human rights violations suffered by her. As established, Raquel Mejía did not file a complaint with the domestic courts since practice in Peru is that this type of act involving State agents is not investigated while moreover those who report them run the risk of reprisals.

The Peruvian State’s failure to give the victim access to a judicial investigation conducted by an independent and impartial tribunal made it, in practice, materially impossible for her to exercise her right to obtain compensation. The fact is that, in Peruvian law, the obtaining of civil compensation for injuries resulting from an unlawful act in the criminal category is subject to establishment of the crime by means of criminal proceedings.

For this reason, in the concrete case of Raquel Mejía, the Peruvian State’s failure to guarantee her right to an effective recourse, besides constituting a violation of her right to judicial protection, also constituted a violation of her right to go to a tribunal that would determine whether she was entitled to compensation for injuries suffered as a result of the sexual abuse to which she was subjected.

The American Convention establishes a distinction between the petitioner and the victim. While

the term “petitioner” refers to the person with active legitimation to file a petition with the system, the word “victim” refers to individuals who have been impacted by violation of their rights. The Commission understands that, in cases where the right to life is violated, omission by the State to provide effective recourses affects the family of the dead person and, therefore, makes them into indirect “victims” of the violation of the right to judicial protection defined in a broad sense, i.e. including the right to compensation.

The Commission has presumed that the Peruvian State omitted to guarantee the right to an effective recourse in the case of Fernando Mejía. In his case, adequate recourse was judicial investigation by the State through initiation of criminal proceedings and, once the existence of an unlawful act was established, determination of compensation for the injuries caused to the victim. While the pertinent criminal proceedings were instituted, the behavior of the State organs, namely the Government Attorney’s office, the judge assigned to the case and the Peruvian Armed Forces in delaying or obstructing the investigation, rendered the recourse inefficacious in practice.

The State’s failure to provide for a thorough investigation in the case of Fernando Mejía affected his wife’s right to an effective recourse and, according to Peruvian law, the fact that the existence of an unlawful act was not established through criminal proceedings prevented Raquel Mejía’s access to a tribunal to determine whether compensation was due to her.

On the basis of the analysis made above, the Commission concludes that the Peruvian State, in not offering effective recourses to Raquel Mejía in both the case of the homicide of her husband and in connection with the violations of her own rights, constituted violation of the rights set forth in Articles 1(1), 8(1) and 25 of the Convention.

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**Tomasi v. France**

241 Eur. Ct. H.R. (ser. A) (1992)

<<http://www.echr.coe.int>>

*[The applicant, a French national, was arrested and charged with several serious criminal offenses including murder and the possession of firearms. The investigation and trial leading to the applicant’s acquittal, during which time the applicant was kept in detention, lasted five years and seven months. The applicant argued that after his arrest, while in police custody, he was beaten and badly treated. Immediately after the period spent in police custody, he was examined by four different physicians who found evidence of slight physical injuries corresponding to the period in question. By reason of this alleged ill-treatment, the applicant lodged a criminal*

*complaint against the police and an application to join the proceedings as a civil party seeking compensation. The determination of this complaint lasted five years and ten months, largely due to delays caused by the judicial authorities, and was finally dismissed.]*

117. The applicant finally complained of the time taken to examine his complaint against persons unknown, lodged together with an application to join the proceedings as a civil party, in respect of the ill-treatment which he had suffered during his police custody. He relied on Article 6 para. 1 (art. 6-1), which is worded as follows . . . .

***A. Government's preliminary objection***

118. The Government contended, as they had done before the Commission, that the applicant had failed to exhaust his domestic remedies, in so far as he had not brought an action against the State for compensation pursuant to Article 781-1 of the Code of Judicial Organisation.

119. The Court confines itself to observing that this submission is out of time having been made for the first time before it at the hearing of 25 February 1992, and not within the time-limits laid down in Rule 48 para. 1 of the Rules of Court.

***B. Merits of the complaint***

***1. Applicability of Article 6 para. 1 (art. 6-1)***

120. In the Government's view, the contested proceedings did not fall within the scope of the notion of "determination of ... civil rights and obligations". By filing an application to join the proceedings as a civil party, the person who claimed to be injured by a criminal offence set in motion the prosecution or associated himself with proceedings which had already been brought by the prosecuting authority. He sought to secure the conviction and sentencing of the perpetrator of the offence in question and did not claim any pecuniary reparation. In other words, an investigation opened upon the filing of such an application concerned the existence of an offence and not that of a right.

121. Like the applicant and the Commission, the Court cannot accept this view.

Article 85 of the Code of Criminal Procedure provides for the filing of a complaint with an application to join the proceedings as a civil party. According to the case-law of the Court of Cassation (Crim. 9 February 1961, Dalloz 1961, p. 306), that provision simply applies Article 2 of that Code which is worded as follows:

"Anyone who has personally suffered damage directly caused by an offence [crime, délit or contravention] may institute civil proceedings for damages...."

The investigating judge will find the civil application admissible - as he did in this instance - provided that, in the light of the facts relied upon, he can presume the existence of the damage alleged and a direct link with an offence (*ibid.*).

The right to compensation claimed by Mr Tomasi therefore depended on the outcome of his complaint, in other words on the conviction of the perpetrators of the treatment complained of. It was a civil right, notwithstanding the fact that the criminal courts had jurisdiction (see, *mutatis mutandis*, the *Moreira de Azevedo v. Portugal* judgment of 23 October 1990, Series A no. 189, p. 17, para. 67).

122. In conclusion, Article 6 para. 1 (art. 6-1) was applicable.

*2. Compliance with Article 6 para. 1 (art. 6-1)*

123. It remains to establish whether a “reasonable time” was exceeded. The applicant and the Commission considered that it had been, whereas the Government denied this.

*(a) Period to be taken into consideration*

124. The period to be taken into consideration began on 29 March 1983, the date on which Mr Tomasi filed his complaint; it ended on 6 February 1989, with the delivery of the Court of Cassation’s judgment declaring the applicant’s appeal from the Bordeaux indictments division’s decision inadmissible (see paragraphs 46 and 67 above). It therefore lasted more than five years and ten months.

*(b) Reasonableness of the length of the proceedings*

125. The reasonableness of the length of proceedings is to be determined with reference to the criteria laid down in the Court’s case-law and in the light of the circumstances of the case, which in this instance call for an overall assessment.

A reading of the decisions given in these proceedings (see paragraphs 63, 66 and 67 above) shows that the case was not a particularly complex one. In addition, the applicant hardly contributed to delaying the outcome of the proceedings by challenging in the Bordeaux indictments division the decision finding no case to answer and by requesting that division to order a further inquiry (see paragraph 64 above). Responsibility for the delays found lies essentially with the judicial authorities. In particular, the Bastia public prosecutor allowed more than a year and a half to elapse before asking the Court of Cassation to designate the competent investigating authority (see paragraphs 57-58 above). The Bordeaux investigating judge heard Mr Tomasi only once and does not seem to have carried out any investigative measure between March and September 1985, and then between January 1986 and January 1987 (see paragraphs 59-61 above).

There has accordingly been a violation of Article 6 para. 1 (art. 6-1).

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**Alfonso René Chanfeau Orayce v. Chile**  
*Cases 11.505 et al., Inter-Am. C.H.R. 512,*  
*Annual Report 1997, OEA/Ser.L/V.II.98, doc. 7 rev. (1998)*  
*[Footnotes omitted]*

*[From 1973 to 1978 thousands of persons were abducted by State security forces in Chile. In most of the cases their whereabouts remain unknown while in other cases the victims were reportedly murdered by their abductors. In these cases different remedies were filed to determine the victims' whereabouts or to open criminal proceedings aimed at identifying and punishing the perpetrators. In all of the cases criminal proceedings were opened and, in most of them, former State agents were identified as the perpetrators of the crimes. The outcome in the criminal investigation carried out by domestic courts was very similar in all the cases: in general, military courts asserted jurisdiction over the cases and dismissed them in application of Decree Law 2191, or the so-called "amnesty law." The Supreme Court, on appeal, upheld those dismissals. Several cases were filed with the Inter-American Commission arguing that the application of the amnesty law to those cases was incompatible with the American Convention on Human Rights. The Commission decided to join the cases because they had a similar pattern of facts, were at the same stage of processing and involved the same issue of law.]*

*c) The violation of the right to judicial guarantees (Article 8)*

54. The complaint alleges that the juridical consequences of the amnesty are incompatible with the Convention, as they violate the right of the victim to a fair trial, as provided for in Article 8, which protects the right of all persons to due process "in the substantiation of any criminal accusation brought against them..."

55. While the State has an obligation to make available effective remedies (Article 25), which should be "substantiated in accordance with the rules of due legal process" (Article 8.1), it is noteworthy that in many criminal law systems in Latin America, the victim has the right to file charges in a criminal action. In the Chilean system which allows this, the victim of a crime has the fundamental right of recourse to the tribunals.

This right is vital in the operation and advancement of criminal proceedings. The amnesty decree clearly affected the right of the victims conferred under Chilean law to institute criminal

proceedings before the courts against those persons accused of human rights violations.

56. Even if these cases did not involve crimes against the public good which are subject to prosecution, the State has the legal, exclusive and irrevocable right to investigate them. For this reason in any event, the State of Chile is the repository of the legal action, and is obliged to promote and advance the various stages of the proceedings, in accordance with its duty to guarantee the right to justice of the victims and their families. This responsibility should be assumed by the State as a juridical duty in its own right and not respond to or depend on special interests, or the supply of evidence by them.

57. The Decree Law also precluded the families of the victims from obtaining compensation in civil tribunals. Article 8 of the American Convention provides that . . . .

58. The right to bring a civil suit, under Chilean legislation, is not necessarily linked to the result of the criminal trial. Nevertheless, a civil suit must be filed against a specific person in order that liability may be determined in respect of the alleged events and the payment of compensation decided. The failure of the State to investigate made it physically impossible to establish liability before the civil tribunals. Notwithstanding the fact that the Supreme Court has stressed that civil and criminal proceedings are independent of each other, the manner in which the amnesty was applied by the tribunals affected the right to seek compensation under civil law as a direct result of the impossibility of identifying any individuals responsible. The amnesty law, as applied and interpreted by the Chilean tribunals, prevented the petitioners from exercising their right to a fair trial to determine their civil rights, as provided for in Article 8.1 of the Convention.

*d) The violation of the right to judicial protection (Article 25)*

60. The complaint alleges that the victims and their families were deprived of the right to effective recourse, as provided for in Article 25 of the Convention, which confers protection from any acts which violate their rights.

61. On the question of the legal obligation of states to make available effective internal remedies, the Inter-American Court of Human Rights has stated the following:

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).

62. The Court has further added that suitable remedies “are those which are suitable to address an infringement of a legal right.”

... 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 Convention or by law or that it be formally recognized, but rather it must 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.

63. The amnesty decree was a general procedure by virtue of which the State declined to punish certain serious crimes. Moreover, the manner of application of the decree by Chilean courts not only precluded the possibility of punishment of the perpetrators of human rights violations, but also prevented any charges from being brought and the names of those responsible for the violations (beneficiaries of the decree) from being revealed; under the law, they were therefore considered as not having committed any illegal act.

64. The amnesty decree law gave rise to juridical inefficacy with respect to crimes; the victims and their families were left with no legal recourse by which perpetrators of human rights violations committed under the military dictatorship could be identified and the corresponding punishment imposed.

65. By promulgating and ensuring compliance of de facto Decree Law 2191, the Chilean State ceased to guarantee the rights to legal protection provided for under Article 25 of the Convention.

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#### **Mentes v. Turkey**

*Eur. Ct. H.R., Judgment of November 28, 1997, Reports 1997 VIII (1997)*

*<<http://www.echr.coe.int>>*

*[The applicants' houses were burned in the course of an operation allegedly carried out by State security forces. Only after their application had been filed before the Commission, and at the request of the Ministry of Justice, two investigations were undertaken by the Public Prosecutor. Both of them concluded with a decision not to prosecute. The first was based upon finding that no incident had taken place on the date in question. The second was based upon finding that the houses had in fact been burned but the PKK was responsible for the incident.]*

#### **4. Alleged violations of Articles 6 § 1 and 13 of the Convention**

*(a) Arguments of those appearing before the Court*

82. The first three applicants complained that they had been denied an effective judicial or other remedy enabling them to challenge the destruction of their homes and possessions by the security forces and to seek compensation. This gave rise to a violation of Article 6 § 1 of the Convention . . . In addition, they maintained that there had been a violation of Article 13 of the Convention . . .

83. The Government disputed the above contentions, emphasising that there were both administrative and civil remedies (see paragraphs 36–45 above), of which the applicants had failed to avail themselves.

84. In the applicants' submission, the administrative remedy applied essentially to acts by the public authorities causing damage to individuals. Where the acts had exceeded the legal boundaries of administrative powers, a claim for damages had to be pursued in the civil courts.

The acts complained of by the applicants were deliberate acts committed by members of the security forces. However, none of the court decisions referred to by the Government dealt with a claim that the security forces had purposely destroyed the houses of the claimants concerned. The social risk theory employed by the administrative courts as a ground for awarding compensation was therefore irrelevant and would necessarily mask the truth of the circumstances of the burning of their houses and possessions.

A remedy which consisted merely of monetary compensation and which ignored the responsibility of the security forces was wholly unacceptable.

Moreover, the applicants stressed that in the absence of criminal proceedings against those responsible, a civil claim for damages would be doomed to failure. The criminal investigation conducted into their allegations had been wholly inadequate.

In addition, the applicants alleged that the system of redress in south-east Turkey did not operate to afford them an effective remedy. In particular, they were deprived of an effective remedy as a result of (a) the widespread powers and immunities granted to the authorities in the region (see paragraphs 48–51 above); (b) the attitude of the authorities to the complaints of the applicants (see paragraphs 27–31 above); and (c) the existence of a policy of village destruction which rendered any remedy for the complaints ineffective.

85. The Commission found that there were undoubted practical difficulties and inhibitions in the way of persons like the applicants who complained of village destruction in south-east Turkey, where broad emergency powers and immunities have been conferred on the Emergency Governors and their subordinates. There had been no example given of compensation paid to a villager in respect of the destruction of a house by the security forces nor any example of a

successful, or indeed any, prosecution brought against the security forces for any such act. In this connection, the Commission referred to the evidence taken in the present case. The applicants had not in fact made any petition to the public prosecutors but the Ministry of Justice in Ankara had instigated the investigation when the Commission had communicated the application to the Government. As this investigation indicated, complaints that the security forces had destroyed villagers' houses did not in practice receive the serious and detailed consideration necessary for any prosecution to be initiated. In fact, no investigation had taken place to verify what occurred in the village and the hamlets (see paragraphs 27–30 above). Where the allegations concerned the security forces, which enjoyed a special protection in the south-east region, it was unrealistic to expect villagers to pursue theoretical civil or administrative remedies in the absence of any positive findings of fact by the State investigative mechanism.

In light of the above considerations, the Commission was of the opinion that, in breach of Article 6 § 1, the applicants did not enjoy an effective access to a tribunal for the determination of their “civil rights”. Nor did they, in violation of Article 13, have an effective remedy with respect to any of their Convention grievances not covered by the expression “civil rights” in Article 6 § 1, and for this reason falling outside the scope of applicability of that provision. This was the case as regards, for example, their claims relating to the forcible evacuation of their village and their subsequent personal difficulties. State action to investigate the incidents promptly, to rehouse or financially assist the villagers, rather than passively awaiting administrative court intervention, may have been a more appropriate response to the applicants' plight.

***(b) The Court's assessment***

*(i) Article 6(1) of the Convention*

86. The Court reiterates that the right of access to a court in civil matters constitutes one aspect of the “right to a court” embodied in Article 6 § 1 (see, amongst many authorities, the above-mentioned Aksoy judgment, p. 2285, § 92). This provision undoubtedly applies to a civil claim for compensation for the destruction of homes and possessions allegedly committed by agents of the State.

87. The applicants did not dispute that they could in theory have their civil rights determined by the administrative courts and the civil courts. However, for the reasons set out above (see paragraph 84) they did not attempt to make an application before the courts. It is therefore not possible for the Court to determine whether the Turkish courts would have been able to adjudicate on the applicants' claims had they initiated proceedings.

In any event, the Court observes that the applicants complained essentially of the lack of a proper investigation into their allegation that the security forces had purposely destroyed their houses and possessions.

88. In view of the above, the Court finds it appropriate to examine this complaint in relation to

the more general obligation on States under Article 13 to provide an effective remedy in respect of violations of the Convention. It does therefore not find it necessary to determine whether there has been a violation of Article 6 § 1.

*(ii) Article 13 of the Convention*

89. The Court reiterates that Article 13 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. 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. The remedy 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 (see the Aksoy judgment cited above, p. 2286, § 95, and the above-mentioned Aydin judgment, pp. 1895–96, § 103).

Furthermore, the nature and gravity of the interference complained of under Article 8 of the Convention in the instant case has implications for Article 13. The provision imposes, without prejudice to any other remedy available under the domestic system, an obligation on the respondent State to carry out a thorough and effective investigation of allegations brought to its attention of deliberate destruction by its agents of the homes and possessions of individuals.

Accordingly, where an individual has an arguable claim that his or her home and possessions have been purposely destroyed 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 investigative procedure.

90. As already noted, the applicants in this case did not approach any domestic authority with their Convention grievances before bringing their application before the Strasbourg institutions. However, following the Commission’s communication of the application to the respondent Government, the Ministry of Justice instigated criminal investigations by the office of the public prosecutor in Genç (see paragraph 28 above). In the Court’s view, the manner in which these investigations were conducted may be taken into account in its examination of the applicants’ initial complaint that they did not dispose of an effective remedy as required by Article 13.

91. In this regard, the Court notes that the first investigation was terminated on 25 April 1994, which must have been less than a fortnight after the prosecutor was notified of the applicants’ complaints to Strasbourg. He was apparently unaware of the applicants’ names at the time. His decision not to prosecute was based solely on the brief statements from the four villagers who had been selected in a manner giving rise to certain misgivings and who lived in separate hamlets about one hour’s walking distance from the applicants’ neighbourhood. The second investigation

consisted merely of a rehearing of the same four witnesses by another prosecutor. Although at that stage the public prosecutor knew the applicants' names and the authorities in Ankara were aware of their addresses, no measures were taken to invite the applicants to make statements. Nor were any attempts made to hear other witnesses from the village or to enquire into the activities of the security forces at the material time and place (see paragraphs 28 to 30 above).

92. The Court concludes that no thorough and effective investigation was conducted into the applicants' allegations and this resulted in undermining the exercise of any remedies the applicants had at their disposal, including the pursuit of compensation before the courts. There has therefore been a breach of Article 13 in respect of the first three applicants.

.....

### **Questions**

1. Do you agree with the preceding case law essentially holding that since under domestic legislation victims are allowed to participate in criminal proceedings, either as private prosecutors or civil parties, the failure of the State to conduct a thorough criminal investigation entails a violation of the right to a fair trial? Compare these cases with the findings of the Human Rights Committee in *Bautista Arellana* where it concluded that the Covenant does not provide individuals with a right to require the State to criminally prosecute another person (para. 8.6).
2. If you agree with the position of the regional human rights bodies with regard to the violation of the right to a fair trial, do you think that an additional violation of the right to an effective remedy should also be found? Compare *Tomasi* with the *Mentes* case. Why do you think the European Court reached different conclusions even though it appears that in both cases the States concerned did not conduct a thorough investigation?
3. Consider the following facts and answer the questions assuming that you are a member of a human rights body charged with the responsibility of drafting a report on the case.

Petitioner alleges that she was tortured while in pretrial detention. She filed a complaint against the police officers responsible for the perpetration of torture with the competent court and constituted herself as a civil party in the criminal investigation that was subsequently initiated. Three years later, since the criminal investigation was never completed and a decision was not reached in her case, she filed a complaint with an international human rights body. She argued that the failure of the State to conduct a thorough investigation violated her right to an effective remedy. Also, she alleged that the State's inaction prevented her from obtaining compensation, thereby violating her right to access to a court for the determination of her civil rights.

- a. How would you rule on the alleged violations? Would your decision be different if the petitioner had only participated as a private prosecutor without requesting the determination of compensation in the criminal proceedings and had never filed a complaint for damages with a civil court? Compare your analysis with the decision of the European Court in *Mentes*.
- b. If your answer to the previous question is in the affirmative, why do you think that it makes a difference if the petitioner files a complaint for damages in a civil court when domestic legislation provides that the decision in those proceedings will be suspended until there is a ruling in the criminal case?
- c. In this case, the petitioner did not file a civil complaint against the State to recover civil damages although the perpetrators were allegedly public officials. Would you consider this fact relevant in assessing the violation of the right to access to a court for the determination of her civil rights?
- d. How would you decide the case if the petitioner were unable to identify the perpetrators and the criminal proceedings had also failed to do so? Do you think that the petitioner could still have filed a civil complaint against the State?

4. How would you decide any of the preceding cases if the State against which the complaints were filed did not allow for victims' participation in criminal proceedings as private prosecutors or civil parties? Compare your answer to the ruling of the European Court in *Mentes* where it stated that the right to an effective remedy entails "effective access for the complainant to the investigative procedure." Do you construe this statement as requiring individual participation in the proceedings?

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**CHAPTER IV**

**THE RIGHT TO LIBERTY AND SECURITY OF PERSON  
AND  
THE RIGHT NOT TO BE SUBJECTED TO TORTURE OR OTHER  
CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

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**A. THE RIGHT TO LIBERTY AND SECURITY OF PERSON**

**1. DETERMINATION OF LAWFULNESS AND ARBITRARINESS OF DETENTION**

**Article 7(1), (2), and (3)  
American Convention on Human Rights**

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.

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**Article 9(1)  
International Covenant on Civil and Political Rights**

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.

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**Article 5(1)  
European Convention for the Protection of Human Rights and Fundamental Freedoms**

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 the 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 fulfillment 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 unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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**Human Rights Committee, General Comment 8, Article 9 (July 28, 1982)**

<<http://sim.law.uu.nl>; <http://www.unhchr.ch>>

1. Article 9 which deals with the right to liberty and security of persons has often been somewhat narrowly understood in reports by States parties, and they have therefore given incomplete information. The Committee points out that paragraph 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. It is true that some of the provisions of article 9 (part of para. 2 and the whole of para. 3) are only applicable to persons against whom criminal charges are brought. But the rest, and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2(3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

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**García v. Perú**

*Case 11.006, Inter-American C.H.R. 71,  
Annual Report 1994, OEA/Ser.L/V/II.88, doc. 9 rev (1995)*

*[On April 5, 1992, President Alberto Fujimori staged a "self-coup" whereby he suspended the Constitution, dissolved Congress, and took over legislative powers. He also declared that the Judiciary, the National Judiciary Council and the Constitutional Court were in recess. Hundreds*

*of soldiers and armored tanks were deployed throughout Lima to take over the Congress Building, the Palace of Justice and the offices of several unions, political parties, and newspapers, radio and television stations. The applicant, former president of Perú, complained that the government breached Article 7 of the American Convention on Human Rights in an April 5th assault on his home, during which his life and personal safety were threatened, his wife and children were held incommunicado under house arrest, and private family documents were removed from his home. The State argued that the petitioner had failed to exhaust domestic remedies.]*

The petitioners have alleged that the events that took place on April 5, 1992, when Peruvian Army soldiers surrounded, fired on, and then burst into the home of Dr. Alan García for purposes of arresting him, constitute violations of rights protected under Article 7 of the American Convention.

That article upholds every person's right to personal liberty and security. In its second subparagraph, Article 7 provides that no one may be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the Constitution or by a law enacted pursuant thereto.

In its jurisprudence the European Commission on Human Rights has held that the words liberty and security must be taken together and understood to refer to physical liberty [*Winer v. UK, Comm. Report 10.7.86, D.R. 48 p.154.*] In the case of *X v. the Federal Republic of Germany*, the Commission's finding was that threatening with arbitrary and unjustified detention can infringe the right to security of person [*X v. Federal Republic of Germany, Comm. Report 7.5.81, D.R. 24 p.103.*]

Under the terms of Article 7 of the Convention, the legality or arbitrariness of an arrest must be analyzed on the basis of whether or not there was observance of the constitution and/or domestic laws enacted pursuant thereto that prescribe the reasons why an individual can be deprived of his or her freedom and establish the procedures that must be carried out in arresting an individual. In that respect, the 1979 Constitution of Perú stipulated the following in Article 2:

Every individual has the right to: Parr. 20. Personal freedom and security. g) no one can be arrested without written court order with a reason assigned by a judge or by the police authorities in a case of "*flagrante delicto*...." h) every individual will be informed immediately and in writing of the cause or reasons of his detention....

As the petitioners have described in their statement of facts, the manner in which the attempted arrest of former President Alan García was conducted utterly disregarded the procedural clauses of the Constitution. These actions were taken without a court order issued by a competent authority setting forth the reasons why the attempt to arrest Dr. García was made.

Moreover, the arrest attempt was carried out by Army soldiers who had no authority to carry out such actions. The Peruvian Constitution, like the constitutions of other democratic states, provides that the role of the armed forces is to guarantee the independence, sovereignty and territorial integrity of the Republic; they therefore have no authority to arrest civilians.

This point is corroborated by the Armed Forces' Service Regulations, which stipulate that in the event troops are used to maintain and restore law and order, they shall confine themselves to discharging their assigned mission and avoid any improper use of their weapons. The Armed Forces are to be accompanied by members of the National Police, who shall make any arrests and detentions that the situation necessitates.

The Commission considers that arrests must be made by the authority who is competent under the domestic laws of the State and that failure to comply with that requirement and failure to observe the procedures required by international law for making an arrest occur in a situation wherein "...arrests cease to be arrests per se and become kidnappings..." [Report on the Situation of Human Rights in Chile, 1985, OEA/Ser.L/V/II.66 doc.17, p.138.]

These arguments, combined with the acts of violence committed by Army soldiers against former President García --the firing of gunshots on his residence-- for purposes of arresting him, lead the Commission to conclude that in the instant case, the former President was threatened with arbitrary and unlawful arrest and therefore his right to personal security, which is protected under Article 7 of the American Convention, was violated by the measures taken by the Peruvian Armed Forces on April 5, 1992.

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### **Gangaram Panday v. Suriname**

*Inter-Am. Ct. H.R., Judgment of January 21, 1994, (ser.C) No. 16 (1994)*

*[A petition was filed with the Commission in reference to the detention and subsequent death of Mr. Asok Gangaram Panday in Suriname. The petition was filed by the victim's brother, who alleged that the victim was illegally and arbitrarily detained by the Military Police of Suriname upon his arrival from Holland at the Zanderij Airport, where he was held in solitary confinement in a special area reserved for deportees. The petitioner further alleged that the victim was tortured prior to his death by asphyxiation while in custody. The Commission charged the State with the violation of articles 1(1), 2, 4(1), 5(1), 5(2), 7(1), 7(2), 7(3), 25(1) and 25(2) of the American Convention. The State denied the allegations of torture, and maintained that the victim's death was a suicide by hanging for which it could not be held responsible.]*

45. The Court must now determine whether the detention of Asok Gangaram Panday by members of the Military Police of Suriname constitutes the alleged illegal or arbitrary acts or a violation of the victim's right to be brought promptly before a judge or other officer authorized by law to exercise judicial functions, and whether it is appropriate to charge Suriname with such acts and, if so, to declare its international responsibility under Article 7(2), 7(3) and 7(5) of the Convention.

....

47. This provision contains specific guarantees against illegal or arbitrary detentions or arrests, as described in clauses 2 and 3, respectively. 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 things, they are unreasonable, unforeseeable or lacking in proportionality.

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**Loren Laroye Riebe Star *et al.* v. Mexico**

*Case 11.610, Inter-Am. C.H.R. 725,  
Annual Report 1998, OEA/Ser.L/V/II.102, doc. 6 rev. (1999)*

*[The complaint giving rise to this case was filed on behalf of three priests from the United States, Argentina and Spain who were detained in a highly irregular manner and expelled from Mexico. The priests had been working with the Catholic Diocese in the State of Chiapas, which is the poorest and most indigenous state in Mexico. Since the emergence of the armed dissident movement known as the Zapatista Army of National Liberation (EZLN) in January 1994, there has been an increase in social upheaval and violent conflicts. Military presence in the region has increased, along with complaints of grave violations of human rights, mainly perpetrated by paramilitary groups with the acquiescence, and, in some cases, active participation, of State agents. The IACHR has received many petitions regarding harassment of human rights activists, including Catholic priests and social workers, in Chiapas. In this case, the State claimed that the priests were arrested because they were carrying out activities for which they had no authorization ("proselytism on behalf of organizations that carry out unlawful acts, inducing farm workers and indigenous people to act against the authorities and individuals"). The State argued that the priests were deprived of their liberty in full accordance with the law, and that*

*there was no discrimination against them. Accordingly, the State requested that the Commission declare the case inadmissible since it did not involve any violations of the American Convention.]*

*A. Right to Personal Liberty (Article 7)*

32. Article 7 of the American Convention guarantees every person the right to personal liberty and security in the following provisions . . . .

33. It is pertinent to refer to Mexican laws applicable to the deprivation of the liberty of Fathers Riebe Star, Barón Guttlein, and Izal Elorz. Article 16 of the Mexican Constitution States:

No one may be molested as a person, family, home, papers or possessions except by virtue of a written order from a competent authority that explains and substantiates the legal basis for such procedure...

34. For its part, the Regulations of the General Law on Population state that the migration authorities are entitled to exercise inspection and surveillance powers over aliens in Mexico and, if need be, to apply the sanctions contemplated in the law, “showing at all times respect for human rights and keeping strictly to the appropriate legal procedures” (Article 140). The next Article in the regulations establishes the requirements for carrying out a migration inspection:

I. The person carrying out the inspection should have a written mandate, stating the purpose of the inspection, the place in which it is to be carried out, and, if available, the name of the person to whom it is directed, the date, the legal basis for the inspection, along with the name, signature, and position of the civil servant issuing the order and of the officer who will be carrying it out.

II. The inspector or officer commissioned for this purpose shall identify himself to the alien or person being inspected by showing his I.D. as a civil servant working for the Office of the Director General of Migration Services in the Ministry of the Interior (“Secretaría de Gobernación”).

35. The Migration Authorities must analyze the results of the inspection in order to decide whether the alien should be summonsed; if so, the summons must be sent out indicating when he should appear. At that point minutes of the meeting must be drawn up in front of witnesses and a copy given to the interested party (Article 142 of the above-mentioned Regulations). The Regulations also provide that the Ministry of the Interior should assess whether a violation of applicable law exists, and, if so, that institution should consider the nature and gravity of the offense in order to determine the appropriate sanction “always bearing in mind the circumstances that might have played a role, the proofs submitted by the offender, and his statements regarding what happened.” Article 144 of the Regulations establishes that “if a crime has been committed, the offender shall be placed at the disposal of the appropriate authority, in accordance with

Article 143 of the Law.”

36. The Commission considers that there is no controverting the fact that on June 22, 1995 Fathers Loren Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz were detained in the State of Chiapas by armed members of the security forces, in three separate operations (see paragraphs 6, 7, and 8 above). Likewise, no one has denied the fact that none of the priests detained was in the process of committing a crime, so there was nothing in flagranti.

37. As for the other circumstances surrounding the deprivation of liberty, the petitioners claim that the State agents who detained the priests refused to identify themselves; that they did not produce any written order issued by a competent authority; and that they were not notified of the reasons for their detention.

38. For its part, the State initially claimed that the Migration Authorities took into account background information showing violations by the priests of the General Law on Population, which is why they proceeded to “locate and detain” them, pursuant to Articles 140 to 143 of the Regulations (cited above). However, in reference to Father Riebe Star, the Mexican State itself declared that “he was notified of the charges against him during the action taken against him under administrative law.” The “administrative” proceedings to which the State refers were the interrogation to which the three priests were subjected at Mexico City airport, in the early hours of June 23, 1995, shortly before the *[sic]* were expelled from the country. None of Mexico’s later statements to the Commission provide evidence contradicting the petitioners’ version of the circumstances under which the three priests were deprived of their liberty.

39. Based on the above facts, the Commission establishes that on June 22, 1995, Fathers Loren Riebe Star, Jorge Alberto Barón Guttlein, and Rodolfo Izal Elorz were arrested by armed members of the security forces, who did not identify themselves, had no written warrant from a competent authority. Nor were the priests notified of the reasons why they were deprived of their liberty, or of the charges brought against them. Each of the priests was taken overland to State installations in Tuxtla Gutiérrez, after which all three were flown to Mexico City airport, where the authorities informed them of the reasons for their detention and proceeded to interrogate them.

40. Thus Fathers Riebe Star, Barón Guttlein, and Izal Elorz were also denied the right of recourse to a competent court, in order for that court to decide without delay on the lawfulness of their detention. Indeed, the facts show irrefutably that they did not even have access to a lawyer, which might have allowed them to present a judicial remedy to end their arbitrary detention and prevent their summary expulsion. This issue will be examined below, under right to due process and effective judicial protection.

41. The Commission concludes that the Mexican State violated the right to personal liberty--guaranteed under Article 7 of the American Convention--of Father Loren Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz.

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**“A” v. Australia**

*Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (April 30, 1997)*  
<<http://sim.law.uu.nl>; <http://www.unhchr.ch>>

*[The petitioner, a Cambodian citizen, arrived in Australia by boat together with 25 other Cambodian nationals, including his family, in November, 1989. He applied for refugee status shortly thereafter. His application was promptly denied, at which time he and other occupants of the boat were flown to a detention center in Sydney. The petitioner's access to counsel was impeded throughout his detention, particularly in light of the fact that he was twice transferred to remote detention centers. Because Australian immigration law effectively precludes the release from custody of asylum-seeking “boat people” who arrive without proper documentation, the petitioner remained in detention for over three years. In his application to the Human Rights Committee, the petitioner claimed to be the victim of violations by Australia of article 9, paragraphs 1, 4 and 5, and article 14, paragraphs 1 and 3(b), (c) and (d), juncto article 2, paragraph 1, of the International Covenant on Civil and Political Rights.]*

3.1 Counsel argues that his client was detained “arbitrarily” within the meaning of article 9, paragraph 1. He refers to the Human Rights Committee’s General Comment on article 9, which extends the scope of article 9 to cases of immigration control, and to the Views of the Committee on communication No. 305/1988 [*Van Alphen v. the Netherlands: Views adopted on 23 July 1990, paragraph 5.8.*] where arbitrariness was defined as not merely being against the law, but as including elements of “inappropriateness, injustice and lack of predictability”. By reference to article 31 of the Convention Relating to the Status of Refugees and to conclusion No. 44 (1986) of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on detention of refugee and asylum-seekers, it is argued that international treaty law and customary international law require that detention of asylum-seekers be avoided as a general rule. Where such detention may become necessary, it should be strictly limited (see conclusion No. 44, para. (b)). Counsel provides a comparative analysis of immigration control and legislation in several European countries as well as Canada and the United States of America. He notes that, under Australian law, not all illegal entrants are subject to detention, nor all asylum-seekers. Those who arrive at Australian borders without a valid visa are referred to as “prohibited entrants” and may be detained under section 88 or 89 of the Migration Act 1958. Section 54B classifies individuals who are intercepted before or on arrival in Australia as “unprocessed persons”. Such persons are deemed not to have entered Australia, and are taken to a “processing area”.

3.2 The author and others arriving in Australia before 1992 were held by the Federal Government under section 88 as “unprocessed persons”, until the entry into force of division 4B of the Migration Amendment Act. Counsel argues that, under these provisions, the State party has established a harsher regime for asylum-seekers who have arrived by boat, without documentation (“boat people”) and who are designated under the provision. The practical effect of the amendment is said to be that persons designated under division 4B automatically remain in custody unless or until removed from Australia or granted an entry permit.

3.3 It is contended that the State party’s policy of detaining boat people is inappropriate, unjustified and arbitrary, as its principal purpose is to deter other boat people from coming to Australia, and to deter those already in the country from continuing with applications for refugee status. The application of the new legislation is said to amount to “human deterrence”, based on the practice of rigidly detaining asylum-seekers under such conditions and for periods so prolonged that prospective asylum-seekers are deterred from even applying for refugee status, and current asylum-seekers lose all hope and return home.

3.4 No valid grounds are said to exist for the detention of the author, as none of the legitimate grounds of detention referred to in conclusion No. 44 (see para. 3.1 above) applies to his case. Furthermore, the length of detention - 1,299 days or three years and 204 days as at 20 June 1993 - is said to amount to a breach of article 9, paragraph 1.

....

*The State party’s admissibility observations and comments*

4.1 In its submission under rule 91, the State party supplements the facts as presented by the author, and provides a chronology of the litigation in which the author has been, and continues to be, involved. It notes that, after the final decision to reject the author’s application for refugee status was taken in December 1992, the author continued to take legal proceedings challenging the validity of that decision. Detention after December 1992 is said to have been exclusively the result of legal challenges by the author. In this context, the State party recalls that, by a letter of 2 November 1993, the Minister for Immigration offered the author the opportunity, in the event of his voluntary return to Cambodia, of applying for (re)entry to Australia after 12 months, on a permanent visa under the Special Assistance Category. The State party further adds that the author’s wife’s application for refugee status has been approved and that, as a result, the author was released from custody on 21 January 1994 and will be allowed to remain in Australia.

4.2 The State party concedes the admissibility of the communication in so far as it alleges that the author’s detention was “arbitrary” within the meaning of article 9, paragraph 1. It adds, however, that it strongly contests on the merits that the author’s detention was “arbitrary”, and that it contained elements of “inappropriateness, injustice and lack of predictability”.

4.3 The State party challenges the admissibility of other elements of the complaint relating to

article 9, paragraph 1. In this context, it notes that the communication is inadmissible ratione materiae, to the extent that it seeks to rely on customary international law or provisions of other international instruments such as the 1951 Convention Relating to the Status of Refugees. The State party argues that the Committee is competent only to determine whether there have been breaches of any of the rights set forth in the Covenant; it is not permissible to rely on customary international law or other international instruments as the basis of a claim.

4.4 Similarly, the State party claims that counsel's general claim that Australian policy of detaining boat people is contrary to article 9, paragraph 1, is inadmissible, as the Committee is not competent to review in abstracto particular government policies or to rely on the application of such policies to find breaches of the Covenant. Therefore, the communication is considered inadmissible to the extent that it invites the Committee to determine generally whether the policy of detaining boat people is contrary to article 9, paragraph 1.

....

5.1 In his comments, counsel takes issue with some of the State party's arguments. He disputes that the three-year period necessary for the final decision of the author's application for refugee status was largely attributable to delays in making submissions and applications by lawyers, with a view to challenging the decision-making process. In this context, he notes that of the 849 days which the administrative process lasted, the author's application was with the Australian authorities for 571 days - two thirds of the time. He further recalls that during this period the author was moved four times and had to rely on three unrelated groups of legal representatives, all of whom were funded with limited public resources and needed time to acquaint themselves with the file.

5.2 Counsel concedes that the author was given a domestic Protection (Temporary) Entry Permit on 21 January 1994 and released from custody, after his wife was granted refugee status because of her Vietnamese ethnic origin. It is submitted that the author could not have brought his detention to an end by leaving Australia voluntarily and returning to Cambodia, first because he genuinely feared persecution if he returned to Cambodia and, secondly, because it would have been unreasonable to expect him to return to Cambodia without his wife.

5.3 The author's lawyer reaffirms that his reliance on article 31 of the 1951 Convention Relating to the Status of Refugees or other instruments to support his allegation of a breach of article 9, paragraph 1, is simply for the purpose of interpreting and elaborating on the State party's obligations under the Covenant. He contends that other international instruments may be relevant in the interpretation of the Covenant, and in this context draws the Committee's attention to a statement made by the Attorney-General's Department before the Joint Committee on Migration, in which it was conceded that treaty bodies such as the Human Rights Committee may rely on other international instruments for the purpose of interpreting the scope of the treaty of which they monitor the implementation.

5.4 Counsel reiterates that he does not challenge the State party's policy vis-à-vis boat people in abstracto, but submits that the purpose of Australian policy, namely, deterrence, is relevant inasmuch as it provides a test against which "arbitrariness" within the meaning of article 9, paragraph 1, can be measured: "It is not possible to determine whether detention of a person is appropriate, just or predictable without considering what was in fact the purpose of the detention". The purpose of detention in the author's case was enunciated in the Minister for Immigration's introduction to the Migration Legislation Amendment Bill 1992; this legislation, it is submitted, was passed in direct response to an application by the author and other Cambodian nationals for release by the Federal Court, which was due to hear the case two days later.

....

*[On April 4, 1995, the Committee declared the petition admissible in so far as it appeared to raise issues under articles 9, paragraphs 1 and 4, and 14, paragraph 1]*

....

State party's merits submission and counsel's comments thereon

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated May 1996, the State party supplements the facts of the case and addresses the claims under articles 9, paragraphs 1 and 4, and 14, paragraph 1. It recalls that Australia's policy of detention of unauthorised arrivals is part of its immigration policy. Its rationale is to ensure that unauthorized entrants do not enter the Australian community until their alleged entitlement to do so has been properly assessed and found to justify entry. Detention seeks to ensure that whoever enters Australian territory without authorization can have any claim to remain in the country examined and, if the claim is rejected, will be available for removal. The State party notes that from late 1989, there was a sudden and unprecedented increase of applications for refugee status from individuals who had landed on the country's shores. This led to severe delays in the length of detention of applicants, as well as to reforms in the law and procedures for determination of on-shore applications for protection visas.

7.2 As to the necessity of detention, the State party recalls that unauthorised arrivals who landed on Australian shores in 1990 and early 1991 were held in unfenced migrant accommodation hostels with a reporting requirement. However, security arrangements had to be upgraded, as a result of the number of detainees who absconded and the difficulty in obtaining cooperation from local ethnic communities to recover individuals who had not met their reporting obligations . . . .

7.3 The State party points out that its policy of mandatory detention for certain border claimants should be considered in the light of its full and detailed consideration of refugee claims, and its extensive opportunities to challenge adverse decisions on claims to refugee status. Given the complexity of the case, the time it took to collect information on the continuously changing

situation in Cambodia and for *A*'s legal advisers to make submissions, the duration of the author's detention was not abusively long. Furthermore, the conditions of detention of *A* were not harsh, prison-like or otherwise unduly restrictive.

....

7.5 As to the claim under article 9, paragraph 1, the State party argues that the author's detention was lawful and not arbitrary on any ground. *A* entered Australia without authorization, and subsequently applied for the right to remain on refugee status basis. Initially, he was held pending examination of his application. His subsequent detention was related to his appeals against the decisions refusing his application, which made him liable to deportation. Detention was considered necessary primarily to prevent him from absconding into the Australian community.

7.6 The State party notes that the travaux préparatoires to article 9, paragraph 1, show that the drafters of the Covenant considered that the notion of "arbitrariness" included "incompatibility with the principles of justice or with the dignity of the human person". Furthermore, it refers to the Committee's jurisprudence according to which the notion of arbitrariness must not be equated with "against the law", but must be interpreted more broadly as encompassing elements of inappropriateness, injustice and lack of predictability [*Views on communication No. 305/1988, Hugo van Alphen v. The Netherlands, adopted on 23 July 1990, paragraph 5.8.*] Against this background, the State party contends, detention in a case such as the author's was not disproportionate nor unjust; it was also predictable, in that the applicable Australian law had been widely publicized. To the State party, counsel's argument that it is inappropriate per se to detain individuals entering Australia in an unauthorized manner is not borne out by any of the provisions of the Covenant.

7.7 The State party asserts that the argument that there is a rule of public international law, be it derived from custom or conventional law, against the detention of asylum seekers, is not only erroneous and unsupported by prevailing State practice, but also irrelevant to the considerations of the Human Rights Committee. The instruments and practice invoked by counsel - inter alia the 1951 Refugee Convention, Conclusion 44 of the Executive Committee of the UNHCR, the Convention on the Rights of the Child, the practice of 12 Western states - are said to fall far short from proving the existence of a rule of customary international law. In particular, the State party disagrees with the suggestion that rules or standards which are said to exist under customary international law or under other international agreements may be imported into the Covenant. The State party concludes that detention for purposes of exclusion from the country, for the investigation of protection claims, and for handling refugee or entry permit applications and protecting public security, is entirely compatible with article 9, paragraph 1.

....

8.1 In his comments, dated 22 August 1996, counsel takes issue with the State party's

explanation of the rationale for immigration detention. At the time of the author's detention, the only category of unauthorized border arrivals in Australia who were mandatorily detained were so-called "boat people". He submits that the Australian authorities had an unjustified fear of a flood of unauthorized boat arrivals, and that the policy of mandatory detention was used as a form of deterrence. As to the argument that there was an "unprecedented influx" of boat people into Australia from the end of 1989, counsel notes that the 33,414 refugee applications from 1989 to 1993 must be put into perspective - the figure pales in comparison to the number of refugee applications filed in many Western European countries over the same period. Australia remains the only Western asylum country with a policy of mandatory, non-reviewable detention.

8.2 In any way, counsel adds, lack of preparedness and adequate resources cannot justify a continued breach of the right to be free from arbitrary detention; he refers to the Committee's jurisprudence that lack of budgetary appropriations for the administration of criminal justice does not justify a four-year period of pre-trial detention. It is submitted that the 77-week period it took for the primary processing of the author's asylum application, while he was detained, was due to inadequate resources.

8.3 Counsel rejects the State party's attempts to attribute some of the delays in the handling of the case to the author and his advisers. He reiterates that Australia mishandled *A's* application, and maintains that there was no excuse for the authorities to take seven months for a primary decision on his application, which was not even notified to him, another eight months for a new primary decision, six months for a review decision, and approximately five months for a final rejection, which could not be defended in court. Counsel suggests that it is less important to determine why delays occurred, but to ask why the author was detained throughout the period when his application was being considered: when the original decision was referred back to immigration authorities after Australia could not defend it in court, the State party took the unprecedented step of passing special legislation (Migration Amendment Act 1992), with the sole purpose of keeping the author and other asylum seekers in detention.

....

8.7 On the issue of the "arbitrariness" of the author's detention, counsel notes that the State party incorrectly seeks to blame the author for the prolongation of his detention. In this context, he argues that *A* should not have been penalized by prolonged detention for the exercise of his legal rights. He further denies that the detention was justified because of a perceived likelihood that the author might abscond from the detention centre; he points out that the State party has been unable to make more than generalized assertions on this issue. Indeed, he submits, the consequences of long-term custody are so severe that the burden of proof for the justification of detention lies with the State authority in the particular circumstances of each case; the burden of proof is not met on the basis of generalised claims that the individual may abscond if released.

8.8 Counsel reaffirms that there is a rule of customary international law to the effect that asylum seekers should not be detained for prolonged periods, and that the pronouncements of

authoritative international bodies, such as UNHCR, and the practice of other states, all point to the existence of such a rule.

....

Examination of the merits

9.1 The Human Rights Committee has examined the present communication in the light of all the information placed before it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol to the Covenant. Three questions are to be determined on their merits:

(a) whether the prolonged detention of the author, pending determination of his entitlement to refugee status, was “arbitrary” within the meaning of article 9, paragraph 1;

....

9.2 On the first question, the Committee recalls that the notion of “arbitrariness” must not be equated with “against the law” but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author’s detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty. The question for the Committee is whether these grounds are sufficient to justify indefinite and prolonged detention.

9.3 The Committee agrees that there is no basis for the author’s claim that it is *per se* arbitrary to detain individuals requesting asylum. Nor can it find any support for the contention that there is a rule of customary international law which would render all such detention arbitrary.

9.4. The Committee observes however, that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. 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. In the instant case, the State party has not advanced any grounds particular to the author’s case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author’s detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1.

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**Baranowski v. Poland**

*Eur. Ct. H.R., Judgment of March 28, 2000*

*<<http://www.echr.coe.int>>*

*[The applicant, a Polish national, was arrested on June 1, 1993 and detained on charges of fraud until October 22, 1996. The Łódz Regional Court, at the prosecutor's request, first prolonged the applicant's detention until December 31, 1993. The court based its ruling in part on the fact that the investigation had not been completed. On December 30, 1993, the court further prolonged the applicant's detention until January 31, 1994. In early January the investigation was completed, and on January 11, 1994, the prosecutor lodged a bill of indictment with the court, under which the applicant remained in detention. In his petition to the European Court, the applicant alleged that his detention after January 31, 1994 lacked any legal basis. He argued that the fact that the indictment had been lodged with the court did not mean that his detention automatically continued after January 31, 1994. He further submitted that no provision of the Code of Criminal Procedure provided that detention was prolonged as a result of the transfer of the case to the court. Accordingly, the applicant complained of a violation of Article 5 § 1 of the European Convention in that his detention after January 31, 1994, under the bill of indictment had been unlawful, and of a violation of Article 5 § 4 in view of the length of the proceedings relating to the lawfulness of his detention.]*

*I. Alleged violation of Article 5 § 1 of the Convention*

42. The applicant submitted that his detention on remand, in so far as it had been effected under the bill of indictment and after the expiry of the detention order of 30 December 1993, had not been "lawful" within the meaning of Article 5 § 1 of the Convention, which states (in so far as relevant):

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

...”

43. The applicant agreed in substance with the Commission’s view that his detention had not been “lawful” since it had not been based on a “law” of adequate foreseeability but on a practice which had been entirely unsupported by any legislative provision or case-law, and had moreover arisen to fill a statutory lacuna. That practice could, therefore, neither replace or be equal to a “law”, nor fulfil the requirement of “foreseeability” of a “law” (see paragraph 63 of the Commission’s report).

44. The applicant further argued that at the material time there had been no legal provision stating that the fact of lodging a bill of indictment had had the effect of prolonging – indefinitely – detention ordered at the investigation stage. In his opinion, nothing had absolved the authorities from their duty to make an appropriate ruling on whether his detention should continue beyond the period fixed in the Łódz Regional Court’s decision, prolonging his detention until 31 January 1994.

45. On this point, the applicant asserted that Polish law had required the courts to apply section 299 § 1(6) of the Code of Criminal Procedure of 1969 and, therefore, the President of the Łódz Regional Court had been obliged under that provision to refer his case to the court session so that the applicant could obtain a decision on the lawfulness of his continued detention.

46. The Government did not deny that the applicant’s detention, in so far as it had been continued under the bill of indictment, had not been based on any legal provision but on practice, a practice which they called “placing a detainee at the disposal of a court”. They agreed that at the material time it had indeed been a question of common practice, arising out of the absence of any precisely formulated provision, that after the lodging of a bill of indictment with the court competent to deal with the case, that court had not been obliged to give, of its own motion, any further decision as to whether the period of detention fixed at the investigation stage should be prolonged.

47. The Government added, however, that the amendments to Polish criminal legislation, introduced by the Law of 29 June 1995 on 4 August 1996, had put an end to that practice. Following the Supreme Court’s resolutions (see paragraphs 31-32 above) it had been replaced by the new practice of referring each case in which a detention order made at the investigation stage had expired to a court session for the purpose of making a fresh ruling on whether detention should continue.

48. The Government acknowledged that the applicant’s detention had been continued after 31 January 1994 without an adequate judicial decision being given on the prolongation of this measure. In that context, they nevertheless stressed that such a situation had been in compliance with the substantive and procedural provisions of Polish law and that the relevant provisions had been accessible to the applicant, sufficiently precise and foreseeable. The Government nevertheless conceded that those provisions had not been specific enough and thus had brought

about the practice complained of.

49. Lastly, the Government stated that they abstained from making their own assessment of the lawfulness of the applicant's detention and asked the Court to rule whether the practice in issue had been compatible with the requirements of Article 5 § 1 of the Convention.

50. The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in Article 5 § 1 essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed (see, among other authorities, *Douiyeb v. the Netherlands* [GC], no. 31464/96, §§ 44-45).

51. However, the "lawfulness" of detention under domestic law is the primary but not always a decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible 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. The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein (see, among many other authorities, the *Winterwerp v. the Netherlands* judgment of 24 October 1979, Series A no. 33, pp. 19-20, § 45; and the *Erkalo v. the Netherlands* judgment of 2 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2477, § 52).

52. On this last point, the Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – 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 (see the *Steel and Others v. the United Kingdom* judgment of 23 September 1998, Reports 1998-VII, p. 2735, § 54).

53. Turning to the circumstances of the present case, the Court notes that the parties agree that between the date of expiry of the detention order of 30 December 1993 – namely 31 January 1994 – and the Łódź Regional Court's subsequent decision of 24 May 1994 on the applicant's liberty, there had been no judicial decision authorising the applicant's detention. It is also common ground that during this time the applicant was kept in detention solely on the basis of the fact that a bill of indictment had in the meantime been lodged with the court competent to deal with his case.

54. The Court observes that the domestic practice of keeping a person in detention under a bill

of indictment was not based on any specific legislative provision or case-law but, as the Commission had found and the parties acknowledged before the Court, stemmed from the fact that Polish criminal legislation at the material time lacked clear rules governing the situation of a detainee in court proceedings, after the expiry of the term of his detention fixed in the last detention order made at the investigation stage.

55. Against this background, the Court considers, first, that the relevant Polish criminal legislation, by reason of the absence of any precise provisions laying down whether – and if so, under what conditions – detention ordered for a limited period at the investigation stage could properly be prolonged at the stage of the court proceedings, does not satisfy the test of “foreseeability” of a “law” for the purposes of Article 5 § 1 of the Convention.

56. Secondly, the Court considers that the practice which developed in response to the statutory lacuna, whereby a person is detained for an unlimited and unpredictable time and without his detention being based on a concrete legal provision or on any judicial decision is in itself contrary to the principle of legal certainty, a principle which is implied in the Convention and which constitutes one of the basic elements of the rule of law.

57. In that context the Court also stresses that, for the purposes of Article 5 § 1 of the Convention, detention which extends over a period of several months and which has not been ordered by a court or by a judge or any other person “authorised ... to exercise judicial power” cannot be considered “lawful” in the sense of that provision. While this requirement is not explicitly stipulated in Article 5 § 1, it can be inferred from Article 5 read as a whole, in particular the wording in paragraph 1(c) (“for the purpose of bringing him before the competent legal authority”) and paragraph 3 (“shall be brought promptly before a judge or other officer authorised by law to exercise judicial power”). In addition, the habeas corpus guarantee contained in Article 5 § 4 further supports the view that detention which is prolonged beyond the initial period foreseen in paragraph 3 necessitates “judicial” intervention as a safeguard against arbitrariness. In the Court’s opinion, the protection afforded by Article 5 § 1 against arbitrary deprivations of liberty would be seriously undermined if a person could be detained by executive order alone following a mere appearance before the judicial authorities referred to in paragraph 3 of Article 5.

58. In conclusion and on the facts of the present case, the Court considers that the applicant’s detention was not “lawful” within the meaning of Article 5 § 1 of the Convention. Consequently, there has been a breach of that provision.

....

### **Questions**

1. Read the language of Articles 7(1), (2) and (3) of the American Convention on Human Rights

(hereinafter American Convention), 9(1) of the International Covenant on Civil and Political Rights (hereinafter ICCPR), and 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter European Convention on Human Rights or European Convention). Do these conventions have a similar scope of application or is the American Convention more restrictive because it only applies to deprivation of “physical liberty?” Does the fact that Article 5(1) of the European Convention establishes an exhaustive list of grounds according to which a person may be deprived of liberty, while the American Convention and the ICCPR do not, imply that this treaty provides a “more objective standard” to monitor compliance with this right? Do the other treaties allow States too wide a margin of discretion to set out reasons for depriving individuals of their right to liberty?

2. Assuming that the ICCPR, like the American Convention, only protects the right to “physical liberty,” could you argue that the scope of application of Article 9(1) of the ICCPR, as defined in General Comment 8 adopted by the Human Rights Committee, should be used to determine the scope of application of Article 7 of the American Convention?

3. Would you argue that the rights to liberty and security as enshrined in human rights treaties are distinct rights with different scopes of application? If so, how would you distinguish between them? What kind of “security” is protected by those rights? Do you find convincing the argument made by the Inter-American Commission in the *García* case that a threat of arbitrary and unlawful detention constitutes a violation of the right to personal security?

4. According to the preceding case law, how would you distinguish “unlawful” from “arbitrary” in the context of the right to liberty and security? Is it possible for an arrest to be lawful but arbitrary? Elaborate.

5. The American Convention and the ICCPR, unlike the European Convention, refer back to States’ domestic law as providing the grounds for depriving a person of his/her liberty. Does this mean that any reason provided by a State will be considered a legitimate ground? If not, how would you assess it? Do human rights treaties require that a “judicial authority” order the detention or do they leave it to domestic law to establish the procedure? If the latter is true, do States have absolute discretion to determine which authority may order the arrest of individuals or enforce that order?

6. Human rights treaties establish that grounds for arrest or detention and the procedure to be followed must be established by “law.” What is the scope of “law” in those provisions? Do they require an act adopted by the Legislative Branch or do they also refer to any other administrative regulation or “practice” followed by competent authorities? See the *Baranowski* case and the following excerpts from Advisory Opinion No. 6<sup>1</sup> adopted by the Inter-American Court:

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<sup>1</sup> Inter-Am. Ct. H.R., The Word “Laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986 (ser. A) No. 6 (1987).

16. The question before us does not go beyond inquiring as to the meaning that the word “laws” has in Article 30 of the Convention. It is, therefore, not a question of giving an answer that can be applied to each case where the Convention uses such terms as “laws,” “law,” “legislative provisions,” “provisions of the law,” “legislative measures,” “legal restrictions,” or “domestic laws.” On each occasion that such expressions are used, their meaning must be specifically determined.

17. Notwithstanding the above, the criteria of Article 30 are applicable to all those situations where the word “laws” or comparable expressions are used in the Convention in referring to the restrictions that the Convention itself authorizes with respect to each of the protected rights. . . .

. . . .

22. In order to guarantee human rights, it is 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. 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. . . .

23. The above may be inferred from the “principle” --a term used by the Permanent Court of International Justice (*Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 65, p. 56)-- of legality. This principle, which is found in almost all the constitutions of the Americas drafted since the end of the 18th century, is one and the same as the idea and the development of law in the democratic world and results in the acceptance of the existence of the so-called requirement of law (*reserva de ley*), by which fundamental rights can only be restricted by law, the legitimate expression of the will of the people.

. . . .

26. From that perspective, one cannot interpret the word “laws,” used in Article 30, as a synonym for just any legal norm, since that would be tantamount to admitting that fundamental rights can be restricted at the sole discretion of governmental authorities with no other formal limitation than that such restrictions be set out in provisions of a general nature. Such an interpretation would lead to disregarding the limits that democratic constitutional law has established from the time that the guarantee of basic human rights was proclaimed under domestic law. . . .

27. Within the framework of the protection of human rights, the word “laws” would not make sense without reference to the concept that such rights cannot be restricted at the sole discretion of governmental authorities. To affirm otherwise would be to recognize in those who govern virtually absolute power over their subjects. On the other hand, the word “laws” acquires all of its logical and historical meaning if it is regarded as a requirement of the necessary restriction of governmental interference in the area of individual rights and freedoms. The Court concludes that the word “laws,” used in

Article 30, can have no other meaning than that of formal law, that is, 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.

Does the fact that human rights treaties give supervisory bodies the power to assess in a particular case of arrest or detention whether the domestic law of a State has been respected imply that these bodies act as a “fourth instance court of appeals?”

7. Does the case law of the Inter-American Court and the Human Rights Committee define a similar scope for “arbitrary detention?” If so, is it an “objective” standard? Do you agree with the ruling of the Human Rights Committee in the “*A*” vs. *Australia* case that detaining asylum-seekers is not *per se* arbitrary detention, and therefore, not a violation of the right to liberty? Does this decision mean, in general terms, that arriving in a country and applying for asylum could be a legitimate ground for detention? Is there a set of “objective grounds” that must be assessed in a particular case to establish whether a detention that was initially lawful might later become arbitrary? Elaborate on your answer in light of the Human Rights Committee reasoning in the “*A*” case.

8. Does the Human Rights Committee have jurisdiction to apply Article 31 of the 1951 Convention Relating to the Status of Refugees<sup>2</sup> and Conclusion No. 44 (1986) of the Executive Committee of the Program of the U.N. High Commissioner for Refugees on detention of refugee and asylum-seekers,<sup>3</sup> as requested by the petitioner in the “*A*” case? What about using them for

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<sup>2</sup> Article 31, paragraph 1 provides:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

<sup>3</sup> Conclusion 44 provides in pertinent parts:

Noting that the term “refugee” in the present Conclusions has the same meaning as that in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, and is without prejudice to wider definitions applicable in different regions.

(a) Noted with deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation;

(b) Expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used

interpreting Article 9 in cases of asylum-seekers? Would your answer be different if the content of Article 31 and conclusion No. 44 had become customary international law? What would be your analysis in a similar case if it were decided by the Inter-American Commission and Court of Human Rights?

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**2. THE RIGHT TO BE INFORMED OF REASONS FOR ARREST AND OF ANY CHARGE AGAINST HIM OR HER**

**Article 7(4)**  
**American Convention on Human Rights**

4. Anyone who is detained shall be informed of the reasons for this detention and shall be promptly notified of the charge or charges against him.

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**Article 9(2)**  
**International Covenant on Civil and Political Rights**

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

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**Article 5(2)**

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fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order;

....

(e) Recommended that detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review;

....

## European Convention for the Protection of Human Rights and Fundamental Freedoms

2. 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.

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### Fox, Campbell and Hartley v. United Kingdom

182 Eur. Ct. H.R. (ser. A) (1990)

<<http://www.echr.coe.int>>

*[The applicants, citizens of Ireland, were arrested in Belfast under Northern Ireland anti-terrorist laws. They were informed that they were being arrested under section 11(1) of the 1978 anti-terrorist Act because they were suspected of being terrorists. During their detention applicants Fox and Campbell were asked about their suspected involvement that day in intelligence gathering and courier work for the Provisional Irish Republican Army. They were also questioned about their suspected membership in the organization. Applicant Hartley was suspected of involvement in a kidnapping incident which had taken place earlier that month. The Government claimed that Mr. Hartley was questioned about terrorist activities in a specific small geographic area, and about his involvement with the Provisional IRA. The area in question was where the kidnapping took place. Applicant Hartley denied any involvement in the kidnapping incident but did not contradict the Government's assertion that he was asked about it. No charges were brought against any of the applicants. The applicants alleged, inter alia, a breach of Article 5 § 2 of the European Convention, claiming that they were not promptly informed of the reasons for their arrest.]*

#### III. Alleged breach of article 5 § 2 (art. 5-2)

37. The applicants alleged a violation of Article 5 § 2 (art. 5-2), which reads . . . .

The Commission upheld this claim which was rejected by the Government.

38. In the applicants' submission, Article 5 § 1(c) (art. 5-1-c) refers to the grounds justifying the arrest and these are what should be communicated to detainees. They argued that suspected terrorism in itself is not necessarily an offence justifying an arrest under section 11. Accordingly, in breach of Article 5 § 2 (art. 5-2) they were not given at the time of their arrest adequate and understandable information of the substantive grounds for their arrest. In particular, they maintained that the national authorities' duty to "inform" the person is not complied with where, as in their cases, the person is left to deduce from the subsequent police interrogation the reasons for his or her arrest.

39. The Government submitted that the purpose of Article 5 § 2 (art. 5-2) is to enable an arrested person to judge the lawfulness of the arrest and take steps to challenge it if he sees fit. They argued that the information given need not be detailed and that it was enough that the arrested person should be informed promptly of the legal basis of his detention and of the “essential facts relevant under (domestic law) for the determination of the lawfulness of his detention”. Applying these principles to the facts of the present case they contended that the requirements of Article 5 § 2 (art. 5-2) were clearly met.

40. Paragraph 2 of Article 5 (art. 5-2) 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 (art. 5): by virtue of paragraph 2 (art. 5-2) 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 (art. 5-4) (see the van der Leer judgment of 21 February 1990, Series A no. 170, p. 13, § 28). 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.

41. On being taken into custody, Mr. Fox, Ms. Campbell and Mr. Hartley were simply told by the arresting officer that they were being arrested under section 11(1) of the 1978 Act on suspicion of being terrorists (see paragraphs 9 and 13 above). This bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 § 2 (art. 5-2), as the Government conceded.

However, following their arrest all of the applicants were interrogated by the police about their suspected involvement in specific criminal acts and their suspected membership of proscribed organisations (see paragraphs 9, 10, and 14 above). There is no ground to suppose that these interrogations were not such as to enable the applicants to understand why they had been arrested. The reasons why they were suspected of being terrorists were thereby brought to their attention during their interrogation.

42. Mr. Fox and Ms. Campbell were arrested at 3.40 p.m. on 5 February 1986 at Woodbourne RUC station and then separately questioned the same day between 8.15 p.m. and 10.00 p.m. at Castlereagh Police Office (see paragraph 9 above). Mr. Hartley, for his part, was arrested at his home at 7.55 a.m. on 18 August 1986 and taken to Antrim Police Station where he was questioned between 11.05 a.m. and 12.15 p.m. (see paragraph 13 above). In the context of the present case these intervals of a few hours cannot be regarded as falling outside the constraints of time imposed by the notion of promptness in Article 5 § 2 (art. 5-2).

43. In conclusion there was therefore no breach of Article 5 § 2 (art. 5-2) in relation to any of the applicants.

....

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**Michael and Brian Hill v. Spain**

*Communication No. 526/1993, U.N. Doc. CCPR/C/59/D/526/1993 (April 2, 1997)*

*<<http://sim.law.uu.nl>; <http://www.unhchr.ch>>*

*[The applicants, British citizens, were convicted of arson in Spain. The applicants maintained that they were innocent, and attributed their conviction to a series of misunderstandings during the trial caused by a lack of proper interpretation. Their petition to the Human Rights Committee included the claim that Spain violated article 9(2) of the International Covenant on Civil and Political Rights, insofar as inadequate translation prevented them of being informed in a timely manner of the reasons for their detention.]*

2.1 The authors owned a construction firm in Cheltenham, United Kingdom, which declared bankruptcy during the detention of the authors in Spain. In July 1985, they went on holiday to Spain. The Gandia police arrested them on 16 July 1985, on suspicion of having firebombed a bar in Gandia, an accusation which the authors have denied since the time of their arrest, claiming that they were in the bar until 2.30 a.m. but did not return at 4 a.m. to set fire to the premises.

2.2 At the police station, the authors requested the police to allow them to contact the British Consulate, so as to obtain the aid of a consular representative who could assist as an independent interpreter. The request was denied, and a young, unqualified interpreter, a student interpreter, was called to assist in the interrogation, which took place without the presence of defence counsel. The authors state that they could not express themselves properly, as they did not speak Spanish, and the interpreter's English was very poor. As a result, serious misunderstandings allegedly arose. They deny having been informed of their rights at the time of their arrest or during the interrogation and allege that they were not properly informed of the reasons for their detention until 7 or 8 hours, respectively, after the arrest.

....

2.5 On 19 July 1985, the authors were formally charged with arson and causing damage to private property. The indictment stated that the authors, on 16 July 1985, had left the bar at 3 a.m., driven away in their camper, returned at 4 a.m. and thrown a bottle containing petrol and petrol-soaked paper through a window of the bar.

2.6 On 20 July 1985, they appeared before the examining magistrate (Gandia No. 1) in order to

submit a statement denying their involvement in the crime.

....

State party's information and observations

....

5.2 The State party summarizes the situation in this case as follows:

*Concerning the detention:*

"1. On 16 July 1985, at around 4 a.m., two individuals, in a metallic grey camper with horizontal trim on the sides and rear and with a registration beginning with the letter A, arrived at the JM club, located in Grao de Gandia, and, after preparing a Molotov cocktail, threw it into the club, breaking several panes of glass above the door, then immediately fled the scene, having thereby started a fire in the premises.

2. An eyewitness to the incident called the police.

3. The police arrived at the scene, together with the fire brigade, and, after listening to the eyewitness, located the camper, registration A811 JAB, inside which they discovered a partly-empty plastic container with some four litres of petrol, and arrested the occupants of the camper, Messrs. Brian and Michael Hill.

4. In the presence of an interpreter, the detainees were immediately informed of their rights.

5. In the presence of the interpreter and with the assistance, at their request, of the legal aid lawyer on duty, the detainees made a statement to the police. They said that they had been in the club in the early hours of the day on which they were making their statement and had drunk 5 or 6 beers there before leaving at around 2.30 a.m. They admitted that the camper and the petrol container belonged to them, but denied having started the fire, acknowledging that 'they had in fact passed close by (the club) in the vehicle' after leaving the premises.

6. During the identification parade, the police showed several persons to the eyewitness, and the said eyewitness recognized Messrs. Hill as 'the persons who had set fire to the JM club the previous night by throwing a flaming bottle against its door, and who had fled in a large camper with a foreign registration'."

....

*[On 22 March 1995, the Human Rights Committee found the communication admissible. In its decision it considered that the facts submitted to the Committee raised or appeared to raise*

*questions regarding articles 9, 10, and 14 of the Covenant.]*

*Observations by the State Party*

....

9.2 As to the merits of the communication, the State party explains that the interpreter was not a person selected *ad hoc* by the local police but a person designated by the Instituto Nacional de Empleo (INEM) upon agreement with the Ministry of Interior. Interpreters must have satisfied professional criteria before being employed by INEM. The records indicate that Isabel Pascual was properly designated interpreter for the Hill brothers in Gandia and include a statement from INEM with respect to the assignment of Ms. Pascual and Ms. Rieta.

9.3 As to the authors' desire to communicate with the British Consulate, the State party contends that the documents reveal that the Consulate was duly informed of their detention.

....

9.9 As to the oral hearing, it is stated that Ms. Rieta was a well qualified interpreter . . . .

....

*Examination of the merits*

11. The Human Rights Committee has examined this communication in the light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

....

12.2 With regard to the authors' allegations of violations of article 9 of the Covenant, the Committee considers that the authors' arrest was not illegal or arbitrary. Article 9, paragraph 2, of the Covenant requires 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. The authors specifically allege that seven and eight hours, respectively, elapsed before they were informed of the reason for their arrest, and complain that they did not understand the charges because of the lack of a competent interpreter. The documents submitted by the State party show that police formalities were suspended from 6 a.m. until 9 a.m., when the interpreter arrived, so that the accused could be duly informed in the presence of legal counsel. Furthermore, from the documents sent by the State it appears that the interpreter was not an *ad hoc* interpreter but an official interpreter appointed according to rules that should ensure her competence. In these circumstances, the Committee finds that the facts before it do not reveal a violation of article 9, paragraph 2, of the Covenant.

.....

## Questions

1. Would you interpret Article 7(4) of the American Convention to establish two different obligations that should be ensured by the State at different stages of detention? Compare the language of Article 9(2) of the ICCPR, according to which the detainee must be informed of the grounds for detention “at the time of arrest” and Article 5(2) of the European Convention providing that the detainee must be informed promptly of both the reasons for arrest and the charges.
2. What is the scope of the right to be informed of the reasons for arrest? What about the scope of the right to be notified of the charges? Do Articles 7(4) of the American Convention, 9(2) of the ICCPR, and 5(2) of the European Convention entail a duty to inform the arrested person of his or her rights, as under the “Miranda rule”<sup>4</sup> in US constitutional law? What about notifying consular officials if the person arrested is a foreign national?<sup>5</sup>
3. Is there any difference between the duties under Article 7(4) of the American Convention and those under Article 8.2.b according to which every person accused of a criminal offense has the right to prior notification in detail of the charges against him or her? Is your answer applicable to similar provisions of the ICCPR and the European Convention?
4. Only Article 5(2) of the European Convention expressly establishes the right to an interpreter if the arrested person does not understand the language of the country where he or she is detained. Would you argue that this right has to be respected under Articles 7(4) of the American

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<sup>4</sup> The “Miranda rule” provides that prior to any custodial interrogation the person must be warned: 1) That he or she has the right to remain silent; 2) That any statement he or she does make may be used as evidence against him or her; 3) That he or she has the right to the presence of an attorney; 4) That if he or she cannot afford an attorney, one will be appointed for him or her prior to any questioning if he so desires (Black’s Law Dictionary 1012 (7th ed. 1999).

<sup>5</sup> Sub-paragraphs (b) of Article 36(1) of the Vienna Convention on Consular Relations provides the following:

if he [a detained foreign national] requests, the competent authorities of the host State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Convention and 9(2) of the ICCPR? Does your answer apply to cases where illegal aliens are arrested under administrative immigration laws?

5. Does “promptly” under Article 7(4) of the American Convention have the same scope as under Article 7(5) of the same treaty? What about similar provisions in the ICCPR and the European Convention? In light of the *Riebe Star et al.* case, the *Fox et.* case, and the *Hill* case, is it possible to determine what “promptly” means in the case law of international supervisory bodies?

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**3. THE RIGHT TO BE BROUGHT PROMPTLY BEFORE A JUDGE OR OTHER OFFICER AUTHORIZED BY LAW TO EXERCISE JUDICIAL POWER AND TO BE TRIED WITHIN A REASONABLE TIME**

**Article 7(5)  
American Convention on Human Rights**

Any person 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 a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

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**Article 9(3)  
International Covenant on Civil and Political Rights**

3. 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 and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

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**Article 5(3)  
European Convention for the Protection of Human Rights and Fundamental Freedoms**

3. Everyone arrested or detained in accordance with the provision of para. 1(c)<sup>6</sup> of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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a. “Promptly”

**Koster v. Netherlands**  
221 Eur. Ct. H.R. (ser. A) (1991)  
<<http://www.echr.coe.int>>

*[The applicant, while completing his compulsory military service, was arrested because he repeatedly refused to obey an order that he should take receipt of a weapon and a uniform. He was arrested on a Wednesday, and was brought before the Military Court on the following Monday. The applicant pleaded before the Military Court that the length of his detention prior to appearance before a competent legal authority had exceeded the four day limit set forth in a directive of March 21, 1983 which governed the bringing before a judicial authority of military personnel in custody, and which derived from article 5(3) of the European Convention. However, the Military Court confirmed the original detention and extended it by 30 days. In its opinion, article 5(3) did not lay down specific time limits. The applicant was subsequently sentenced to a term of one year's imprisonment. In his petition to the European Court, the applicant alleged a breach of article 5(3) of the European Convention.]*

22. The applicant complained that the failure to bring him before the Arnhem Military Court until five days after his arrest was not consistent with the promptness required under Article 5 para. 3 (art. 5-3) . . . .

23. The Government explained that the lapse of time in question had occurred because of the weekend, which fell in the intervening period, and the two-yearly major manoeuvres, in which the military members of the court had been participating at the time.

At the hearing before the Court, they conceded nevertheless that there had been a failure to comply with the directive of 21 March 1983 which, taking as its basis Article 5 para. 3 (art. 5-3) of the Convention, laid down that the Military Court was to sit within four days of an

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<sup>6</sup> Article 5.1(c) refers to the lawful arrest of a person to bring him/her before a 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.

arrest (see paragraph 18 above).

24. The use in the French text of the word “aussitôt”, with its constraining connotation of immediacy, confirms 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 (see the de Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p. 25, para. 52), 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 para. 3 (art. 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 (see the Brogan and Others judgment of 29 November 1988, Series A no. 145-B, pp. 32-33, para. 59).

25. Like the Commission, the Court considers that the manoeuvres in question did not justify any delay in the proceedings: as they took place at periodical intervals and were therefore foreseeable, they in no way prevented the military authorities from ensuring that the Military Court was able to sit soon enough to comply with the requirements of the Convention, if necessary on Saturday or Sunday.

Accordingly, and even taking into account the demands of military life and justice (see the de Jong, Baljet and van den Brink judgment, cited above, Series A no. 77, p. 25, para. 52), the applicant’s appearance before the judicial authorities did not comply with the requirement of promptness laid down in Article 5 para. 3 (art. 5-3).

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**Castillo Petruzzi v. Perú**

*Inter-Am. Ct. H.R., Judgment of May 30, 1999 (ser. C) No. 52 (1999)*

*[The petitioners, citizens of Chile, were convicted of treason against the State of Perú by a “faceless” military tribunal and sentenced to life imprisonment for their alleged involvement with the armed dissident group known as the Tupac Amaru Revolutionary Movement (MRTA). The petitioners complained that Perú violated numerous provisions of the American Convention, including article 7(5), in the application of its anti-terrorist laws against them. The laws permitted, among other things, that the applicants be held incommunicado for an extended pre-trial detention period. The State argued that the procedures used in the applicants’ case were justified because article 7 rights were suspended under the state of emergency declared by the Peruvian government in response to serious political violence.]*

104. Article 7, paragraph 5 of the American Convention provides that . . . .

105. Arguments of the Commission:

- a) Perú violated Article 7 of the Convention by not bringing the alleged victims before a judge within the reasonable time required under the Convention. In the case under study, “the military judge was not notified of the arrests, searches and expert reports and opinions until 30 days after the fact,” whereas the Convention requires that any person detained is to be brought before a judge either immediately or after an acceptable delay. An acceptable delay would be the “amount of time needed to prepare the transfer”;
- b) States “have a right and a duty to defend themselves against terrorist attacks.” The issue here, however, is whether a government of laws must ensure the guarantees of due process in the case of persons detained on suspicion of having committed terrorist acts;
- c) While Article 27 of the Convention regulates states of emergency, international case law holds that states of emergency must be ones in which there is a danger to the nation; even then, only certain rights are derogable. The fact that some rights are not among the non-derogable rights named in Article 27(2) of the Convention does not give the States blanket authority to suspend them; nor is the State permitted to suspend them simply because there is no law that says otherwise. Finally, the suspension of guarantees must not be incompatible with other obligations and should not result in any form of discrimination.

106. Arguments of the State:

- a) the certified copies of the court record show that Mr. Castillo Petruzzi was detained on October 15, 1993, and made a statement the following November 4. This proves that “he was in isolation [...] or *incommunicado* for fifteen days, not thirty”;
- b) “From [1980] onward, terrorism created a very tense situation in Perú [...] forcing the competent authorities to implement the laws that the circumstances dictated.” Given the situation, the Executive Branch used the authorities conferred under Articles 231.a of the 1979 Constitution and 137.1 of the 1993 Constitution to declare a 60-day state of emergency in the affected areas, regulated by a “body of stringent laws”; and
- c) the Commission is bringing a case against the State for allegedly violating Article 7 of the Convention, even though rights had been suspended because of the terrorism rampant in the country. Such suspensions are permissible under Article 27(2) of the Convention, which does not list Article 7 as one of the non-derogable rights.

107. The Court observes that the Commission did not allege violation of Article 7 in its application; it did so only in its final pleading. However, this does not prevent this Tribunal from examining, during the proceedings on the merits, the Commission's arguments concerning the defendants' prolonged detention.

108. Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "European Convention" or "Rome Convention") provides that "[e]veryone arrested or detained ... shall be brought promptly before a judge," the assumption being that anyone deprived of his freedom without any form of judicial control must be either released or brought promptly before a judge. The European Court of Human Rights held that while the word "promptly" must be interpreted with due regard for the "attendant circumstances," no situation, however grave, gave the authorities the power to prolong incarceration unduly without violating Article 5.3 of the European Convention.<sup>85</sup>

109. In the instant case, the detention 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. 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. As for Perú's allegation that the state of emergency that was declared involved a suspension of Article 7 of the Convention, the Court has 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, which must be specified with precision in the decree promulgating the state of emergency, would ... be unlawful."<sup>86</sup> 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."<sup>87</sup>

110. As to the State's alleged violation of Article 7(5) of the Convention, the Court is of the view that those Peruvian 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 the provision of the Convention to the effect that

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<sup>85</sup> *Cf. Eur. Court H. R., Brogan and Others Case, decision of 23 March 1988, Series A No. 145-B, paras. 58-59, 61-62.*

<sup>86</sup> *Habeas corpus in emergency situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8., para. 38, and Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 36.*

<sup>87</sup> *Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), supra note 86, para. 21.*

“[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power [...].”

111. Applying the laws in force to this specific case, the State held Mr. Mellado Saavedra, Mrs. Pincheira Sáez and Mr. Astorga Valdéz in custody, without judicial oversight, from October 14, 1993, to November 20, 1993, the date on which they were brought before a military court judge. Mr. Castillo Petruzzi, for his part, was detained on October 15, 1993, and brought before the judge in question on November 20 of that year. This Court finds that the period of approximately 36 days that elapsed between the time of detention and the date on which the alleged victims were brought before a judicial authority is excessive and contrary to the provisions of the Convention.

112. The Court therefore finds that the State violated Article 7(5) of the Convention.

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**Article 6**  
**Constitution of the Republic of Guatemala**  
*reprinted in 8 Constitutions of the Countries of the World*  
*(Gisbert H. Flanz Ed., Oceana Publications, Inc., 1997)*

No person may be arrested or detained except for a crime or misdemeanor and by virtue of a warrant issued according to the law by a competent judicial authority. Cases of flagrant delict or fleeing from justice are excepted. Prisoners will have to be made available to the competent judicial authority within a time limit not exceeding six hours and cannot be subject to any other authority.

The official or agent of the authority which violates what is provided in this article will be sanctioned according to the law, and the tribunals will automatically initiate the appropriate proceedings.

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**Article 12**  
**Constitution of the Republic of Paraguay**  
*reprinted in 14 Constitutions of the Countries of the World*  
*(Gisbert H. Flanz Ed., Oceana Publications, Inc., 1993)*

No one will be detained or arrested without a written order issued by a competent authority, except for those caught in flagrante delicto in relation to a crime punishable

with a prison sentence. Any arrested person has the right:

- 5) To be brought before a competent judge within 24 hours of his arrest so that the judge may take appropriate legal decisions in the case.

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**Article 21**  
**Constitution of the Republic of Panama**  
*reprinted in 14 Constitutions of the Countries of the World*  
*(Gisbert H. Flanz Ed., Oceana Publications, Inc., 1995)*

No one may be deprived of his liberty, except by virtue of a written order of a competent authority issued in accordance with legal formalities and for a reason previously defined by law. Those executing such orders are obliged to give a copy thereof to the interested person, if he requests it.

An offender surprised *flagrante delicto* may be apprehended by any person and must be delivered immediately to the authorities.

No one may be detained for more than twenty-four hours without being placed at the disposal of the competent authority. Public officials who violate this precept shall be punished by the loss of their employment, without prejudice to other penalties established by law for this purpose.

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**Ruth del Rosario Garcés Valladares v. Ecuador**  
*Case 11.778, Inter-Am. C.H.R. 494,*  
*Annual Report 1998, OEA/Ser.L/V/II.102, doc. 6 rev. (1999)*

*[The petitioner was working as the assistant manager for foreign trade at a bank at the time of her arrest. She was detained in 1992 as part of an anti-narcotics effort called "Operation Cyclone," and was held in incommunicado detention. Various money-laundering charges were brought against her. She was released after five years and eleven months of preventive detention, during which time she was acquitted of all charges against her. The petitioner complained that Ecuador violated her rights to liberty and personal integrity, fair trial and access to a simple and effective remedy, as embodied in articles 1, 5, 7, 8 and 25, respectively, of the American Convention. The State did not contest the petitioner's claim that the length of the incommunicado detention to which she was subjected violated article 5(2) of the Convention.]*

34. The petitioner argued in its initial complaint that the alleged victim was held *incommunicado* for five days at Interpol facilities. The State did not contest this allegation.

35. The petitioner attached to its response a press article published in *El Comercio* related to the case. The article states that the alleged victim had been held *incommunicado* for 55 days at a police facility. The State did not object to the contents of this article.

36. In its reply of March 13, 1998, the petitioner alleged that the victim had been held *incommunicado* for “more than one month.” The State was silent on the veracity of this allegation.

37. The Commission notes that the State provided the transcripts of three statements made by the alleged victim while detained at the office of Interpol. The last of these transcripts was dated July 14, 1992. The State also presented a document certifying her admission to the Women’s Social Rehabilitation Center of Quito dated November 19, 1992.

38. Based on these elements, the Commission concludes that the alleged victim was arrested on June 22 but was not transferred to a detention center until November 19, 1992. These elements though are not enough to conclude that she remained *incommunicado* for four months, particularly when the petitioner has referred, in an inconsistent manner, to shorter periods of isolation. However, it has been established that she was held at a facility controlled by the police at least between June 22 and July 14, 1992, that is, more than 22 days.

39. The Inter-American Court has stated:

*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 expressly established by the law. Even in this 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 defense during his incarceration [I/A Court H.R., *Suárez Rosero Case, Judgment of November 12, 1997, para. 51*]

40. The Commission notes that the domestic legislation provides for a maximum period of isolation during detention. Article 22(19)(h) of the Political Constitution of Ecuador states that such period shall not exceed 24 hours.

41. The State has failed to present information challenging the petitioner’s claim on the unlawfulness of the isolation. This is equivalent to admitting that the alleged victim in fact remained in that state beyond the time limit provided by the law.

42. The information provided by the parties also reveals that the alleged victim was kept *incommunicado* at the Interpol office. The Inter-American Court has established that police

facilities are unsuitable to accommodate persons held in preventive detention [*I/A Court H.R., Suárez Rosero Case, idem supra, para. 46.*]

43. As a result, the Commission concludes that Ruth Garcés Valladares was held *incommunicado* beyond the time limits contemplated by the law in violation of Article 7(2) of the American Convention.

44. The petitioner has also argued that holding the alleged victim *incommunicado* for such a long period constitutes cruel and inhuman treatment under the terms of Article 5(2) of the American Convention. This provision reads:

No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

45. The Inter-American Court has established that the mere verification that a person has been held *incommunicado* for a long period is indicative of the fact that such person has been subjected to cruel and inhuman treatment. This is more so when it is determined that isolation for such a period is contrary to domestic law. [*I/A Court H.R., Suárez Rosero Case, idem supra, para. 91.*]

46. In this regard the Inter-American Court has said:

One of the reasons for which lack of communications is conceived as an exceptional instrument is for the grave effects it has on the detained person. In effect, isolation from the outside world produces in any person moral suffering and psychological disturbance and puts that person in a situation of particular vulnerability[...]

47. The Commission concludes that the length of the *incommunicado* detention to which Ruth Garcés Valladares was subjected to, violated Article 5(2) of the American Convention.

### **Questions**

1. Do you consider that under Article 7(5) of the American Convention only those individuals arrested or detained on a criminal charge have the right to be brought before a judge or other officer authorized by law? How would you decide on an alleged violation of this right in *Riebe Star et al.* [*see supra*],<sup>7</sup> where the three victims were arrested on the basis of an infraction of immigration laws and were deported after those infractions appeared to be established in administrative proceedings? Would your answer change if that case were to be decided under

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<sup>7</sup> Though it appears that petitioners in that case argued a violation of Article 7(5), the Commission failed to analyze that issue in the report on the merits.

Article 9(3) of the ICCPR or Article 5(3) of the European Convention?

2. How do the European and Inter-American Courts determine the scope of “promptly” in the context of Articles 7(5) and 5(3), respectively? According to Inter-American case law if a maximum period of *incommunicado* detention is established in the Constitution of a State or its domestic laws, the Commission and Court will use that standard to establish whether or not the right to be brought promptly before a competent authority has been violated [see, for example, *Suárez Rosero* and *Garcés Valladares*.] What would be your position if a Constitution or national law authorized *incommunicado* detention for 4 days?

3. Did the Inter-American Court hold in *Castillo Petruzzi* that a State can not retain a person *incommunicado* for 15 days even after derogating the right to liberty during a state of emergency? What does “derogation” mean? Is there any limitation for States that derogate the exercise of rights considered derogable under Article 27 of the American Convention? [see also *Aksoy v. Turkey*<sup>8</sup> decided by the European Court.] Would you argue that since the purpose of this right is to ensure access to a court to challenge the legality of detention, it should be a non-derogable right like habeas corpus? [see the following section on the right to habeas corpus.]

4. Does the ruling of the Inter-American Court in *Suárez Rosero* and the decision of the Commission in *Garcés Valladares* following that case law imply that a violation of the right to be brought promptly before a competent authority also constitutes an automatic violation of Article 5(2) of the American Convention protecting the right not to be subjected to cruel and inhuman treatment?

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**b. “Judge or Other Officer Authorized by Law to Exercise Judicial Power”**

**Schiesser v. Switzerland**  
34 *Eur. Ct. H.R. (ser. A)* (1979)  
<<http://www.echr.coe.int>>

*[The applicant was arrested and brought before the Winterthur District Attorney, who made an order directing that he be placed in detention on remand. In his petition to the Commission, the applicant alleged a violation of article 5(3) of the European Convention in that the District Attorney could not be regarded as an “officer authorized by the law to exercise judicial power,” within the meaning of that provision. The State asserted that the District Attorney had acted as*

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<sup>8</sup> *Eur. Ct. H.R.*, Judgment of December 18, 1996, Reports 1996 VI (1996),  
<<http://www.echr.coe.int>>

*an investigating authority in which capacity he was required to be equally thorough in gathering evidence in favor of and against the accused; accordingly, the State argued that the District Attorney did in fact fulfill a judicial function that was appropriate for purposes of article 5(3).]*

27. In providing that an arrested person shall be brought promptly before a “judge” or “other officer”, Article 5 para. 3 (art. 5-3) leaves the Contracting States a choice between two categories of authorities. It is implicit in such a choice that these categories are not identical. However, the Convention mentions them in the same phrase and presupposes that these authorities fulfil similar functions; it thus clearly recognises the existence of a certain analogy between “judge” and “officer”. Besides, were this not so, there would scarcely be any explanation for the inclusion of the adjective “other”.

28. “Magistrat” in French and, even more, “officer” in English manifestly have a wider meaning than “juge” and “judge”.

Again, the exercise of “judicial power” is not necessarily confined to adjudicating on legal disputes. In many Contracting States, officers (magistrats) and even judges exercise such power without adjudicating, for example members of the prosecuting authorities and investigating judges.

A literal analysis thus suggests that Article 5 para. 3 (art. 5-3) includes officials in public prosecutors’ departments as well as judges sitting in court (les magistrats du parquet comme ceux du siège).

29. As regards the context of the words falling to be interpreted, the Government and the Commission note that throughout Article 5 (art. 5) use is made of expressions of two kinds, one precise - “court” (para. 1(a) and (b), para. 4) (art. 5-1-a, art. 5-1-b, art. 5-4) and “judge” (para. 3) (art. 5-3) - and the other rather vague - “competent legal authority” (para. 1(c)) (art. 5-1-c) and “officer authorised by law to exercise judicial power” (para. 3) (art. 5-3). In their view, it is reasonable to deduce from this that the first kind of expression contemplates stricter requirements than the second kind.

The Court shares this opinion but wishes to emphasise the limits of the distinction which it establishes.

Since paragraph 1(c) forms a whole with paragraph 3 (art. 5-1-c, art. 5-3), “competent legal authority” is a synonym, of abbreviated form, for “judge or other officer authorised by law to exercise judicial power” (Lawless judgment of 1 July 1961, Series A no. 3, p. 52; Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 75, para. 199).

In the present case, greater assistance can be gained from a comparison of paragraphs 3 and 4 (art. 5-3, art. 5-4): unlike paragraph 3, paragraph 4 requires the intervention of a “court”. Before

a body can properly be regarded as a “court”, it must, *inter alia*, be independent of the executive and of the parties (Neumeister judgment of 27 June 1968, Series A no. 8, p. 44; De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 41, para. 78), but this also holds good for the “officer” mentioned in paragraph 3 (art. 5-3): while the “judicial power” he is to exercise, unlike the duties set out in paragraph 4 (art. 5-4), may not take the form of adjudicating on legal disputes (“un caractère juridictionnel”), nonetheless judicial power is likewise inconceivable if the person empowered does not enjoy independence (*see* paragraph 31 below).

30. The ordinary meaning of the expression in question (*see* paragraph 28 above), read in its context (*see* paragraph 29), is moreover in harmony with the object and purpose of Article 5 (art. 5), as to which Government and Commission take the same view.

According to the Government, the purpose of Article 5 para. 3 (art. 5-3) is to guarantee the impartiality and objectivity of the person before whom the individual concerned will be brought. In addition, the Government see the appearance before a judge or other officer as calculated to protect everyone against any unjustified arrest and detention.

For the Commission, the object of the provision under consideration is to afford to individuals deprived of their liberty a special guarantee: recourse not to a specific institution, namely a court, but to a procedure of a judicial nature.

The Court views Article 5 (art. 5) as designed to ensure that no one should be arbitrarily dispossessed of his liberty (*see* the Winterwerp judgment of 24 October 1979, Series A no. 33, p. 16, para. 37). This overall purpose entails, in the area covered by paragraph 4 (art. 5-4), the necessity of following a procedure that has a “judicial character” and gives “guarantees appropriate to the kind of deprivation of liberty in question”, without which it would be impossible to speak of a “court” (above-mentioned De Wilde, Ooms and Versyp judgment, pp. 40-41, para. 76). The “officer” referred to in paragraph 3 (art. 5-3) must, for his part, offer guarantees befitting the “judicial” power conferred on him by law.

31. To sum up, the “officer” is not identical with the “judge” but must nevertheless have some of the latter’s attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested.

The first of such conditions is independence of the executive and of the parties (*see*, *mutatis mutandis*, the above-mentioned Neumeister judgment, p. 44). This does not mean that the “officer” may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence.

In addition, under Article 5 para. 3 (art. 5-3), there is both a procedural and a substantive requirement. The procedural requirement places the “officer” under the obligation of hearing himself the individual brought before him (*see*, *mutatis mutandis*, the above-mentioned Winterwerp judgment, p. 24, para. 60); the substantive requirement imposes on him the

obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons (above-mentioned Ireland v. the United Kingdom judgment, p. 76, para. 199).

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### **Questions**

1. Does a State have a certain degree of discretion to set out in its laws whether an arrested or detained person will be brought before a court or other officer authorized by law to exercise judicial power? If so, is that discretion absolute or are there certain characteristics that an “officer” must comply with to meet the standard established in European case law? Would you use the European standards developed in *Schiesser* to inform the interpretation of Article 7(5) of the American Convention? Elaborate.
2. Does a prosecutor always comply with the requirements set out in the European case law? What about an administrative judge deciding on the application of immigration laws?
3. Does a law providing that a court or “other officer” may only review whether procedural rights have been respected in the arrest or detention of person meet the standard set forth in the preceding case law? If not, is there any objective substantive standard that must be reviewed to determine the legality of detention? What defines the standard, international or domestic law?

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### **c. “Trial within a Reasonable Time”**

**Mansur v. Turkey**  
319-B Eur. Ct. H.R. (ser. A) (1995)  
<<http://www.echr.coe.int>>

*[In 1981, a Greek court sentenced the applicant to four years’ imprisonment for drug trafficking between Greece and Turkey. In 1984, in respect of the same facts, criminal proceedings were brought against him by two separate courts in Turkey. The applicant was arrested and placed in pre-trial detention until July 1, 1991. His detention was repeatedly prolonged because of the “nature of the offense” of which he was accused, and the first two years of his detention in Turkey had been taken up exclusively with correspondence between the Greek and Turkish judicial authorities. The applicant claimed that the length of his pre-trial detention had*

*contravened article 5 § 3 of the European Convention.]*

49. Mr Mansur complained of the length of his detention pending trial. He considered it contrary to Article 5 para. 3 (art. 5-3) of the Convention . . . .

50. The Government contested this view, in the alternative, whereas the Commission accepted it.

*B. Reasonableness of the length of detention*

52. It falls in the first place to the national judicial authorities to ensure that, in a given case, the detention of an accused person pending trial does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of presumption of innocence, a departure from the rule of respect for individual liberty and set them 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 applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 para. 3 (art. 5-3) of the Convention (see, among other authorities, the *Letellier v. France* judgment of 26 June 1991, Series A no. 207, p. 18, para. 35).

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 continue to justify the deprivation of liberty (*ibid.* and see the *Wemhoff v. Germany* judgment of 27 June 1968, Series A no. 7, pp. 24-25, para. 12, and the *Ringeisen v. Austria* judgment of 16 July 1971, Series A no. 13, p. 42, para. 104). 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 (see the *Matznetter v. Austria* judgment of 10 November 1969, Series A no. 10, p. 34, para. 12; the *B. v. Austria* judgment of 28 March 1990, Series A no. 175, p. 16, para. 42; and the *Letellier* judgment previously cited, p. 18, para. 35).

53. During the period covered by the Court’s jurisdiction *ratione temporis* the Edirne First Assize Court (“the first court”) considered the question of the applicant’s continued detention on nine occasions of its own motion.

As grounds for refusing to release Mr Mansur it cited “the nature of the offence” the applicant stood accused of and “the state of the evidence” (see paragraph 31 above); on three occasions it omitted to state the reasons for its decision.

The Government emphasised the heavy sentence to which the accused was liable, the danger that he would abscond or destroy evidence and the risk of collusion. Mr Mansur had no fixed abode

in Turkey and, once released, might have ignored the summonses of the judicial authorities or evaded enforcement of the sentence, only the length of which remained to be determined.

54. The applicant complained of the repetitiveness of the orders in issue and asserted that he had always lived in Turkey and worked as a trader in the Great Bazaar in Istanbul. The courts had therefore neglected to look into the true facts of his situation.

55. The Court points out that the danger of an accused's absconding cannot be gauged solely on the basis of the severity of the sentence risked. It 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 (see, *mutatis mutandis*, the Letellier judgment previously cited, p. 19, para. 43).

In the instant case the first court's orders confirming detention nearly always used an identical, not to say stereotyped, form of words, and on three occasions gave no reasons.

56. The expression "the state of the evidence" could be understood to mean the existence and persistence of serious indications of guilt. Although in general these may be relevant factors, in the present case they cannot on their own justify the continuation of the detention complained of (see the *Kemmache v. France* (nos. 1 and 2) judgment of 27 November 1991, Series A no. 218, p. 24, para. 50).

57. In the light of these considerations, the Court holds that the applicant's continued detention during the period in question contravened Article 5 para. 3 (art. 5-3).

That conclusion makes it unnecessary to look at the way in which the judicial authorities conducted the case.

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**Jorge A. Giménez v. Argentina**  
*Case 11.245, Inter-Am. C.H.R. 33,*  
*Annual Report 1995, OEA/Ser.L/V/II.91, doc. 7 rev. (1996)*  
*[Footnotes omitted]*

*[The petitioner was arrested on September 29, 1989, and an order of pretrial detention was issued shortly thereafter. His various requests for conditional release were denied by the courts. In December 1993, the petitioner was convicted of aggravated robbery plus two counts of automobile theft. He was sentenced to nine years in prison, which was affirmed by the Appeals*

*Court. In December 1994, the petitioner was released on bail. The decision concluded that he had served in pre-trial detention two-thirds of his sentence, according to the system established by Law 24,390.<sup>9</sup> In his petition to the Commission, the petitioner alleged that his prolonged detention in the absence of a conviction was unreasonable and violated articles 7(3) and 8(2) of the Convention.]*

59. The case before us raises the following problems in interpreting the various provisions of the Convention. First is the question of establishing what the entitlement “to be tried within a reasonable time” means in the context of Article 7(5) of the Convention; and, in particular, whether in this case the prolongation of detention has ceased to be reasonable. Another question is the determination of whether prolonged incarceration without trial beyond a reasonable time constitutes a violation of the presumption of innocence guaranteed in Article 8(2). The Commission must also consider whether the prolonged imprisonment of Mr. Giménez also violated his right to a trial with a reasonable time as contemplated by Article 8(1) of the Convention.

*C. Relevant domestic law*

60. The Argentine courts have based their decisions rejecting the request for release on various provisions of internal positive law.

61. According to Article 366 of the Code of Criminal Procedure<sup>10</sup>, preventive custody may be

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<sup>9</sup> On November 1994, Law No. 24.390 was passed in Argentina, limiting the duration of preventive detention. Articles 1, 2 and 7 state as follows:

1. The length of preventive detention shall not exceed two years. However, when the number of crimes the defendant is charged with, or the evident complexity of the cases have impeded the finalization of the proceedings in the aforementioned deadline, this may be extended one more year by judicial decision, which shall be immediately notified to the corresponding court of appeals for appropriate control.

2. The above mentioned deadlines shall be extended six more months in the case that they expire after a conviction which is not final.

7. Once the two-year deadline mentioned in Article 1 has expired, every day in preventive detention shall be counted as two days of conviction or one of reclusion.

<sup>10</sup> Article 366 of the Code of Criminal Procedure establishes that the detention shall become custody pending trial when all of the following are present:

1. The existence of a crime is substantiated by inconclusive evidence at least;

ordered when the following requirements are met: there is prima facie evidence of a crime; the accused has made a statement during the preliminary examination, or is apprised of the charges against him or her; and there exists a reasonable suspicion as to his or her guilt.

62. Article 379 of the Code of Criminal Procedure establishes the conditions under which an accused person can be released on bail. In particular, paragraph 6 states that such release must be granted when the period of preventive custody has exceeded the term specified in Article 701, which may in no case be more than two years.

63. Article 701 of the Code of Criminal Procedure in turn provides that “*All cases must be completely terminated within the period of two years, not counting any delays caused by statements of the parties, letters rogatory or requisitions, the testimony of experts or other necessary procedures the duration of which is not governed by action of the court.*” The Government contends that the two-year period stipulated in Articles 379(6) and 701 provides the foundation for a “reasonable length of time” which corresponds to the guarantees established in Article 7(5) of the Convention. However, the Government rejects the notion that these laws indicate that any period of preventive detention beyond two years has exceeded a reasonable period of time and therefore the application of Article 379(6) must be automatic. Rather, the Government asserts that by using the word “may” in Article 379, the Code of Criminal Procedure bestows upon the judge the authority, but not the obligation, to release an accused from preventive detention.

64. Moreover, the Government argues that this interpretation of Article 379 is reinforced by the provisions in Article 380 of the Code of Criminal Procedure. Article 380 states:

In spite of provisions in the preceding article, a request for release of the prisoner may be rejected when the objective assessment of the characteristics of the act and the personal conditions of the accused could, in essence, make it possible to assume that the above said prisoner will attempt to evade justice. The provisions in this article shall not restrict the application of subsections 2, 3, 4, and 5 of the preceding article.

65. To support its argument, the Government also cites the Commission’s decision in its Report No. 17/89, which holds that “*When vesting this power, the legislator is appealing to the sound judgment of the judge. In other words, what is involved is a regulated power, not an obligation,*

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2. The detainee has given--or has refused to give--a statement during the preliminary examination, and has been apprised of the reason for his imprisonment; and
  3. There are sufficient grounds, in the opinion of the judge, for believing that the defendant has committed the offense.

When the conditions cited in items 1 and 3 have been found without merit, the judge shall officially rescind the order for preventive custody.

*and hence the release of the prisoner is something that is within the discretionary powers of the judge.”*

66. Therefore, the Government contends that in each case the definition of a “reasonable length of time” must come from the harmonious consideration of Articles 379(6) and 380. Preventive detention beyond two years may be “reasonable” under Argentine law if so decided by the national judicial authority in accordance with Article 380.

67. The Commission considers that a “reasonable length of time” for incarceration before conviction cannot be established in the abstract and thus belies the Government’s contention that the 2-year period stipulated in Article 379(6) provides a criteria of reasonableness which corresponds to the guarantees found in Article 7(5) of the Convention. A period of pre-trial detention cannot be considered per se “reasonable” simply because it is prescribed by law. Rather, as the Government itself argued in defending its analysis of Article 380, whether a period of detention exceeds a reasonable length of time must be based on the “sound judgement of the judge,” using those criteria established by law.

68. Therefore, to determine whether the use of pre-trial detention in the present case is compatible or incompatible with the Convention, the Commission must determine what constitutes a “reasonable length of time” for incarceration without conviction under Article 7(5) of the Convention.

69. In its response to petitioner’s allegations, the Argentine government recognized, as did the Commission in its Report 17/89, that the concept of “reasonable time” in the Convention cannot be defined with precision. In this regard, the Commission has recognized that member states to the Convention are not obligated to set a fixed period of time for incarceration before conviction independent of the individual circumstances. Since it is not possible to establish an abstract criteria for a “reasonable length of time,” what is reasonable must be analyzed in light of the specific facts of each case.

70. The Commission has always held that the determination of whether or not a detention is unreasonable inevitably must be analyzed on a case by case basis. However, this does not preclude the possibility of a norm that establishes a general term limit beyond which a detention is considered prima facie illegal no matter the crime charged or the complexity of the case. This would be consonant with the principle of presumption of innocence as well as all other rights associated with due process.

71. Although the Commission agrees with the government that article 701 of the Argentinean Criminal Procedure Code need not imply an automatic release from pre-trial incarceration, any detention that is prolonged beyond that period should be deemed prima facie unlawful. This follows because any norm that authorizes the release of a prisoner from jail cannot be interpreted so as to allow the preventive detention to be prolonged for a greater length of time than the procedural code deems reasonable for the entire judicial procedure.

72. The State's interest in resolving alleged criminal cases cannot breach the reasonable restriction of the individual's fundamental rights. This concern is evident in the Argentinean legislation which regulates time limits for the criminal prosecution. To this end, it is crucial to note that preventive detention applies only in exceptional cases and its extension must be strictly scrutinized especially when the duration exceeds the time limit stipulated by law for the entire criminal procedure. Preventive detention may be unreasonable without exceeding two years. At the same time, incarceration without conviction may be reasonable, even after the two-year period stipulated in Articles 379(6) and 701 has expired.

73. As a result, since this is an area that in the domestic law of Argentina is largely subject to interpretation by the courts, it is up to the Commission to decide whether the criteria used by the domestic courts are "relevant and sufficient" to justify the length of the detention period.

*D. Reasonableness of the length of incarceration without conviction: article 7(5)*

74. Article 7(5) of the Convention stipulates that . . . .

75. To understand the precise scope of this provision it is helpful to set it in context. Article 7, which begins with an affirmation of the right of everyone to liberty and security of person, specifies the situations and conditions in which derogations from this principle may be allowed. It is in light of this presumption of liberty that national courts, and then the Convention organs, must determine whether the detention of an accused person prior to a final judgment has, at some stage, exceeded a reasonable limit.

76. The rationale behind this guarantee is that no person should be punished without a prior trial which includes a charge, the opportunity to defend oneself, and a sentence. All these stages must be completed within a reasonable time. The time limit is intended to protect the accused with respect to his or her fundamental right to personal liberty, as well as the accused's personal security against being the object of an unjustified procedural risk.

77. The State must prove guilt within a reasonable period of time in order to ensure and institutionalize confidence in the system's procedural fairness. The statement of guilt or innocence is equally fair as long as due process guarantees are respected. The fairness and impartiality of the procedure are the ultimate ends to be achieved in a state governed by the rule of law.

78. Thus, the principle of the rule of law that establishes the need for criminal prosecution of all crimes by the State, cannot justify an unlimited length of time to resolve the criminal matter. Otherwise, there would be an implicit assumption that the State always prosecutes guilty people and that thus the length of time taken to convict the accused is irrelevant. By international standards, all persons accused of a criminal offense must be considered innocent until proven guilty.

79. Article 8(2) of the Convention, which guarantees the right to presumption of innocence states:

Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law...

80. In addition, the risk of inverting the presumption of innocence increases with an unreasonably prolonged pre-trial incarceration. The guarantee of presumption of innocence becomes increasingly empty and ultimately a mockery when pre-trial imprisonment is prolonged unreasonably, since presumption notwithstanding, the severe penalty of deprivation of liberty which is legally reserved for those who have been convicted, is being visited upon someone who is, until and if convicted by the courts, innocent.

81. The right to defense also guaranteed in the Convention under article 8(2)(f) is threatened by lengthy incarceration without conviction because, in some cases, it increases the defendant's difficulty in mounting a defense. With the passing of time, the limits of acceptable risks that are calculated into the defendant's ability to present evidence and counterarguments are enhanced. The possibility to convene witnesses diminishes as well as the strength of any counterarguments.

*C. The prolonged imprisonment of Mr. Giménez was unreasonable*

82. In the present case, the Commission must analyze the Argentinean judicial authorities' reasons for repeatedly denying Mr. Giménez' request for release from prison to properly conclude whether the justifications for pre-trial incarceration are "relevant and sufficient" such that the accused's detention is "reasonable" under Article 7(5) of the Convention.

83. To this effect, the Commission has developed a two-part analysis to determine whether an accused's pre-trial incarceration violates Article 7(5) of the Convention. First, the national judicial authorities must justify an accused's preventive detention using relevant and sufficient criteria. Second, where the Commission concludes that the findings of the national judicial authorities are adequately "relevant and sufficient" to justify continued detention, it must then examine whether these authorities used "special diligence" in the conduct of the proceedings so that the length of detention would not be unreasonable. The Convention organs must determine whether the time that has elapsed, for whatever reason, before judgment is passed on the accused has at some stage exceeded a reasonable limit whereby imprisonment without conviction imposes a greater sacrifice than could, in the circumstances of the case, reasonably be expected of a person presumed innocent. Thus, where continued detention ceases to be reasonable, either because the justifications for incarceration are not "relevant or sufficient," or the length of the judicial proceedings is unreasonable, provisional release must be granted.

84. The purpose of preventive detention is to ensure that the accused will not abscond or otherwise interfere with the judicial investigation. The Commission stresses that preventive detention is an exceptional measure and only applies in cases where there exists a reasonable

suspicion that the accused will either evade justice or impede the preliminary investigation by intimidating witnesses or otherwise destroying evidence. Such a measure is necessarily exceptional because of the preeminent right to personal liberty and the risk that pre-trial incarceration poses for the right to presumption of innocence and due process guarantees, including the right to defense.

85. In the present case, the courts of Argentina based their refusal to grant the release of Mr. Giménez on bail on the nature of the offense he is said to have committed; on his criminal record; and on the prospect of severe punishment. According to those who sit in judgment, those criteria have led them to believe that if Mr. Giménez were to be released on bail, he would manage to evade the law.

*i. Relevant and sufficient Criteria*

*a. Danger of Absconding, Seriousness of the Crime and the Potential Severity of the Sentence*

86. Both the argument based on the seriousness of the crime and that of the severity of the punishment can in principle be taken into account when the risk of the detainee's evasion is examined. The Commission nevertheless believes that since both arguments are inspired by criteria of penal retribution, the use thereof to justify prolonged preventive imprisonment has the effect of impairing the purpose of the preventive measure, converting it, for all intents and purposes, into a substitute for the punishment depriving the prisoner of his freedom. The balance that must be struck between the general interest of society in suppressing crime and the interest of the individual in seeing that his or her fundamental rights are respected breaks down to the detriment of the individual, upon whom a greater sacrifice is imposed.

87. Moreover, the anticipation of severe punishment, after a lengthy period of detention has elapsed, is an insufficient criterion for assessing the risk of the detainee's evasion. The threat that the future sentence represents to the person in prison is vitiated if detention continues, while his or her perception that he or she has already served part of the sentence is heightened.

88. The Commission also notes that in such a case the State can perfectly well resort to some other type of cautionary measure to ensure that the accused appears for trial--measures which do not entail further restriction of his or her personal freedom. Furthermore, the Commission finds that the notion that there exists a sense of proportion between the sentence and the pre-trial incarceration is actually a justification for the anticipated punishment, and thus in violation of the presumption of innocence guaranteed in the Convention.

89. Given the fact that pre-trial incarceration is a deprivation of liberty of a person who still benefits from the presumption of innocence, it should be based solely on the probability of the accused's abusing conditional liberty and fleeing, and on whether conditional freedom of an accused is likely to result in some significant risk. Preventive detention should not, however, be

based solely on the fact that a suspected crime is deemed particularly socially objectionable.

*b. Risk of repetition of offenses*

90. Another reason adduced by the domestic courts for denying conditional release is Mr. Giménez' criminal record. This type of consideration is based on an evaluation of the threat the individual may present to society: on how likely it is that his conduct may jeopardize the legal rights of the victim of his crime or those of society.

91. The Commission believes that criteria which focus solely on societal interests cannot be allowed to take precedence in evaluating the future conduct of the accused. Given the fact that pre-trial incarceration is a deprivation of liberty of a person who still benefits from the presumption of innocence, it should be based solely on the probability of the accused's abusing conditional liberty and fleeing and on whether conditional freedom of an accused is likely to result in some significant risk.

92. The interest of the individual who has committed a felony in becoming rehabilitated and returning to his or her place in society must also be taken into account. To that end, weight should be given to such elements as the individual's subsequent conduct after facing the consequences of his crime; the will or desire to make reparation for the damage caused by the offense; the interest of the accused in adopting socially acceptable rules of conduct; his or her social and family environment; and his or her chances of rehabilitation.

93. Given the length of prison time served, the courts should reach a fair balance of those criteria which address the particular interests of the individual rather than those which serve the public order of society at large, when the time comes to decide whether the accused should be released from prison. In the case sub examine, the Commission considers that there is no proof that the type of crime for which Mr. Giménez is charged has seriously affected public order.

94. The Commission thus concludes that, for the reasons stated, the arguments adduced by the domestic courts to continue holding Mr. Giménez in pre-trial incarceration are neither sufficient nor reasonable.

*c. Personal circumstances*

95. The decision of October 6, 1989 denying Mr. Giménez' initial request for release from pre-trial incarceration was based entirely on the fact that he had a history of criminal convictions. These previous convictions of December 1977, December 1978, and September 1980 entailed conditional release which had subsequently been revoked. In its 1989 decision denying Mr. Giménez conditional release, the court relied on the fact that the conditionality of the two 1977 and 1978 convictions had been subsequently revoked as a justification for holding him in pre-trial incarceration for the wholly unrelated case in 1989. The Commission notes that the conditionality of his two earlier convictions could in no way have extended to 1989.

96. The presumption of innocence guaranteed in the Convention is a principle that constructs a presumption in favor of an individual accused of a crime according to which he or she is considered innocent until criminal responsibility is established in the case before the courts.

97. The decision to retain Mr. Giménez in prison without sentence as a result of his earlier convictions contravenes this principle, as well as the concept in criminal law of rehabilitation. Any reliance on these previous convictions to decide a person's guilt or retain them in preventive detention is, in essence, a perpetuation of the punishment. Once the person convicted has completed the sentence or the period of conditionality has lapsed, then the person is returned to his or her full civil status.

98. Thus, the Commission deems that the grounds for keeping Mr. Giménez in preventive detention was unlawful because it directly contravened the principle of presumption of innocence guaranteed in the Convention. Mr. Giménez's criminal record is not relevant and sufficient criteria which justifies the extension of pre-trial imprisonment for a period of five years.

*ii. Special diligence*

99. As discussed earlier, where the Commission finds that the reasons given by the national judicial authorities are relevant and sufficient to justify continued detention, it must turn to whether these authorities use "special diligence" in the conduct of the proceedings so that the length of detention would not be unreasonable. In the present case, in addition to finding the reasons for prolonging Mr. Giménez's pre-trial detention insufficient, the Commission considers that the judicial authorities have not acted with the special diligence owed a person in prison pending trial.

100. The Commission believes that in keeping with Articles 7(5) and 8(2) of the Convention, an accused person in detention is entitled to have his case given priority and expedited by the proper authorities and that this can be accomplished without hindering the judicial authorities, prosecution and defense from carrying out their task with due care.

101. In cases of prima facie unacceptable duration it rests upon the respondent government to adduce specific reasons for the delay. Such reasons will be subject to the Commission's closest scrutiny.

102. The Commission moves on to consider whether the domestic authorities have conducted the internal proceedings with the necessary due diligence to prevent the pre-trial incarceration from becoming unreasonable. For the Commission's purposes, such diligence is required of States pursuant to Articles 7(5) and 8(1) of the Convention, a joint reading of which provides grounds for concluding that the person accused or detained is entitled to have his case decided expeditiously and with priority by the national authorities.

103. In determining whether special diligence was used by the investigating authorities, the

complexity and scope of the case, in addition to the conduct of the accused, must be taken into account. However, an accused who refuses to cooperate with an investigation or who uses available remedies is merely exercising his or her legal right. Therefore, delay in the proceedings should not be attributed to a detainee unless the system is intentionally abused for the purpose of delaying the process. The Commission distinguishes between the petitioner's reliance on procedural rights, failure to cooperate in the investigation or trial, and deliberate obstruction. The Government did not articulate any behavior of the petitioner that indicates anything other than his reliance and use of his procedural rights.

104. As to the complexity of the case, the Government has recognized in its response to the claim that "there have been no difficulties in the handling of the case other than those usually encountered in this type of procedure, given the number of persons accused."

105. In regard to the conduct of the accused, the Commission considers that sufficient elements have not been provided that indicate bad faith or obstructive designs on his part. It has been established that, in respect to one of his requests to be released, the accused resorted to a special remedy before the Supreme Court. The Commission finds no reason to object to such conduct, since the remedy seems to have been lodged in good faith. On the other hand, the fact that the original file was in the hands of the Supreme Court for more than 14 months during which the court of original jurisdiction was unable to advance in its handling of the case constitutes a dilatory act which can be attributed to the authorities in the procedure, inasmuch as certified copies or photocopies could have been sent to the high court instead of the original file to avoid slowing the procedure to a halt.

106. In the overall evaluation of the diligence displayed by the domestic courts, the Commission concurs with the view expressed by Argentina's Penal Prosecutor in his recommendation 49/PP/93, dated December 17, 1993. Issued in response to a query from the petitioner on November 30, 1993, the Attorney General's review of the case:

- a. Found that the length of time for which Mr. Giménez had been held in custody pending trial to be excessive and unreasonable in the light on Argentina's constitutional principles and international commitments.
- b. Observed that the Attorney General's Office had neither represented this anomaly nor complied with the instruction to request that Mr. Giménez be released from prison.
- c. Considered that the prolongation of pre-trial detention could deprive Mr. Giménez of the benefits of progressive adjustment to the penitentiary system, in the event that he is sentenced to prison.
- d. Notified the Ministry of Justice of the anomalously prolonged period of pre-trial detention to which Mr. Giménez had been subjected, and recommended

that the Minister of that department instruct the respective agent to request that Mr. Giménez be released from prison.

107. The instructions to the Attorney General's Office cited in the above opinion are those appearing in resolutions 56/92 and 406/92 of the Ministry of Justice. They instruct the representatives of the Public Prosecutor's Department, through the National Attorney General's Office, to examine on a case by case basis for releasing from prison persons who have been accused and are awaiting trial; and to seek real and concrete enforcement of the American Convention on Human Rights (Articles 7(5) and 8(1)), appearing before the respective courts and requesting the release from prison and the issue of such orders for release as may be necessary, due primarily to the unreasonably prolonged duration of the procedures.

108. The Commission thus concludes that the national authorities have failed to act with sufficient due diligence to avoid the prolongation of Mr. Giménez's remand in custody. The fact that the accused has been uninterruptedly deprived of his freedom throughout the course of the procedure constitutes a violation of the right to be tried within a reasonable time as provided by Article 7(5) of the American Convention.

*D. The right to trial within a reasonable time: Article 8(1)*

109. Article 7(5) and 8(1) are specifically designed to ensure that the charges which the penal procedure places on the individual are not unremittingly protracted and produce permanent harm.

110. Although they are inspired by the same principle, the two provisions do not coincide in their references to what constitutes a reasonable period. A delay that constitutes a violation of the provision in Article 7(5) may be justified pursuant to Article 8(1). The specificity of Article 7(5) stems from the fact that an individual who is accused and held in custody is entitled to have his or her case resolved on a priority basis and conducted with diligence. The State's ability to apply coercive measures such as pre-trial detention is one of the decisive reasons which justify the priority treatment that should be given to procedures involving the deprivation of liberty for the accused. The concept of reasonable time in Article 7 and in Article 8 differs in that Article 7 establishes the possibility for an individual to be released without prejudice to continuation of the proceedings. The time established for detention is necessarily much shorter than the period allotted for the entire trial.

111. A reasonable length of time for the proceedings as allowed by Article 8 should be measured according to a series of factors such as the complexity of the case, the behavior of the accused, and the diligence of the competent authorities in their conduct of the proceedings. Unlike the right established in Article 7(5), the considerations involved in determining the reasonable length of the procedure are more flexible. The reason is obvious: in the case of Article 7(5), holding the accused in pre-trial incarceration affects his or her right to personal liberty.

112. Given the absence of complexity in the case sub judice and the judicial authorities' lack of

diligence in duly disposing of the case, the Commission finds that the prolongation of the procedure for more than five years without handing down a sentence constitutes a violation of the right to be heard with due guarantees and within a reasonable time established in Article 8(1).

*E. Violation of the presumption of innocence as a result of a prolonged detention:  
Article 8(2)*

113. The prolonged imprisonment without conviction, with its natural consequence of undefined and continuous suspicion of an individual, constitutes a violation of the principle of presumed innocence set forth in Article 8(2) of the American Convention. It should nevertheless be noted that the existence of a growing suspicion of a person in the course of the criminal proceeding is not *per se* contrary to the principle of presumption of innocence. Neither is the fact that such mounting suspicion justifies the adoption of safeguards--such as pre-trial incarceration--in regard to the suspect's person.

114. Article 8(2) requires the States to compile material incriminating the person accused of a crime in order to "establish that person's guilt." The substantiation of guilt calls for the formulation of a judgment establishing blame in a final sentence. If the use of that procedure fails to assign blame within a reasonable length of time and the State is able to justify further holding of the accused in pre-trial incarceration, based on the suspicion of guilt, then it is essentially substituting pre-trial detention for the punishment. Preventive custody thus loses its purpose as an instrument to serve the interests of sound administration of justice, and the means becomes the end. In the instant case the prolonged imprisonment without conviction of Mr. Giménez is in violation of his right, guaranteed under Article 8(2), to be presumed innocent.

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**Suárez Rosero v. Rosero**

*Inter-Am. Ct. H.R., Judgment of November 12, 1997 (ser. C) No. 35 (1997)*

*[For the facts of this case, see Chapter III]*

93. The Commission requested the Court to find that the unnumbered Article which follows Article 114 of the Ecuadorian Criminal Code (hereinafter "Article 114 *bis*") violates "*the right to judicial protection*" enshrined in Article 2 of the Convention. According to the Commission, it is an obligation of a State to organize its judicial apparatus in such a way as to ensure "*to every person subject to its jurisdiction the free and full exercise of the rights established therein.*"

94. In the brief containing its final arguments, Ecuador stated that it had initiated the pertinent procedures for making that law conform to its Political Constitution, which is the Supreme Law

to which all other lesser laws and provisions are subordinated.

95. The aforementioned Article 114 his provides that

[p]ersons who, having been kept in detention for a time equal to or greater than one-third of the period established in the Criminal Code as the maximum sentence for the offense with which they are charged, have neither had their case discontinued nor been committed to trial, shall be immediately released by the judge hearing the case.

Likewise, persons, who have been kept in detention without sentence for a time equal to or greater than half the period established by the Criminal Code as the maximum sentence for the offense with which they are charged, shall be released by the criminal court hearing the case.

These provisions do not include persons charged with offenses punished under the Law on Narcotic Drugs and Psychotropic Substances.

96. Article 2 of the Convention establishes that

[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights and freedoms.

97. As the Court has maintained, the States Parties to the Convention may not order measures that violate the rights and freedoms recognized therein (*International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights)*, Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 36). Whereas the first two provisions of Article 114 his of the Ecuadorian Criminal Code accord detained persons the right to be released when the conditions indicated exist, the last paragraph of the same article contains an exception to that law.

98. The Court considers that this exception deprives a part of the prison population of a fundamental right, on the basis of the crime of which it is accused and, hence, intrinsically injures everyone in that category. This rule has been applied in the specific case of Mr. Suárez-Rosero and has caused him undue harm. The Court further observes that, in its opinion, this law violates *per se* Article 2 of the American Convention, whether or not it was enforced in the instant case.

99. In conclusion, the Court points out that the exception contained in the aforementioned Article 114 his violates Article 2 of the Convention in that Ecuador has not taken adequate measures under its domestic law to give effect to the right enshrined in Article 7(5) of the Convention.

....

### **Questions**

1. What is the rationale under international human rights law for considering preventive detention an exceptional measure?
2. What are the elements of the standard applied by the European Court and the Inter-American Commission to determine in a particular case whether the right to be tried within a reasonable time has been respected? Does international or domestic law set out the “relevant and sufficient” grounds according to which the continued reasonability of the detention will be measured in the first place? Is there an exhaustive number of those grounds or do States have discretion to argue additional reasons? How do international bodies assess in a particular case whether the “relevant and sufficient” standard has been met?
3. Does the lack of “relevant and sufficient” grounds to prolong the detention of an individual constitute an additional violation of Article 7(3) on the basis that such detention has become arbitrary? [See, *inter alia*, the “A” vs. *Australia* case.]
4. Does the preceding case law establish an objective standard to measure the length of proceedings? What about the two-year limit established in the Argentinean legislation? Does the case-by-case analysis of the European and Inter-American supervisory bodies help domestic courts to determine whether a person has been tried within a reasonable time?
5. What is the difference between the rights provided in Articles 7.5 and 8.1 of the American Convention? Is the determination of an alleged violation of those provisions measured according to a similar test? Elaborate.
6. Read the *Suárez Rosero* excerpts. Can this holding be interpreted as stating a general rule according to which laws providing that those accused of certain crimes will not benefit from bail or conditional release will be incompatible *per se* with the American Convention? What about those accused of crimes against humanity such as genocide? What is the rationale behind the decision of the Court in *Suárez Rosero*?

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#### **4. THE RIGHT TO JUDICIAL REVIEW OF THE LAWFULNESS OF THE DETENTION (HABEAS CORPUS)**

**Article 7(6)**  
**American Convention on Human Rights**

6. 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.

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**Article 9(4)**  
**International Covenant on Civil and Political Rights**

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

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**Article 5(4)**  
**European Convention for the Protection of Human Rights and Fundamental Freedoms**

4. 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.

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**Habeas Corpus in Emergency Situations**  
*Inter-Am. Ct. H.R., Habeas Corpus in Emergency Situations*  
*(Arts. 27(2) and 7(6) of the American Convention on Human Rights),*  
*Advisory Opinion OC-8/87 of January 30, 1987 (ser. A) No. 8 (1987)*

27. As the Court has already noted, in serious emergency situations it is lawful to temporarily suspend certain rights and freedoms whose free exercise must, under normal circumstances, be

respected and guaranteed by the State. However, since not all of these rights and freedoms may be suspended even temporarily, it is imperative that “the judicial guarantees essential for (their) protection” remain in force. Article 27(2) does not link these judicial guarantees to any specific provision of the Convention, which indicates that what is important is that these judicial remedies have the character of being essential to ensure the protection of those rights.

28. 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 from those that seek to protect the right to a name, for example, which is also non-derogable.

29. It follows from what has been said above that the judicial remedies that must be considered to be essential 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.

30. 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.

31. The Court must now determine whether, despite the fact that Articles 25 and 7 are not mentioned in Article 27(2), the guarantees contained in Articles 25(1) and 7(6), which are referred to in the instant advisory opinion request, must be deemed to be among those “judicial guarantees” that are “essential” for the protection of the non-derogable rights.

32. Article 25(1) of the Convention provides that . . . .

The above text is a general provision that 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. Since “amparo” can be applied to all rights, it is clear that it can also be applied to those that are expressly mentioned in Article 27(2) as rights that are non-derogable in emergency situations.

33. In its classical form, the writ of habeas corpus, as it is incorporated in various legal systems of the Americas, is a judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered. The Convention proclaims this remedy in Article 7(6), which states . . . .

34. If the two remedies are examined together, it is possible to conclude that “amparo” comprises

a whole series of remedies and that habeas corpus is but one of its components. An examination of the essential aspects of both guarantees, as embodied in the Convention and, in their different forms, in the legal systems of the States Parties, indicates that in some instances habeas corpus functions as an independent remedy. Here its primary purpose is to protect the personal freedom of those who are being detained or who have been threatened with detention. In other circumstances, however, habeas corpus is viewed either as the “amparo of freedom” or as an integral part of “amparo.”

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 . . . .

Those who drafted the Convention were aware of these realities, which may well explain why the Pact of San Jose is the first international human rights instrument to include among the rights that may not be suspended essential judicial guarantees for the protection of the non-derogable rights.

37. A further question that needs to be asked, and which goes beyond the consideration of habeas corpus as a judicial remedy designed to safeguard the non-derogable rights set out in Article 27(2), is whether the writ may remain in effect as a means of ensuring individual liberty even during states of emergency, despite the fact that Article 7 is not listed among the provisions that may not be suspended in exceptional circumstances.

38. If, as the Court has already emphasized, the suspension of guarantees may not exceed the limits of that strictly required to deal with the emergency, any action on the part of the public authorities that goes beyond those limits, which must be specified with precision in the decree promulgating the state of emergency, would also be unlawful notwithstanding the existence of the emergency situation.

39. The Court should also point out that since it is improper to suspend guarantees without complying with the conditions referred to in the preceding paragraph, it follows that the specific measures applicable to the rights or 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 missuse 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.

....

42. From what has been said before, it follows 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.

43. The Court must also observe that the Constitutions and legal systems of the States Parties that authorize, expressly or by implication, the suspension of the legal remedies of habeas corpus or of “amparo” in emergency situations cannot be deemed to be compatible with the international obligations imposed on these States by the Convention.

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**Neira Alegría v. Perú**

*Inter-Am. Ct. H.R., Judgment of January 19, 1995, (ser. C) No. 20 (1995)*

*[The petition giving rise to this case was filed by the family members of three inmates convicted of terrorism who have being held at the San Juan Bautista prison, or “El Frontón,” and who disappeared in 1986 after prison disturbances that were violently repressed by the Peruvian Armed Forces. Some 111 inmates were killed, many reportedly extrajudicially executed. The family members in this case filed writs of habeas corpus on behalf of the three victims, but were unable to obtain relief. Because the Armed Forces had occupied the correctional facilities under presidential decrees which imposed a state of emergency and placed the prisons within the so-called “Restricted Military Zones,” the matter was referred to the military courts. The petitioners alleged in part that the result was an effective denial of habeas corpus, in violation of article 7(6) and 27(2) of the American Convention.]*

77. This Court likewise considers that the Government also violated the provisions of Articles

7(6) and 27(2) of the American Convention through the application of Supreme Decrees 012-IN and 006-86 JUS of June 2 and 6, 1986, which declared the state of emergency in the Provinces of Lima and El Callao and applied the status of Restricted Military Zone in three correctional facilities, including the San Juan Bautista Prison. In effect, while such decrees did not expressly suspend the *habeas corpus* remedy or action recognized in Article 7(6) of the Convention, in reality, compliance with both decrees resulted in the ineffectiveness of said instrument of protection, thereby resulting in its suspension to the detriment of the alleged victims. *Habeas corpus* was the ideal procedure by which the judicial authority could investigate and acquire knowledge as to the whereabouts of the three persons to which this case refers.

78. In the *habeas corpus* writ filed on June 16, 1986 with the Twenty-First Instructional Judge of Lima, in favor of Victor Neira-Alegría and Edgar and William Zenteno-Escobar against the President of the Joint Command of the Armed Forces and the Commandant General of the Navy, Irene Neira-Alegría and Julio Zenteno-Camahualí stated that their next of kin had not been found on the occasion of the crushing of the uprising at the San Juan Bautista Prison where they were being held and had not since appeared, possibly because they had been abducted. The petitioners requested that, in the event that the detainees had died, the Judge demand that the military authorities indicated where the bodies can be found and deliver the respective death certificates.

79. The *habeas corpus* application was declared inadmissible by the Judge in his decision of July 17, 1986, on the grounds that the petitioners did not prove that the prisoners had been abducted, the incidents that occurred at the three prisons (including the San Juan Bautista Prison) were subject to investigation by the military courts and the Office of the Attorney General of the Nation, and that such occurrences were outside the scope of the summary *habeas corpus* procedure.

80. In accordance with arguments previously pointed out (*supra* para. 40), on August 1 of that year, the Eleventh Correctional Court of Lima confirmed the original judgment based on the essential argument that the exclusive military tribunal was exercising jurisdiction with respect to the San Juan Bautista Prison, making it impossible for the regular jurisdictional bodies to intervene. On the 25<sup>th</sup> of the same month of August, the Criminal Section of the Supreme Court declared that, “*in consideration of its grounds,*” the application for annulment made against the appeal decree judgment was inadmissible. Finally, on December 5, 1986, the Constitutional Guarantees Court, to which the petitioners had appealed, declared, that the judgment of the Supreme Court “*stood inalterable,*” since the minimum number of five votes in favor, had not been obtained as required by Peruvian law.

81. This Court considers it useful to stress that the judgment of the Constitutional Guarantees Court stood upon a voting where four justices were in favor of admitting the appeal filed, and two were in favor of denying the annulment. In virtue of this, while it is true that the minimum number of five votes in favor was not obtained, the singular vote of the four justices represents the majority opinion of the Court. The pertinent section of the opinion was affirmed when it said: “*That, while it is true that such a situation does not constitute a legal definition for*

*kidnaping, it leads to the conclusion that the judge should have exhausted the investigation concerning the lives and whereabouts of the persons in whose favor the [habeas corpus] action is being brought.” Thus, in the opinion of said justices, the appeal against the judgment of the Supreme Court was justiciable. Had the appeal been admitted, the intervention of military justice would not have impaired the habeas corpus proceeding.*

82. The court has interpreted articles 7(6) and 27(2) of the Convention in advisory opinions OC-8 and OC-9 of January 30 and October 6, 1987 respectively. In the former opinion, the Court maintained 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 they serve, moreover, to preserve legality in a democratic society. This Court also deemed that [i]n 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. (*Habeas Corpus in Emergency Situations*, (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, paras. 42 and 35.)

83. In Advisory Opinion OC-9, this Court added

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. (*Judicial Guarantees in States of Emergency*, (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 38.)

84. These interpretive [sic] criteria are applicable to this case in that 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.

85. In accordance with Article 1(1) of the Convention, “[t]he States Parties to this Convention 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,” thus, as a consequence, this provision is a general one, and its violation is always related to the violation of a provision that establishes a specific human right. As the Court already expressed in a previous case, Article 1

specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated. (Velásquez Rodríguez Case, supra 63, para. 162; Godínez Cruz Case, supra 63, para. 171.)

....

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**García v. Perú**

*Case 11.006, Inter-Am. C.H.R. 71,*

*Annual Report 1994, OEA/Ser.L/V/II.88, doc. 9 rev. (1995)*

*[Footnotes omitted; for the facts of this case, see section 1 of this Chapter]*

*a. Denial of access to remedies under domestic law*

Dr. Alan García reported to the Commission that Army soldiers broke into his house to arrest him and that this, in his opinion, constituted a threat to his right to freedom insofar as his arrest was not carried out in accordance with the constitutional procedures. On several occasions his wife attempted to file a habeas corpus on behalf of the former president, but her efforts were frustrated by Army soldiers stationed at the Palace of Justice who prevented her from entering and prevented her from making any contact with the judges on duty.

In the Convention, where one of the rights protected under it is violated, the state under whose jurisdiction the presumed violation takes place is responsible for ensuring the victims a simple and prompt redress to their claims *[See articles 1.1 and 25 of this instrument.]*

The right to personal freedom is among the rights enshrined in the Convention. Article 7 stipulates that 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 laws enacted in accordance with it. In order to challenge the legality of his arrest, any person deprived of his personal freedom has the right to a judge who shall hand down a decision on the matter.

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...,” the said article states that “...this remedy may not be restricted or abolished...”

Thus, based on the interpretation of the rules of the Convention plus the jurisprudence established by the Court, the Commission can conclude that where a deprivation of freedom, or a threat of deprivation of freedom, occurs --in states whose laws so provide-- all persons should

enjoy prompt and effective remedy to challenge the legality of a measure.

....

In the instant case of Perú, a prompt and effective legal recourse to challenge the legality of a deprivation or threat of deprivation of freedom is the habeas corpus. Article 295 of the Constitution of Perú (1979) in fact stipulates that:

An action or omission by any authority, official or person who undermines or threatens individual liberty is ground for an action of "habeas corpus."

The obligation to guarantee access to prompt and effective remedy is not only applicable in times of political stability but during states of emergency as well.

Under the provisions of Article 27.2 of the Convention both remedies --namely, amparo and habeas corpus-- are, in essence, indispensable judicial remedies. They cannot be suspended, not even during a state of emergency.

....

Applying the arguments advanced hitherto, the Commission is led to conclude that by denying Dr. García Pérez access to a simple and prompt remedy to prevent violation of his rights, the Government of Perú has failed to honor its obligations under the Convention. As such under the provisions of the Convention, and as the Inter-American Court understands those provisions, not even if the Government were to claim that there was a state of emergency would a suspension of indispensable guarantees such as habeas corpus be justified.

....

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**Peter Grant v. Jamaica**

*Communication No 597/1994, UN Doc.CCPR/C/56/D/597/1994 (April 10, 1996)*

*<<http://sim.law.uu.nl>; <http://www.unhchr.ch>>*

*[At the time of his submission to the Human Rights Committee, the applicant was awaiting execution on death row, having been convicted of murder. His sentence was later commuted to life imprisonment. He was arrested and detained on July 13, 1987, and was seen by the investigating officer seven days later, when he also gave a written statement under caution. No magistrate or other judge was present. In the statement he admitted participating in the murder, and implicated his co-defendants. However, later at the trial the applicant claimed that the*

*statement had not been voluntary, but rather that he had been subjected to death threats and other ill-treatment. The applicant claimed several violations of his rights under article 9 of the Covenant. The State denied such violations, asserting that there was no delay in bringing the applicant before the courts for trial, and that the applicant failed through his own fault to exercise his right to file a writ of habeas corpus.]*

### The complaint

3.1 The author claims that the ill treatment he was submitted to by the investigating officer, in order to induce him to sign a confession of guilt, constitutes a violation of articles 7, 10, paragraph 1, and 14, paragraph 3 (g), of the Covenant.

3.2 Counsel alleges that no evidence was given to justify the delay of seven days between the author's detention and his being seen by the investigating officer; counsel contends that this period of detention was meant to induce the author into signing a statement. Counsel also alleges that the author was only informed of the charges against him after seven days, during the meeting with the investigating officer, and that he was not brought promptly before a judge. The above is said to constitute a violation of article 9, paragraphs 2, 3, and 4, of the International Covenant on Civil and Political Rights. In this context, counsel refers to the Human Rights Committee's jurisprudence Communication No. 277/1988 (Jijón v. Ecuador), Views adopted 26 March 1992 and communication No. 253/1987 (Kelly v. Jamaica), Views adopted 8 April 1991, in which violations of article 9, paragraph 3, were found because the delays exceeded a few days.

....

### State party's observations

....

4.2 As regards the allegation of breach of article 9, paragraph 2, of the Covenant, the State party argues that while it is a well-known principle of criminal law that an arrested person must be informed of the grounds for his arrest, there are cases in which it is obvious that the person in question was well aware of the substance of the alleged offence (R. v. Howarth [1928], Mood CC 207). The facts of the instant case reveal that Mr. Peter Grant knew of the substance of the alleged offence for which he had been arrested.

4.3 In respect of the allegation of breach of article 9, paragraph 3, of the Covenant, the State party notes that the principle is that an arrested person should be brought before a magistrate within a reasonable time. Any determination as to what amounts to a reasonable time depends on the circumstances of the case. In any event, there was no delay in bringing Mr. Grant before the courts for trial.

4.4 As regards the allegation of breach of article 9, paragraph 4, the State party denies that there has been any breach of that provision. Article 9, paragraph 4, provides that an arrested person is entitled to take proceedings before a court to determine the lawfulness of his detention and order his release if the detention is not lawful. Mr. Grant had the opportunity to have filed on his behalf a writ of habeas corpus to secure his release. There has been no denial of his right to do so by the State, but rather a failure on the part of Mr. Grant to exercise that right to apply for the writ.

....

Counsel's comments

....

5.2 With regard to article 9 of the Covenant counsel contests the State party's argument that as Peter Grant knew of the substance of the alleged offence for which he had been arrested, there was no need to inform him of the grounds for his arrest and that it was reasonable for Mr. Grant to be brought before a judicial officer seven days after his detention. Article 9 was the subject of General Comment 8 by the Human Rights Committee (16th session, 1982). The Committee noted that delays under article 9, paragraph 3, must not exceed a few days and that pre-trial detention "should be an exception and as short as possible". It is submitted that no compelling evidence was called to explain the delay of seven days between Peter Grant's detention and the investigating officer seeing him.

5.3 A requirement to give reasons on arrest was imposed at common law (Christie v. Leachinsky [1947] AC 573, HL) and is now found in s.28 of the Police and Criminal Evidence Act 1984. Thus a person arrested must be informed of both the fact and the ground of arrest or as soon as practicable thereafter; where a person is arrested by a constable, these obligations apply regardless of whether these matters are obvious. Where no reason is given, the arrest is clearly unlawful.

5.4 Article 9, paragraph 3, of the Covenant requires that a person detained on a criminal charge be brought promptly before a judicial officer. In Kelly v. Jamaica (communication No. 257/1987), the Human Rights Committee emphasised that delays "should not exceed a few days".

5.5 Article 9, paragraph 4, of the Covenant entitled any person subject to arrest or detention to challenge the lawfulness of a detention before a Court without delay. The State party contends that there was no denial of Mr. Grant's right to do so by the State, but rather a failure on the part of Mr. Grant himself to exercise that right to apply for a writ of habeas corpus. It is submitted that as Peter Grant was not brought promptly before a judicial officer within the meaning of article 9, paragraph 3, he was not able to take proceedings before a Court to determine the lawfulness of his detention.

....

Decision on admissibility and examination of the merits

*[The Committee declared complaints under Article 9 admissible and proceeded to decide on the merits]*

....

8.1 With regard to the author's allegations concerning a violation of article 9, the Committee observes that the State party is not absolved from its obligation under article 9, paragraph 2, of the Covenant to inform someone of the reasons of his arrest and of the charges against him, because of the arresting officer's opinion that the arrested person is aware of them. In the instant case, the author was arrested some weeks after the murder with which he was subsequently charged, and the State party has not contested that he was not informed of the reasons for his arrest until seven days later. In the circumstances, the Committee concludes that there has been a violation of article 9, paragraph 2.

8.2 As regards the author's claim under article 9, paragraph 3, the Committee notes that it is not clear from the information before it when the author was first brought before a judge or other officer authorized by law to exercise judicial power. It is uncontested, however, that the author, when he was seen by the investigating officer seven days after his arrest, had not yet been brought before a judge, nor was he brought before a judge that day. Accordingly, the Committee concludes that the period between the author's arrest and his being brought before a judge was too long and constitutes a violation of article 9, paragraph 3, of the Covenant and, to the extent that this prevented the author from access to court to have the lawfulness of his detention determined, of article 9, paragraph 4.

....

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**Assenov and Others v. Bulgaria**

*Eur. Ct. H.R., Judgment of October 28, 1998, Reports 1998 VIII (1998)*

*<<http://www.echr.coe.int>>*

*[The applicants in this case were a family of Bulgarian nationals of Roma origin. Their complaint first alleged that on September 19, 1992, while gambling in the market square in Shoumen, Mr. Assenov (then aged 14) was arrested by an off-duty policeman and taken to a nearby bus station, where Mr. Assenov was beaten by the police. He and his father were taken to a police station, where they were detained without charge and later released. Mr. Assenov*

*alleged that he was also beaten at the police station. The applicants obtained a medical certificate attesting to Mr. Assenov's injuries and complained to the District Directorate of Internal Affairs, the regional and general military prosecution offices, and the Chief General Prosecutor. However, the authorities did not find cause to initiate criminal action against the police. Mr. Assenov was again arrested in July, 1995, for burglary and robbery. He remained in pre-trial detention for two years before being convicted of four street robberies and sentenced to 30 months' imprisonment. The applicants' petitions for Mr. Assenov's release had been repeatedly dismissed. Mr. Assenov asked the Court to find violations of articles 3, 5, 6, 13, and, together with his parents, 25 of the Convention.]*

4. *Alleged violation of Article 5 § 4 of the Convention*

159. The applicant further alleged that the respondent State had failed to comply with Article 5 § 4 of the Convention, which provides . . . .

160. The Government pointed out that Mr Assenov had taken the opportunity provided by the law as it then stood to apply to a court for a review of the lawfulness of his detention. Although the hearing had not been in public, the Shoumen District Court had considered the written submissions of the parties as contained in the case file.

They also informed the Court that the law had been amended on 8 August 1997 and now provided in such cases for a public hearing in the presence of the parties.

161. The Commission, joined by the applicant, considered that the facts that the applicant was then a minor and that the stated reason for his continued detention was the risk of his reoffending suggested that a hearing should have been held. Instead, the Shoumen District Court, which moreover was not empowered to examine whether the accusations against Mr Assenov were supported by sufficient evidence (see paragraph 74 above), had examined the question of his continued detention in camera, without the participation of the parties (see paragraphs 38 and 73 above). Following this application, it had not been possible for him to request a further judicial review of his detention until the case had been sent for trial (see paragraphs 41, 47 and 75 above). In consequence, and in breach of Article 5 § 4, the first personal contact enjoyed by the applicant with an impartial judicial authority competent to review the lawfulness of his detention appeared to have taken place on 6 February 1997, approximately nineteen months after his arrest.

162. The Court recalls that by virtue of Article 5 § 4, an arrested or detained person is entitled 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 (see paragraph 139 above), of his or her deprivation of liberty (see the above-mentioned Brogan and Others judgment, p. 34, § 65).

Although it is not always necessary that the procedure under Article 5 § 4 be attended by the

same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation (see the *Megyeri v. Germany* judgment of 12 May 1992, Series A no. 237-A, p. 11, § 22), it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question. In the case of a person whose detention falls within the ambit of Article 5 § 1(c), a hearing is required (see the above-mentioned *Schiesser* judgment, p. 13, §§ 30–31, the *Sanchez-Reisse v. Switzerland* judgment of 21 October 1986, Series A no. 107, p. 19, § 51, and the *Kampanis v. Greece* judgment of 13 July 1995, Series A no. 318-B, p. 45, § 47).

Furthermore, Article 5 § 4 requires that a person detained on remand must be able to take proceedings at reasonable intervals to challenge the lawfulness of his detention (see the *Bezicheri v. Italy* judgment of 25 October 1989, Series A no. 164, pp. 10–11, §§ 20–21). In view of the assumption under the Convention that such detention is to be of strictly limited duration (see paragraph 154 above), periodic review at short intervals is called for (see the above-mentioned *Bezicheri* case, loc. cit.).

163. The Court recalls that the Shoumen District Court examined Mr Assenov’s application for release in camera, without hearing him in person (see paragraphs 38 and 73 above). Whilst the Court notes that the relevant law has subsequently been amended to provide for an oral hearing in such cases (see paragraph 160 above), it is nonetheless required to restrict its assessment to the facts of the applicant’s case (see the *Findlay v. the United Kingdom* judgment of 25 February 1997, Reports 1997-I, p. 279, § 67).

164. Moreover, the Court notes that under Bulgarian law a person detained on remand is only entitled to apply to have the lawfulness of this detention reviewed by a court on one single occasion (see paragraph 75 above). Thus a second such request on the part of the applicant was rejected on this ground by the Shoumen District Court on 19 September 1995 (see paragraph 41 above).

165. In conclusion, in view in particular of the impossibility for the applicant, during his two years of pre-trial detention, to have the continuing lawfulness of this detention determined by a court on more than one occasion, and the failure of the court to hold an oral hearing on that occasion, the Court finds that there has been a violation of Article 5 § 4 of the Convention.

....

### ***Questions***

1. If no violation of the lawfulness of detention is found, is it still possible to find a violation of the right to judicial review?
2. What are the elements that habeas corpus must contain to be an “effective remedy” within the language of Article 7(6) of the American Convention? In that respect, is it consistent with that

provision for a law to require that the petitioner filing a habeas corpus to provide the place of detention of the alleged victim?

2. Do you find a contradiction in the reasoning of the Court when it states that although the right to liberty protected under Article 7 of the American Convention can be suspended under Article 27(2) of the American Convention during states of emergency, habeas corpus is a non-derogable right? What is the rationale behind that analysis? Is habeas corpus non-derogable in all circumstances, even in the context of an international armed conflict? [See the *Coard* case<sup>11</sup>]

5. What is the scope of “threat” to liberty under Article 7(6)? Is the issuance of a warrant sufficient to establish the existence of such a threat? Compare with the *García* case.

6. Does a violation of the right to be notified of pending charges or to be brought before a judge or other officer authorized by law to exercise judicial power have any implications in determining a violation of the right to access to a court, as provided by Articles 7(6) of the American Convention, 9(4) of the ICCPR, and 5(4) of the European Convention? To answer this question read the *Grant* case decided by the Human Rights Committee and compare it to the following holding of the Inter-American Court in *Suárez Rosero*:

57. The Commission asked the Court to rule that Mr. Suárez-Rosero’s *incommunicado* detention violated Article 7(6) of the American Convention in that it denied him contact with the outside world and did not permit him to exercise his right of *habeas corpus*.

....

59. The Court has already ruled that a detained person must be guaranteed the right of habeas corpus at all times, even when he is being held in exceptional circumstances of *incommunicado* detention established by law. That guarantee is doubly entrenched in the law in Ecuador. Article 28 of the Political Constitution provides that

[a]ny person who believes that he is being unlawfully deprived of his liberty may seek the remedy of *habeas corpus*. He may exercise this right himself or through another person without the need for written mandate ...

The Code of Criminal Procedure of that State establishes in Article 458 that

[a]ny person who is charged with infringing the precepts contained in [that] Code and is kept in detention may apply to be released to a higher Court than the one that has ordered the deprivation of his liberty.

[...]

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<sup>11</sup> Case 10.951, Inter-Am. C.H.R. 1283, Annual Report 1999, OEA/Ser.L/V/II.106, doc. 3 rev. (2000).

The application shall be made in writing.

[...]

Immediately upon receipt of the application, the Judge who is to hear it shall order the detained person to be brought before him and shall hear his statements, which shall be included in a record which shall be signed by the Judge, the Secretary and the applicant, or, should the applicant be unable to sign, by a witness on his behalf. Thereupon, the Judge shall seek to obtain all the information he deems necessary for the purpose of arriving to a conclusion and ensuring the lawfulness of his decision and shall, within forty-eight hours, decide what he deems to be lawful.

60. The Court observes, first of all, that the aforesaid articles do not restrict access to the remedy of habeas corpus to the persons who are held *incommunicado*; in addition, the Constitution allows that remedy to be sought by any person “*without the need for written mandate.*” It also points out that no evidence has been submitted to it to show that Mr. Suárez-Rosero attempted to file such an appeal with a competent authority during his *incommunicado* detention, nor did any other person attempt to do so on his behalf. Consequently, the Court deems the Commission’s claim in that regard not to have been proven.

7. Is formal review of compliance with procedural rules sufficient to meet the standard required by Articles 7(6) of the American Convention, 9(4) of the ICCPR, and 5(4) of the European Convention? What are the differences between the right to be brought before a competent authority and the right to access enshrined in the above-mentioned provisions? Are there any other requirements that must be complied with to ensure that the right to access to a court to determine the legality of detention is respected under international human rights treaties? Read carefully the decision of the European Court in the *Assenov* case.

8. On the relationship between the right to an effective remedy and the right to habeas corpus, see Chapter III of this Manual.

\* \* \* \* \*

**B. THE RIGHT NOT TO BE SUBJECTED TO TORTURE OR OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

**1. SCOPE OF THE RIGHT NOT TO BE SUBJECTED TO TORTURE OR OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

**Article 5  
Right to Humane Treatment  
American Convention on Human Rights**

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel,inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.

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**Article 7  
International Covenant on Civil and Political Rights**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

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**Article 3  
Prohibition of torture  
European Convention for the Protection of Human Rights and Fundamental Freedoms**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

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**Article 1  
Convention against Torture and Other Cruel, Inhuman or  
Degrading Treatment or Punishment**

1. For the purposes of this 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

**Article 16**  
**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

1. Each State Party shall undertake 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, 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. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

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**Article 2**  
**Inter-American Convention to Prevent and Punish Torture**

For the purposes of this 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.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

**Article 3**

## Inter-American Convention to Prevent and Punish Torture

The following shall be held guilty of the crime of torture:

- a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
- b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

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**Luis Lizardo Cabrera v. Dominican Republic**  
*Case 10.832, Inter-Am C.H.R. 821,*  
*Annual Report 1997, OEA/Ser.L/V/II.98, doc. 7 rev. (1998)*  
*[Footnotes omitted]*

2. According to the report, Mr. Luis Lizardo Cabrera was arrested on May 4, 1989, by the National Police, was confined for five days and tortured. On May 11, 1989, he was accused of participating in a bomb attack on the headquarters of the Dominican American Institute.
3. By a decision dated July 17, 1989, the judge of the First Criminal Division of the Lower Court of the National District of Santo Domingo received a petition for habeas corpus lodged in behalf of Luis Lizardo Cabrera and ordered his immediate release, it having been demonstrated that there was no evidence of his guilt. The court's decision was disobeyed by the National Police.
4. On November 30, 1989, the judge of the Fourth Criminal Division of the National District ordered the immediate release of Luis Lizardo Cabrera because there was no evidence of his guilt. This decision was also disobeyed by the National Police.
5. Once the accusation that he had participated in bomb attacks was rejected by the judiciary, the National Police accused him of having participated in an assault on Banco Metropolitano, which had occurred in September 1988.
6. At this new trial, on July 16, 1990, the judge of the First Criminal Division of the National District of Santo Domingo received a petition for habeas corpus lodged in behalf of Luis Lizardo Cabrera and ordered his immediate release, because there was no serious, conclusive, and consistent evidence of his criminal liability.
7. On August 31, 1992, the Supreme Court passed a resolution ordering the release of Luis

Lizardo Cabrera.

8. The National Police has refused to abide by the judicial decisions in favor of Mr. Lizardo Cabrera, alleging that he must remain in prison because of “police regulations”

....

## 2. *Violation of Article 5 of the American Convention*

### 2.1 *Scope of Article 5 of the Convention*

74. Article 5 of the American Convention on Human Rights provides as follows . . .

75. The Convention does not establish criteria to define what is understood by torture or cruel, inhuman, or degrading punishment or treatment.

With regard to the concept of torture, the Inter-American Convention to Prevent and Punish Torture, ratified by the Dominican Republic, establishes . . . .

76. Neither the American Convention nor the Convention to Prevent and Punish Torture establish what should be understood by “inhuman or degrading treatment” or where the border is between torture and inhuman or degrading treatment.

77. With regard to the concept of inhuman and degrading treatment, the European Commission on Human Rights has indicated that “inhuman treatment is that which deliberately causes severe mental or psychological suffering, which, given the particular situation, is unjustifiable” and that “treatment or punishment of an individual may be degrading if he is severely humiliated in front of others or he is compelled to act against his wishes or conscience”.

78. On the same subject, the European Human Rights Court has indicated that for treatment to be “inhuman or degrading” it has to attain a minimum level of severity. The evaluation of this “minimum” level is relative and depends on the circumstances in each case, such as the duration of the treatment, its physical and mental effects, and, in some cases, the sex, age, and health of the victim. The European Court has further expressed that the prohibition against torture and inhuman or degrading treatment is absolute, regardless of the victim’s conduct.

79. With regard to the conceptual difference between the term “torture” and “inhuman or degrading treatment”, the European Commission on Human Rights has indicated that the term “torture” includes “inhuman treatment”, that the concept of “inhuman treatment” includes that of “degrading treatment”, and that torture is “inhuman treatment” with a purpose, which is to obtain information or confessions, or to inflict punishment, and is generally an aggravated form of inhuman treatment.”

80. In the view of the European Human Rights Court, the essential criterion to distinguish between one concept and the other “primarily results from the intensity of the suffering inflicted”.

81. The Inter-American Convention to Prevent and Punish Torture does not use as a criterion in defining torture the intensity or degree of physical or mental suffering experienced by the victim. The criteria the Convention establishes to qualify an act as torture are that:

- (a) it is an intentional act or method;
- (b) it inflicts physical or mental pain or anguish on the person;
- (c) it has a purpose;
- (d) it is perpetrated by a public servant or employee or by a private person at the instigation of a public servant or employee.

82. The Commission considers that both the American Convention and the Inter-American Convention to Prevent and Punish Torture give it certain latitude to assess whether, in view of its seriousness or intensity, an act or practice constitutes torture or inhuman or degrading punishment or treatment.

83. The Commission considers that such classification should be done on a case-by-case basis, taking into account the peculiarities thereof, the duration of the suffering, the physical and mental effects on each specific victim, and the personal circumstances of the victim.

84. The Commission made reference separately to the continued imprisonment of Mr. Lizardo and to his solitary confinement in order to determine whether Article 5 of the American Convention was violated.

### *2.2 The continued imprisonment of Mr. Lizardo constitutes torture*

85. With regard to the continued imprisonment of Mr. Lizardo, the Commission believes that this act constitutes torture inasmuch as:

- (a) Imprisonment has been imposed as a deliberate act by the police authorities who justified it citing “police regulations”. According to the petitioners, the police has also argued that it is due to “superior orders” or because Mr. Lizardo represents “a danger to the country.”
- (b) The measure affecting Mr. Lizardo constitutes a severe attack on his mental and moral integrity. The severity derives from the constant uncertainty over Mr. Lizardo’s future, which has lasted six years. The Commission is also taking into account that the origin of the state of uncertainty is found in an entirely discretionary act by State agents who have exceeded their authority and competence.

(c) The Commission understands that the justifications argued by the Dominican National police to keep Mr. Lizardo in prison illustrate the purposes of the act of torture to which Article 2 of the Inter-American Convention to Prevent Torture refers.

(d) The measure applied to Mr. Lizardo has been imposed by agents of the Dominican government who, while acting beyond their authority, have done so in the course of official duties.

*2.3 The solitary confinement to which Mr. Lizardo Cabrera was subjected constitutes torture*

86. With regard to the solitary confinement imposed on Mr. Lizardo, the Commission believes that it too constitutes torture inasmuch as:

(a) The solitary confinement was deliberately imposed on Mr. Lizardo.

(b) The measure was imposed under circumstances in which Mr. Lizardo's health was in a delicate state.

Mr. Lizardo had previously been involved in a hunger strike that lasted 36 days. The Commission has received information that Mr. Lizardo was suffering from a gastrointestinal illness resulting from the conditions of his imprisonment. The solitary confinement lasted longer than was prudent (seven days) and was extreme in that he was deprived of food and drink and was not allowed access to sunlight. The circumstances of this solitary confinement together with Mr. Lizardo's personal circumstances lead the Commission to conclude that the measure seriously endangered Mr. Lizardo's physical integrity.

(c) The solitary confinement was imposed as a consequence of a riot that occurred in the prison in which Mr. Lizardo is being held. The Commission understands that the measure was imposed for the purpose of personal punishment.

(d) The act of torture is attributable to the State inasmuch as it was perpetrated by its agents acting in the course of official duties.

87. The Commission is taking into account that in the ruling handed down on the substance of the Velásquez Rodríguez case, the Inter-American Court on Human Rights qualified coercive solitary confinement *per se* as cruel and inhuman treatment. However, it considers that, given the specific circumstances of this case, Mr. Lizardo's solitary confinement falls within the concept of torture defined by the Inter-American Convention on Torture. The Commission concludes that the Dominican State violated Articles 5.1 and 5.2 of the American Convention to the detriment of Luis Lizardo Cabrera.

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**Loayza Tamayo v. Perú**

*Inter-Am. Ct. H.R., Judgment of September 17, 1997, (ser. C) No. 33 (1997)*

*[For the facts of this case, see Chapter I]*

56. The Inter-American Commission claimed that Peru violated Ms. María Elena Loayza-Tamayo's right to humane treatment, in breach of Article 5 of the Convention.

57. 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. The European Court of Human Rights has declared 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 (cf. *Eur. Cour H.R., Case of Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25*, para. 167). That situation is exacerbated by the vulnerability of a person who is unlawfully detained (cf. *Eur. Court HR, Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336*, para. 36). 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 (cf. *Ibid.*, para. 38), 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.

58. Although the Commission contended in its application that the victim was raped during her detention, after examination of the file and, given the nature of this fact, the accusation could not be substantiated. However, the other facts alleged, such as *incommunicado* detention, being exhibited through the media wearing a degrading garment, solitary confinement in a tiny cell with no natural light, blows and maltreatment, including total immersion in water, intimidation with threats of further violence, a restrictive visiting schedule (*supra*, para. 46 c., d., e., k. and l.), all constitute forms of cruel, inhuman or degrading treatment in the terms of Article 5(2) of the American Convention. A study of the arguments and evidence proffered shows grave and convergent acts that were not refuted by the State and give reason to believe that cruel, inhuman and degrading treatment was meted out in the instant case of Ms. María Elena Loayza-Tamayo, in violation of her right to humane treatment enshrined in Article 5 of the American Convention.

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**Selmouni v. France**

*Eur. Ct. H.R., Judgment of July 28, 1999 (1999)*

*<<http://www.echr.coe.int>>*

*[Mr. Selmouni was arrested on November 25, 1992 and accused of drug-trafficking. He remained detained for 72 hours in police custody under the authorization of the investigating judge. He alleged that during that period of time he was subjected to ill-treatment by police officers. The expert appointed by the investigating judge reported that the applicant had lesions of traumatic origin. Two actions were initiated to investigate these events, one by a public prosecutor and the other by the applicant himself. Those actions were finally joined. After five years of proceedings, the investigating judge committed the accused police officers for trial. They were finally convicted but their sentences were suspended, with the exception of the officer in charge, who served three months imprisonment. Mr. Selmouni, who was a dual citizen of the Netherlands and Morocco, was sentenced to thirteen years in prison and ordered to pay a sum of money to the customs authority. In his petition he alleged violations of Articles 3 and 6 of the European Convention on Human Rights.]*

91. The applicant submitted that the threshold of severity required for the application of Article 3 had been attained in the present case. He considered that the motive for the police officers' actions had been to obtain a confession, as he had been informed against and the police officers had been convinced that he was guilty even though the body search and the search of his hotel room at the time of his arrest had not yielded any evidence. He asserted that, aged forty-nine, he had never been convicted or even arrested and that he stood by his refusal to admit any involvement in the drug-trafficking being investigated by the police. He contended that the police officers had deliberately ill-treated him, given their constant questioning by day and, above all, by night.

The applicant submitted that he had been subjected to both physical and mental ill-treatment. In his view, it was well known that such police practices existed, and that they required preparation, training and deliberate intent and were designed to obtain a confession or information. He argued that, in the light of the facts of the case, the severity and cruelty of the suffering inflicted on him justified classifying the acts as torture within the meaning of Article 3 of the Convention.

92. The Commission considered that the blows inflicted on the applicant had caused him actual injuries and acute physical and mental suffering. In its opinion, that treatment must have been inflicted on him deliberately and, moreover, with the aim of obtaining a confession or information. In the Commission's view, such treatment, inflicted by one or more State officials and to which medical certificates bore testimony, was of such a serious and cruel nature that it could only be described as torture, without it being necessary to give an opinion regarding the

other offences, in particular of rape, alleged by the applicant.

93. In their memorial the Netherlands Government agreed with the Commission's assessment of the facts in the light of the provisions of the Convention, and with its conclusion.

94. The French Government pointed to a contradiction between the finding by the Commission, which noted the "seriousness" of the injuries found by Dr Garnier in his report of 7 December 1991, and the finding by Dr Garnier himself, who concluded in a later report that the injuries had "no serious features". The Government also submitted that the eye specialist had concluded that there was no causal link between the alleged facts and the loss of visual acuity.

In any event, they contended in the light of both the Court's case-law (see the *Ireland v. the United Kingdom*, *Tomasi v. France* and *Aydin v. Turkey* judgments cited above) and the circumstances of the case that the ill-treatment allegedly inflicted by the police officers did not amount to "torture" within the meaning of Article 3 of the Convention.

95. The Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation (see the following judgments: *Ireland v. the United Kingdom*, cited above, p. 65, § 163; *Soering v. the United Kingdom*, cited above, p. 34, § 88; and *Chahal v. the United Kingdom*, 15 November 1996, Reports 1996-V, p. 1855, § 79).

96. In order to determine whether a particular form of ill-treatment should be qualified as torture, the Court must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. As the European Court has previously found, it appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering (see the *Ireland v. the United Kingdom* judgment cited above, p. 66, § 167).

97. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, also makes such a distinction, as can be seen from Articles 1 and 16 [see text of articles reproduced above.]

98. The Court finds that all the injuries recorded in the various medical certificates (see paragraphs 11-15 and 17-20 above) and the applicant's statements regarding the ill-treatment to which he had been subjected while in police custody (see paragraphs 18 and 24 above) establish the existence of physical and – undoubtedly (notwithstanding the regrettable failure to order a psychological report on Mr Selmouni after the events complained of) – mental pain and suffering. The course of the events also shows that pain and suffering were inflicted on the

applicant intentionally for the purpose of, inter alia, making him confess to the offence which he was suspected of having committed. Lastly, the medical certificates annexed to the case file show clearly that the numerous acts of violence were directly inflicted by police officers in the performance of their duties.

99. The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance. The Court therefore finds elements which are sufficiently serious to render such treatment inhuman and degrading (see the *Ireland v. the United Kingdom* judgment cited above, p. 66, § 167, and the *Tomasi v. France* judgment cited above, p. 42, § 115). In any event, the Court reiterates that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see the *Ribitsch v. Austria* judgment of 4 December 1995, Series A no. 336, p. 26, § 38, and the *Tekin v. Turkey* judgment of 9 June 1998, Reports 1998-IV, pp. 1517-18, § 53).

100. In other words, it remains to establish in the instant case whether the “pain or suffering” inflicted on Mr Selmouni can be defined as “severe” within the meaning of Article 1 of the United Nations Convention. The Court considers that this “severity” is, like the “minimum severity” required for the application of Article 3, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.

101. The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture (see the *Aksoy v. Turkey* judgment cited above, p. 2279, § 64, and the *Aydin v. Turkey* judgment cited above, pp. 1892-93, §§ 83-84 and 86). However, having regard to the fact that the Convention is a “living instrument which must be interpreted in the light of present-day conditions” (see, among other authorities, the following judgments: *Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26, p. 15, § 31; *Soering v. the United Kingdom*, cited above, p. 40, § 102; and *Loizidou v. Turkey*, 23 March 1995, Series A no. 310, p. 26, § 71), the Court considers that certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.

102. The Court is satisfied that a large number of blows were inflicted on Mr Selmouni. Whatever a person’s state of health, it can be presumed that such intensity of blows will cause substantial pain. Moreover, a blow does not automatically leave a visible mark on the body. However, it can be seen from Dr Garnier’s medical report of 7 December 1991 (see paragraphs 18-20 above) that the marks of the violence Mr Selmouni had endured covered almost all of his body.

103. The Court also notes that the applicant was dragged along by his hair; that he was made to run along a corridor with police officers positioned on either side to trip him up; that he was made to kneel down in front of a young woman to whom someone said “Look, you’re going to hear somebody sing”; that one police officer then showed him his penis, saying “Look, suck this”, before urinating over him; and that he was threatened with a blowlamp and then a syringe (see paragraph 24 above). Besides the violent nature of the above acts, the Court is bound to observe that they would be heinous and humiliating for anyone, irrespective of their condition.

104. The Court notes, lastly, that the above events were not confined to any one period of police custody during which – without this in any way justifying them – heightened tension and emotions might have led to such excesses. It has been clearly established that Mr Selmouni endured repeated and sustained assaults over a number of days of questioning (see paragraphs 11-14 above).

105. Under these circumstances, the Court is satisfied that the physical and mental violence, considered as a whole, committed against the applicant’s person caused “severe” pain and suffering and was particularly serious and cruel. Such conduct must be regarded as acts of torture for the purposes of Article 3 of the Convention.

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**“The Judgment Concerning the Interrogation Methods Implied by the GSS”**

*Supreme Court of Israel, Judgment of September 6, 1999 (1999)*

*<<http://www.court.gov.il/>>*

*[This case was brought to the Supreme Court of Israel by two NGOs and by individual applicants in order to challenge the legality of the methods used by the General Security Service (GSS), a counter-terrorism agency, in interrogating individuals suspected of terrorist activities. As accepted by the parties, in the context of those interrogations, GSS investigators made use of physical means such as shaking, “waiting in the ‘Shabach’ position,”<sup>1</sup> the so-called “frog crouch,”<sup>2</sup> excessive tightening of handcuffs, and sleep deprivation. Petitioners argued that those methods constitute torture, and therefore violate international and domestic laws. The State, on the other hand, argued that they do not violate international law because they cannot be*

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<sup>1</sup> This method is described in the decision itself.

<sup>2</sup> This method is described as consecutive, periodic crouches on the tips of one’s toes, each lasting for five minute intervals.

*qualified as torture or cruel and inhuman treatment since they do not cause pain and suffering to the suspects under interrogation. Moreover, these methods are also legal under the “necessity defense” recognized by Israel’s domestic criminal laws. It concluded that in specific cases, where it is necessary to obtain certain information in order to save human lives, the investigator is entitled to apply both psychological pressure and a moderate degree of physical pressure. The Supreme Court of Israel addressed the issue of the legality of the methods of interrogation used by the GSS for the first time in this case.]*

The General Security Service (hereinafter, the “GSS”) investigates individuals suspected of committing crimes against Israel’s security. Is the GSS authorized to conduct these interrogations? The interrogations are conducted on the basis of directives regulating interrogation methods. These directives equally authorize investigators to apply physical means against those undergoing interrogation (for instance, shaking the suspect and the “Shabach” position). The basis for permitting such methods is that they are deemed immediately necessary for saving human lives. Is the sanctioning of these interrogation practices legal? - These are the principal issues presented by the applicants before us.

....

21. As we have seen, the GSS investigators are endowed with the authority to conduct interrogations (See par. 20, *supra*). What is the scope of these powers and do they encompass the use of physical means in the course of the interrogation in order to advance it? Can use be made of the physical means presently employed by GSS investigators (such as shaking, the “Shabach” position, and sleep deprivation) by virtue of the investigating powers given the GSS investigators? . . . .

....

23. It is not necessary for us to engage in an in-depth inquiry into the “law of interrogation” for the purposes of the applications before us. . . This having been said, a number of general principles are nonetheless worth noting:

First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever. . . This conclusion is in perfect accord with (various) International Law treaties -to which Israel is a signatory -which prohibit the use of torture, “cruel, inhuman treatment” and “degrading treatment” . . . These prohibitions are “absolute”. There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect’s body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can potentially lead to the investigator being held criminally liable. . . Second, a reasonable investigation is likely to cause discomfort; it may result in insufficient sleep; the conditions under which it is conducted risk being unpleasant. . . .

24. We shall now turn from the general to the particular. Plainly put, shaking is a prohibited investigation method. It harms the suspect's body. It violates his dignity. It is a violent method which does not form part of a legal investigation. It surpasses that which is necessary. . . .

25. It was argued before the Court that one of the investigation methods employed consists of the suspect crouching on the tips of his toes for five minute intervals. The State did not deny this practice. This is a prohibited investigation method. It does not serve any purpose inherent to an investigation. It is degrading and infringes upon an individual's human dignity.

26. The "Shabach" method is composed of a number of cumulative components: the cuffing of the suspect, seating him on a low chair, covering his head with an opaque sack (head covering) and playing powerfully loud music in the area. Are any of the above acts encompassed by the general power to investigate? Our point of departure is that there are actions which are inherent to the investigation power (Compare C.A. 4463/94, *supra.*, *ibid.*). Therefore, we accept that the suspect's cuffing, for the purpose of preserving the investigators' safety, is an action included in the general power to investigate (Compare H.C. 8124/96 *Mubarak v. The GSS* (unpublished)). Provided the suspect is cuffed for this purpose, it is within the investigator's authority to cuff him. The State's position is that the suspects are indeed cuffed with the intention of ensuring the investigators' safety or to prevent fleeing from legal custody. Even the applicants agree that it is permissible to cuff a suspect in similar circumstances and that cuffing constitutes an integral part of an interrogation. Notwithstanding, the cuffing associated with the "Shabach" position is unlike routine cuffing. The suspect is cuffed with his hands tied behind his back. One hand is placed inside the gap between the chair's seat and back support, while the other is tied behind him, against the chair's back support. This is a distorted and unnatural position. The investigators' safety does not require it. Therefore, there is no relevant justification for handcuffing the suspect's hands with particularly small handcuffs, if this is in fact the practice. The use of these methods is prohibited. . . .

27. This is the law with respect to the method involving seating the suspect in question in the "Shabach" position. We accept that seating a man is inherent to the investigation. This is not the case when the chair upon which he is seated is a very low one, tilted forward facing the ground, and when he is sitting in this position for long hours. This sort of seating is not encompassed by the general power to interrogate. Even if we suppose that the seating of the suspect on a chair lower than that of his investigator can potentially serve a legitimate investigation objective (for instance, to establish the "rules of the game" in the contest of wills between the parties, or to emphasize the investigator's superiority over the suspect), there is no inherent investigative need for seating the suspect on a chair so low and tilted forward towards the ground, in a manner that causes him real pain and suffering. Clearly, the general power to conduct interrogations does not authorize seating a suspect on a forward tilting chair, in a manner that applies pressure and causes pain to his back, all the more so when his hands are tied behind the chair, in the manner described. All these methods do not fall within the sphere of a "fair" interrogation. They are not reasonable. They impinge upon the suspect's dignity, his bodily integrity and his basic rights in an excessive manner (or beyond what is necessary). They are not to be deemed as included

within the general power to conduct interrogations.

28. We accept that there are interrogation related considerations concerned with preventing contact between the suspect under interrogation and other suspects and his investigators, which require means capable of preventing the said contact. The need to prevent contact may, for instance, flow from the need to safeguard the investigators' security, or that of the suspects and witnesses. It can also be part of the "mind game" which pins the information possessed by the suspect, against that found in the hands of his investigators. For this purpose, the power to interrogate- in principle and according to the circumstances of each particular case- includes preventing eye contact with a given person or place. In the case at bar, this was the explanation provided by the State for covering the suspect's head with an opaque sack, while he is seated in the "Shabach" position. From what was stated in the declarations before us, the suspect's head is covered with an opaque sack throughout his "wait" in the "Shabach" position. It was argued that the sack (head covering) is entirely opaque, causing the suspect to suffocate. The edges of the sack are long, reaching the suspect's shoulders. All these methods are not inherent to an interrogation. They do not confirm the State's position, arguing that they are meant to prevent eye contact between the suspect being interrogated and other suspects. Indeed, even if such contact should be prevented, what is the purpose of causing the suspect to suffocate? Employing this method is not connected to the purpose of preventing the said contact and is consequently forbidden. Moreover, the statements clearly reveal that the suspect's head remains covered for several hours, throughout his wait. For these purposes, less harmful means must be employed, such as letting the suspect wait in a detention cell. Doing so will eliminate any need to cover the suspect's eyes. In the alternative, the suspect's eyes may be covered in a manner that does not cause him physical suffering. For it appears that at present, the suspect's head covering - which covers his entire head, rather than eyes alone,- for a prolonged period of time, with no essential link to the goal of preventing contact between the suspects under investigation, is not part of a fair interrogation. It harms the suspect and his (human) image. It degrades him. It causes him to lose sight of time and place. It suffocates him. All these things are not included in the general authority to investigate. In the cases before us, the State declared that it will make an effort to find an "ventilated" sack. This is not sufficient. The covering of the head in the circumstances described, as distinguished from the covering of the eyes, is outside the scope of authority and is prohibited.

29. Cutting off the suspect from his surroundings can also include preventing him from listening to what is going on around him. We are prepared to assume that the authority to investigate an individual equally encompasses precluding him from hearing other suspects under investigation or voices and sounds that, if heard by the suspect, risk impeding the interrogation's success. Whether the means employed fall within the scope of a fair and reasonable interrogation warrant examination at this time. In the case at bar, the detainee is found in the "Shabach" position while listening to the consecutive playing of powerfully loud music. Do these methods fall within the scope or the general authority to conduct interrogations? Here too, the answer is in the negative. Being exposed to powerfully loud music for a long period of time causes the suspect suffering. Furthermore, the suspect is tied (in place) in an uncomfortable position with his head covered (all

the while). The use of the “Shabach” method is prohibited. It does not fall within the scope of the authority to conduct a fair and effective interrogation. Powerfully loud music is a prohibited means for use in the context described before us.

30. To the above, we must add that the “Shabach” position includes all the outlined methods employed simultaneously. Their combination, in and of itself gives rise to particular pain and suffering. This is a harmful method, particularly when it is employed for a prolonged period of time. For these reasons, this method does not form part of the powers of interrogation. It is an unacceptable method. . . .

. . . .

31. The interrogation of a person is likely to be lengthy, due to the suspect’s failure to cooperate or due to the information’s complexity or in light of the imperative need to obtain information urgently and immediately. . . Indeed, a person undergoing interrogation cannot sleep as does one who is not being interrogated. The suspect, subject to the investigators’ questions for a prolonged period of time, is at times exhausted. This is often the inevitable result of an interrogation, or one of its side effects. This is part of the “discomfort” inherent to an interrogation. This being the case, depriving the suspect of sleep is, in our opinion, included in the general authority of the investigator. . . The above described situation is different from those in which sleep deprivation shifts from being a “side effect” inherent to the interrogation, to an end in itself. If the suspect is intentionally deprived of sleep for a prolonged period of time, for the purpose of tiring him out or “breaking” him- it shall not fall within the scope of a fair and reasonable investigation. Such means harm the rights and dignity of the suspect in a manner surpassing that which is required.

. . . .

Physical Means and the “Necessity” Defence

33. We have arrived at the conclusion that the GSS personnel who have received permission to conduct interrogations (as per the Criminal Procedure Statute [Testimony]) are authorized to do so. This authority-like that of the police investigator- does not include most of the physical means of interrogation which are the subject of the application before us. Can the authority to employ these interrogation methods be anchored in a legal source beyond the authority to conduct an interrogation? This question was answered by the State’s attorneys in the affirmative. As noted, an explicit authorization permitting GSS to employ physical means is not to be found in our law. An authorization of this nature can, in the State’s opinion, be obtained in specific cases by virtue of the criminal law defense of “necessity”, prescribed in the Penal Law.<sup>3</sup>

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<sup>3</sup> Article 34(1)) provides: *“A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the particular state of things*

34. . . . Likewise, we are prepared to accept . . . that the “necessity” exception is likely to arise in instances of “ticking time bombs”, and that the immediate need (“necessary in an immediate manner” for the preservation of human life) refers to the imminent nature of the act rather than that of the danger. Hence, the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the danger is certain to materialize and there is no alternative means of preventing its materialization. In other words, there exists a concrete level of imminent danger of the explosion’s occurrence . . .

Consequently we are prepared to presume, as was held by the Inquiry Commission’s Report, that if a GSS investigator- who applied physical interrogation methods for the purpose of saving human life-is criminally indicted, the “necessity” defence is likely to be open to him in the appropriate circumstances . . . .

35. Indeed, we are prepared to accept that in the appropriate circumstances, GSS investigators may avail themselves of the “necessity” defence, if criminally indicted. This however, is not the issue before this Court. . . . The question before us is whether it is possible to infer the authority to, in advance, establish permanent directives setting out the physical interrogation means that may be used under conditions of “necessity”. Moreover, we are asking whether the “necessity” defence constitutes a basis for the GSS investigator’s authority to investigate, in the performance of his duty. According to the State, it is possible to imply from the “necessity” defence, available (*post factum*) to an investigator indicted of a criminal offence, an advance legal authorization endowing the investigator with the capacity to use physical interrogation methods. Is this position correct?

36. In the Court’s opinion, a general authority to establish directives respecting the use of physical means during the course of a GSS interrogation cannot be implied from the “necessity” defence. The “necessity” defence does not constitute a source of authority, allowing GSS investigators to make use physical means during the course of interrogations. The reasoning underlying our position is anchored in the nature of the “necessity” defence. This defence deals with deciding those cases involving an individual reacting to a given set of facts; It is an ad hoc endeavour, in reaction to a event. . . Thus, the very nature of the defence does not allow it to serve as the source of a general administrative power. . . .

Moreover, the “necessity” defence has the effect of allowing one who acts under the circumstances of “necessity” to escape criminal liability. The “necessity” defence does not possess any additional normative value. In addition, it does not authorize the use of physical means for the purposes of allowing investigators to execute their duties in circumstances of necessity. The very fact that a particular act does not constitute a criminal act (due to the

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*[circumstances], at the requisite timing, and absent alternative means for avoiding the harm.”*

“necessity” defence) does not in itself authorize the administration to carry out this deed, and in doing so infringe upon human rights. The Rule of Law (both as a formal and substantive principle) requires that an infringement on a human right be prescribed by statute, authorizing the administration to this effect. . . .

37. In other words, general directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not from defences to criminal liability. . . . If the State wishes to enable GSS investigators to utilize physical means in interrogations, they must seek the enactment of legislation for this purpose. . . . The power to enact rules and to act according to them requires legislative authorization, by legislation whose object is the power to conduct interrogations. Within the boundaries of that legislation, the Legislator, if he so desires, may express his views on the social, ethical and political problems, connected to authorizing the use of physical means in an interrogation. . . . Endowing GSS investigators with the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the latter’s dignity and liberty, raise basic questions of law and society, of ethics and policy, and of the Rule of Law and security. These questions and the corresponding answers must be determined by the Legislative branch. This is required by the principle of the Separation of Powers and the Rule of Law, under our very understanding of democracy . . . .

. . . .

### **Questions**

1. Is there a single definition of torture in international law? If so, what are the elements that have to be present to consider a particular conduct torture? Do the general human rights treaty provisions reproduced above set out an “objective” standard to distinguish between torture and other cruel and inhuman or degrading treatment and punishment? What about the provisions of the U.N. and Inter-American Conventions against Torture?
2. Does the preceding case law of the Inter-American and European Systems provide clear guidance for establishing when conduct constitutes torture or cruel and inhuman treatment or punishment? What about degrading treatment? If it does, how would you articulate the applicable tests? Do you find convincing the argument of the European Court in the *Selmouni* case that the scope of torture is an evolving concept that changes according to the new perceptions of societies?
3. What is the scope of the requirement stated in Articles 1 and 16 of the U.N. Convention against Torture and Articles 2 and 3 of the Inter-American treaty that sufficient contact with State officials be established to consider particular conduct torture? To answer this question, read carefully the decision of the U.S. Court of Appeals in *Kadic v. Karadzic* that is reproduced

below. Also, consider the decision of the Committee against Torture in *Elmi v. Australia*<sup>4</sup> where the petitioner complained that his forced return to Somalia would constitute a violation of Australia's obligations under Article 3 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment. According to his account, as a member of the Shikal clan in Somalia, he faced persecution by other armed clans that were involved in the civil strife in his country. Australia challenged the admissibility of the petition arguing that for a particular act to fall within the definition of torture under Article 1 of the Convention it must be carried out by, or at the instigation of, or with the consent or acquiescence of a public official or any other person acting in an official capacity. The Committee in its decision stated:

6.5 The Committee does not share the State party's view that the Convention is not applicable in the present case since, according to the State party, the acts of torture the author fears he would be subjected to in Somalia would not fall within the definition of torture set out in article 1 . . . The Committee notes that for a number of years Somalia has been without a central government, that the international community negotiates with the warring factions and that some of the factions operating in Mogadishu have set up quasi-governmental institutions and are negotiating the establishment of a common administration. It follows then that, de facto, those factions exercise certain prerogatives that are comparable to those normally exercised by legitimate governments. Accordingly, the members of those factions can fall, for the purpose of the application of the Convention, within the phrase "public officials or other persons acting in an official capacity" contained in article 1.

Do certain acts within the sphere of domestic violence against women fall within the definition of torture or other cruel, inhuman or degrading treatment under international law? Elaborate.

4. If you were a legislator, how would you draft a bill incorporating the crime of torture into domestic criminal law? How would you distinguish it from cruel and inhuman or degrading treatment or punishment? Would you use the provisions of international treaties and the case law of supervisory bodies for that purpose or, from your point of view, are they not precise enough to be applied by a domestic court establishing criminal liability?

5. After reading the provisions of international treaties and the preceding case law, do you think the right not to be subjected to torture or other cruel, inhuman or degrading treatment is "absolute" or, in your opinion, could it be subject to restrictions in particular circumstances, such as those related to national security issues? Compare your answer to the decision of the European Court in the *Chahal* case, reproduced in Chapter III of this Manual. What about the "ticking time bomb" rationale advanced by the Government of Israel in the case concerning the methods of interrogation used by the General Security Service in that country? In regard to that case, did the decision of the Supreme Court of Israel hold that the use of the challenged methods by the

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<sup>4</sup> Communication No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999), <<http://sim.law.uu.nl>; <http://www.unhchr.ch>>

members of the GSS is prohibited? Assuming that the Parliament of Israel adopts the legislation suggested by the decision, would that legislation be compatible with international standards? Elaborate.

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**2. OTHER EXAMPLES OF VIOLATIONS OF THE RIGHT NOT TO BE  
SUBJECTED TO TORTURE, OR OTHER CRUEL, INHUMAN OR DEGRADING  
TREATMENT**

*Comment*

Apart from cases of detained or arrested persons, violations to the right not to be subjected to torture, or other cruel, inhuman or degrading treatment have been raised in the context of other circumstances such as rape, extradition/expulsion of foreign nationals, the death penalty, and forced disappearances. The most relevant cases where rape has been considered torture are *Raquel Martín de Mejía v. Perú*, decided by the Inter-American Commission on Human Rights and *Aydin v. Turkey*, decided by the European Court of Human Rights. Both decisions are reproduced in Chapter VII of this Manual in the section dealing with Women's Rights.

**a. Extradition/Expulsion<sup>5</sup>**

**Article 3  
Convention against Torture and Other Cruel, Inhuman or  
Degrading Treatment or Punishment**

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

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<sup>5</sup> The Inter-American Convention to Prevent and Punish Torture only provides in Article 13 concerning extradition of those accused of torture that extradition shall not be granted when there are grounds to believe that his/her life will be in danger, that he/she will be subjected to torture or to cruel, inhuman or degrading treatment, or that he/she will be tried by special or ad hoc courts. Additionally, the American Convention establishes in Article 22(8) that an alien may not be deported or returned to a country if in that country his right to life or personal freedom is in danger of been violated because of his race, nationality, religion, social status, or political opinion.

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.

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**Halil Haydin v. Sweden**

*[U.N. Committee against Torture]*

*Communication No. 101/1997, U.N. Doc. CAT/C/21/D/101/1997 (December 16, 1998)*

*<<http://sim.law.uu.nl>; <http://www.unhchr.ch>>*

*[Mr. Haydin is a Turkish national of Kurdish origin from the southeastern part of Turkey. According to his account he supported the PKK actively until he left his country. For that reason, on one occasion he was arrested for forty days and subjected to torture and other cruel and inhuman treatment. Afterwards, whenever a clash between the PKK and the Turkish armed forces occurred near the applicant's village, he was arrested, interrogated for hours, and then released. Following one of those clashes, and after learning that his name had been revealed to the authorities, Mr. Haydin fled from his village to the mountains, and then left his country. After arriving in Sweden, he applied for political asylum on several occasions but his application was always denied. He filed a complaint with the Committee against Torture arguing that his forced return to Turkey would constitute a violation by Sweden of Article 3 of the Convention against Torture.]*

*The complaint*

3.1. In view of his political activities, the author claims that there exist substantial grounds to believe that he would be subjected to torture if he were to be returned to Turkey. His forced return would therefore constitute a violation by Sweden of article 3 of the Convention against Torture.

3.2. Counsel provides a medical report from the Center for Torture and Trauma Survivors in Stockholm indicating that the author suffers from a post-traumatic stress disorder (PTSD). He states that the report neither confirms nor denies that the author has been subjected to physical torture. However, the medical experts underline that the forms of torture which the author claims he was subjected to do not necessarily leave physical marks.

....

*The State party's observations*

4.1. By submission of 20 February 1998, the State party informs the Committee that, following

the Committee's request under rule 108, paragraph 9, of its rules of procedure, the National Immigration Board decided to stay the expulsion order against the author while his communication is under consideration by the Committee.

....

4.6. As to merits of the communication, the State party refers to the Committee's jurisprudence in the cases of Mutombo v. Switzerland, Communication No. 13/1993 (CAT/C/12/D/13/1993), Views adopted on 27 April 1994; and Ernest Gorki Tania Paez v. Sweden, Communication No. 39/1996 (CAT/C/18/39/1996), Views adopted on 7 May 1997, and the criteria established by the Committee: first, that a person must personally be at risk of being subjected to torture and second, that such torture must be a necessary and foreseeable consequence of the return of the person to his or her country.

4.7. The State party reiterates that when determining whether article 3 of the Convention applies, the following considerations are relevant: (a) the general situation of human rights in the receiving country, although the existence of a consistent pattern of gross, flagrant or mass violations of human rights is not in itself determinative; (b) the personal risk of the individual concerned of being subjected to torture in the country to which he would be returned; and (c) the risk of the individual being subjected to torture if returned must be a foreseeable and necessary consequence. The State party recalls that the mere possibility that a person will be subjected to torture in his or her country of origin is not sufficient to prohibit his or her return on the ground of incompatibility with article 3 of the Convention.

4.8. The State party states that it is aware of the serious human rights problems occurring in Turkey, in particular in the south-eastern part of the country. It is a well-known fact that arbitrary arrests, demolitions of whole villages and torture are used in the fight against Kurdish separatists. However, in the State party's view, the situation is not so serious that it constitutes a general obstacle to the deportation of Turkish citizens of Kurdish origin to Turkey. A large part of the population consists of persons of Kurdish origin. While many of them live in the south-eastern part of Turkey, others are scattered throughout other parts of the country where they are completely integrated into the Turkish society in general. It should be stressed that, according to current practice, if an expulsion order is carried out with respect to a Turkish citizen of Kurdish origin, he or she will not be deported from Sweden to the Kurdish areas against his or her will, but to Istanbul or Ankara.

4.9. As regards its assessment of whether or not the author would be personally at risk of being subjected to torture, the State party relies on the evaluation of the facts and evidence made by the National Immigration Board and the Aliens Appeal Board. The facts and circumstances invoked by the author have been examined twice by the National Immigration Board and six times by the Aliens Appeal Board. The Swedish authorities have not considered credible the information which the author has provided about his political activities and about the torture and ill-treatment which he claims to have undergone. When re-examining the facts in the second set of

proceedings, the official responsible for the case at the National Immigration Board heard the author in person and was able to make an assessment of the reliability of the information which he submitted orally.

....

4.14. The Government states that the author has not made it credible that he has been engaged in political activities that would make him of interest to the Turkish authorities. He has not substantiated that he had been arrested and undergone torture or other forms of ill-treatment. The Government shares the view of UNHCR and the Aliens Appeal Board that no internal place of refuge is available for persons who risk being suspected of being active in or sympathizers of the PKK. However, since the author has not substantiated that he would run any particular risk of being detained and tortured, the Government is of the opinion that if the author wishes to avoid the disturbances that undoubtedly characterize the south-east he has the possibility of staying in another part of the country.

4.15. The State party concludes that, in the circumstances of the present case, the author's return to Turkey would not have the foreseeable and necessary consequence of exposing him to a real risk of torture. An enforcement of the expulsion order against the author would therefore not constitute a violation of article 3 of the Convention.

*Counsel's comments*

....

5.2. Counsel maintains that the Swedish Government has not evaluated the risk the author would face if he were to be expelled to Turkey, but has focused merely on his credibility. Counsel acknowledges that the author has on different occasions given the authorities an inconsistent account of his political activities and his flight; but these inconsistencies are not material and should be viewed in the light of the fact that the author suffers from PTSD. In this context counsel refers to the Committee's jurisprudence in the cases of *Pauline Muzonzo Paku Kisoki v. Sweden* and *Kaveh Yaragh Tala v. Sweden* where it is stated that "complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims". Counsel reiterates that the author is suffering from PTSD. She states that when asked why he had given different answers to the National Immigration Board in 1997 and during the initial investigative procedure in 1990, the author cried out that although he knew it was important to repeat what he had said almost seven years before, he simply couldn't remember.

....

5.5. Counsel concludes that the author has presented sufficient evidence that he was politically active in the PKK and that he is well known to the Turkish authorities; that he has been detained,

tortured and ill-treated because of his political activities; and finally that the human rights situation in Turkey is such that the group most likely to be exposed to harassment, prosecution and persecution are Kurds suspected of being connected to or being sympathizers of the PKK. She therefore claims that the author's return to Turkey would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured.

5.6. On 29 October 1998, counsel submitted further information to the Committee, indicating that according to a Kurdish solidarity association based in Sweden, of which the author has been a member since 1996, the author is wanted by the Turkish police and the Turkish security service. It is further claimed that the author's family in Turkey has been questioned by the police on three occasions during the past six months about the whereabouts of the author. With respect to this additional information the State party states, in a letter sent to the Committee on 16 November 1998, that it has not altered its position regarding the admissibility and merits of the communication, as described above.

*[The Committee declared the case admissible and proceeded to analyze the merits of the petition.]*

**Views:**

6.2. The issue before the Committee is whether the forced return of the author to Turkey would violate the obligation of Sweden under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

6.3. The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger of being subject to torture upon return to Turkey. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. 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 he or 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; specific grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of 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.

6.4. The Committee is aware of the serious human rights situation in Turkey. Reports from reliable sources suggest that persons suspected of having links with the PKK are frequently tortured in the course of interrogations by law enforcement officers and that this practice is not

limited to particular areas of the country. In this context, the Committee further notes that the Government has stated that it shares the view of UNHCR, i.e. that no place of refuge is available within the country for persons who risk being suspected of being active in or sympathizers of the PKK.

6.5. The Committee recalls that, for the purposes of article 3 of the Convention, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he is returned. The Committee wishes to point out that the requirement of necessity and predictability should be interpreted in the light of its general comment on the implementation of article 3 which reads: *“Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable” (A/53/44, annex IX, para. 6).*

6.6. The Committee notes the medical evidence provided by the author. The Committee notes in particular that the author suffers from a post-traumatic stress disorder and that this has to be taken into account when assessing the author’s presentation of the facts. The Committee notes that the author’s medical condition indicates that the author has in fact been subjected to torture in the past.

6.7. In the author’s case, the Committee considers that the author’s family background, his political activities and affiliation with the PKK, his history of detention and torture, as well as indications that the author is at present wanted by Turkish authorities, should be taken into account when determining whether he would be in danger of being subjected to torture upon his return. The Committee notes that the State party has pointed to contradictions and inconsistencies in the author’s story and further notes the author’s explanations for such inconsistencies. The Committee considers that complete accuracy is seldom to be expected by victims of torture, especially when the victim suffers from post-traumatic stress syndrome; it also notes that the principle of strict accuracy does not necessarily apply when the inconsistencies are of a material nature. In the present case, the Committee considers that the presentation of facts by the author does not raise significant doubts as to the trustworthiness of the general veracity of his claims.

6.8. In the circumstances, the Committee considers that substantial grounds exist for believing that the author would be in danger of being subjected to torture if returned to Turkey.

....

## b. Death Penalty

**Soering v. United Kingdom**  
*161 Eur. Ct. H.R. (ser. A) (1989)*  
<<http://www.echr.coe.int>>

*[Mr. Soering, a German national, was accused of murdering his girlfriend's parents, Mr. and Ms. Haysom, in Bedford County, Virginia. After committing the murders, he fled to England where he was finally detained while an extradition request from the United States was processed. In June 1986 he was indicted by a grand jury in Virginia on charges alleging capital murder of both of the victims and the separate non-capital murders of each. Though the prosecuting authorities from Virginia assured that a representation would be made to the judge at the time of sentencing that it was the wish of the United Kingdom that the death penalty neither be imposed nor carried out against Mr. Soering, they nevertheless informed that Government that it was their intention to seek the death penalty in the applicant's case. In February 1987, the Government of the then Federal Republic of Germany requested Mr. Soering's extradition. The British Government rejected that request and, in August 1988, the Secretary of State signed a warrant ordering the applicant's surrender to the United States authorities. In his petition, Mr Soering claimed that there was a serious likelihood that he would be sentenced to death if extradited to the United States; therefore, he would be subjected to the "death row phenomenon" and thereby to inhuman and degrading treatment and punishment contrary to Article 3 of the European Convention on Human Rights. By the time the Court decided this case, the extradition had been stayed by virtue of the interim measures indicated by both the European Commission and Court.]*

### *AS TO THE LAW*

#### *I. ALLEGED BREACH OF ARTICLE 3 (art. 3)*

80. The applicant alleged that the decision by the Secretary of State for the Home Department to surrender him to the authorities of the United States of America would, if implemented, give rise to a breach by the United Kingdom of Article 3 (art. 3) of the Convention . . . .

#### *A. Applicability of Article 3 (art. 3) in cases of extradition*

81. The alleged breach derives from the applicant's exposure to the so-called "death row phenomenon". This phenomenon may be described as consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death.

. . . .

84. The Court will approach the matter on the basis of the following considerations.

85. As results from Article 5 § 1(f) (art. 5-1-f), which permits “the lawful ... detention of a person against whom action is being taken with a view to ... extradition”, no right not to be extradited is as such protected by the Convention. Nevertheless, in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee (see, *mutatis mutandis*, the *Abdulaziz, Cabales and Balkandali* judgment of 25 May 1985, Series A no. 94, pp. 31-32, §§ 59-60 - in relation to rights in the field of immigration). What is at issue in the present case is whether Article 3 (art. 3) can be applicable when the adverse consequences of extradition are, or may be, suffered outside the jurisdiction of the extraditing State as a result of treatment or punishment administered in the receiving State.

86. Article 1 (art. 1) of the Convention, which provides that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I”, sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to “securing” (“reconnaître” in the French text) the listed rights and freedoms to persons within its own “jurisdiction”. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 (art. 1) cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 (art. 3) in particular. In the instant case it is common ground that the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant’s complaints. It is also true that in other international instruments cited by the United Kingdom Government - for example the 1951 United Nations Convention relating to the Status of Refugees (Article 33), the 1957 European Convention on Extradition (Article 11) and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Article 3) - the problems of removing a person to another jurisdiction where unwanted consequences may follow are addressed expressly and specifically. These considerations cannot, however, absolve the Contracting Parties from responsibility under Article 3 (art. 3) for all and any foreseeable consequences of extradition suffered outside their jurisdiction.

....

88. Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies

making up the Council of Europe. It is also to be found in similar terms in other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on Human Rights and is generally recognised as an internationally accepted standard. The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3 (art. 3). That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that “no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture”. The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 (art. 3) of the European Convention. It would hardly be compatible with the underlying values of the Convention, that “common heritage of political traditions, ideals, freedom and the rule of law” to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intent of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article (art. 3).

....

91. In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 (art. 3) of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.

*B. Application of Article 3 (art. 3) in the particular circumstances of the present case*

92. The extradition procedure against the applicant in the United Kingdom has been completed, the Secretary of State having signed a warrant ordering his surrender to the United States authorities (see paragraph 24 above); this decision, albeit as yet not implemented, directly affects him. It therefore has to be determined on the above principles whether the foreseeable

consequences of Mr Soering's return to the United States are such as to attract the application of Article 3 (art. 3). This inquiry must concentrate firstly on whether Mr Soering runs a real risk of being sentenced to death in Virginia, since the source of the alleged inhuman and degrading treatment or punishment, namely the "death row phenomenon", lies in the imposition of the death penalty. Only in the event of an affirmative answer to this question need the Court examine whether exposure to the "death row phenomenon" in the circumstances of the applicant's case would involve treatment or punishment incompatible with Article 3 (art. 3).

1. *Whether the applicant runs a real risk of a death sentence and hence of exposure to the "death row phenomenon."*

93. The United Kingdom Government, contrary to the Government of the Federal Republic of Germany, the Commission and the applicant, did not accept that the risk of a death sentence attains a sufficient level of likelihood to bring Article 3 (art. 3) into play. Their reasons were fourfold. Firstly, as illustrated by his interview with the German prosecutor where he appeared to deny any intention to kill (see paragraph 16 above), the applicant has not acknowledged his guilt of capital murder as such. Secondly, only a prima facie case has so far been made out against him. In particular, in the United Kingdom Government's view the psychiatric evidence (see paragraph 21 above) is equivocal as to whether Mr Soering was suffering from a disease of the mind sufficient to amount to a defence of insanity under Virginia law (as to which, see paragraph 50 above). Thirdly, even if Mr Soering is convicted of capital murder, it cannot be assumed that in the general exercise of their discretion the jury will recommend, the judge will confirm and the Supreme Court of Virginia will uphold the imposition of the death penalty (see paragraphs 42-47 and 52 above). The United Kingdom Government referred to the presence of important mitigating factors, such as the applicant's age and mental condition at the time of commission of the offence and his lack of previous criminal activity, which would have to be taken into account by the jury and then by the judge in the separate sentencing proceedings (see paragraphs 44-47 and 51 above). Fourthly, the assurance received from the United States must at the very least significantly reduce the risk of a capital sentence either being imposed or carried out (see paragraphs 20, 37 and 69 above). At the public hearing the Attorney General nevertheless made clear his Government's understanding that if Mr Soering were extradited to the United States there was "some risk", which was "more than merely negligible", that the death penalty would be imposed.

....

95. Under Virginia law, before a death sentence can be returned the prosecution must prove beyond reasonable doubt the existence of at least one of the two statutory aggravating circumstances, namely future dangerousness or vileness (see paragraph 43 above). In this connection, the horrible and brutal circumstances of the killings (see paragraph 12 above) would presumably tell against the applicant, regard being had to the case-law on the grounds for establishing the "vileness" of the crime (see paragraph 43 above). Admittedly, taken on their own the mitigating factors do reduce the likelihood of the death sentence being imposed. No less than

four of the five facts in mitigation expressly mentioned in the Code of Virginia could arguably apply to Mr Soering's case. These are a defendant's lack of any previous criminal history, the fact that the offence was committed while a defendant was under extreme mental or emotional disturbance, the fact that at the time of commission of the offence the capacity of a defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly diminished, and a defendant's age (see paragraph 45 above).

96. These various elements arguing for or against the imposition of a death sentence have to be viewed in the light of the attitude of the prosecuting authorities.

97. The Commonwealth's Attorney for Bedford County, Mr Updike, who is responsible for conducting the prosecution against the applicant, has certified that "should Jens Soering be convicted of the offence of capital murder as charged ... a representation will be made in the name of the United Kingdom to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out" (see paragraph 20 above). The Court notes, like Lord Justice Lloyd in the Divisional Court (see paragraph 22 above), that this undertaking is far from reflecting the wording of Article IV of the 1972 Extradition Treaty between the United Kingdom and the United States, which speaks of "assurances satisfactory to the requested Party that the death penalty will not be carried out" (see paragraph 36 above). However, the offence charged, being a State and not a Federal offence, comes within the jurisdiction of the Commonwealth of Virginia; it appears as a consequence that no direction could or can be given to the Commonwealth's Attorney by any State or Federal authority to promise more; the Virginia courts as judicial bodies cannot bind themselves in advance as to what decisions they may arrive at on the evidence; and the Governor of Virginia does not, as a matter of policy, promise that he will later exercise his executive power to commute a death penalty (see paragraphs 58-60 above). This being so, Mr Updike's undertaking may well have been the best "assurance" that the United Kingdom could have obtained from the United States Federal Government in the particular circumstances. According to the statement made to Parliament in 1987 by a Home Office Minister, acceptance of undertakings in such terms "means that the United Kingdom authorities render up a fugitive or are prepared to send a citizen to face an American court on the clear understanding that the death penalty will not be carried out ... It would be a fundamental blow to the extradition arrangements between our two countries if the death penalty were carried out on an individual who had been returned under those circumstances" (see paragraph 37 above). Nonetheless, the effectiveness of such an undertaking has not yet been put to the test.

98. The applicant contended that representations concerning the wishes of a foreign government would not be admissible as a matter of law under the Virginia Code or, if admissible, of any influence on the sentencing judge. Whatever the position under Virginia law and practice (as to which, see paragraphs 42, 46, 47 and 69 above), and notwithstanding the diplomatic context of the extradition relations between the United Kingdom and the United States, objectively it cannot be said that the undertaking to inform the judge at the sentencing stage of the wishes of the United Kingdom eliminates the risk of the death penalty being imposed. In the independent

exercise of his discretion the Commonwealth's Attorney has himself decided to seek and to persist in seeking the death penalty because the evidence, in his determination, supports such action (see paragraph 20 in fine above). If the national authority with responsibility for prosecuting the offence takes such a firm stance, it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the "death row phenomenon".

99. The Court's conclusion is therefore that the likelihood of the feared exposure of the applicant to the "death row phenomenon" has been shown to be such as to bring Article 3 (art. 3) into play.

2. *Whether in the circumstances the risk of exposure to the "death row phenomenon" would make extradition a breach of Article 3 (art. 3).*

(a) *General considerations*

100. As is established in the Court's case-law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3 (art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see the above-mentioned Ireland v. the United Kingdom judgment, Series A no. 25, p. 65, § 162; and the Tyrer judgment of 25 April 1978, Series A no. 26, pp. 14-15, §§ 29 and 30). Treatment has been held by the Court to be both "inhuman" because it was premeditated, was applied for hours at a stretch and "caused, if not actual bodily injury, at least intense physical and mental suffering", and also "degrading" because it was "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance" (see the above-mentioned Ireland v. the United Kingdom judgment, p. 66, § 167). In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment (see the Tyrer judgment, loc. cit.). In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him.

....

103. The Convention is to be read as a whole and Article 3 (art. 3) should therefore be construed in harmony with the provisions of Article 2 (art. 2) (see, mutatis mutandis, the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 31, § 68). On this basis Article 3 (art. 3) evidently cannot have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 § 1 (art. 2-1). Subsequent practice in national penal policy, in the form of a generalised abolition of capital

punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (art. 2-1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3 (art. 3). However, Protocol No. 6 (P6), as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention (see paragraph 87 above), Article 3 (art. 3) cannot be interpreted as generally prohibiting the death penalty.

104. That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3 (art. 3). The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 (art. 3). Present-day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.

(b) *The particular circumstances*

.....

i. *Length of detention prior to execution*

106. The period that a condemned prisoner can expect to spend on death row in Virginia before being executed is on average six to eight years (see paragraph 56 above). This length of time awaiting death is, as the Commission and the United Kingdom Government noted, in a sense largely of the prisoner's own making in that he takes advantage of all avenues of appeal which are offered to him by Virginia law. The automatic appeal to the Supreme Court of Virginia normally takes no more than six months (see paragraph 52 above). The remaining time is accounted for by collateral attacks mounted by the prisoner himself in habeas corpus proceedings before both the State and Federal courts and in applications to the Supreme Court of the United States for certiorari review, the prisoner at each stage being able to seek a stay of execution (see paragraphs 53-54 above). The remedies available under Virginia law serve the purpose of ensuring that the ultimate sanction of death is not unlawfully or arbitrarily imposed. Nevertheless, just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full. However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present

shadow of death.

*ii. Conditions on death row*

107. As to conditions in Mecklenburg Correctional Center, where the applicant could expect to be held if sentenced to death, the Court bases itself on the facts which were uncontested by the United Kingdom Government, without finding it necessary to determine the reliability of the additional evidence adduced by the applicant, notably as to the risk of homosexual abuse and physical attack undergone by prisoners on death row (see paragraph 64 above). The stringency of the custodial regime in Mecklenburg, as well as the services (medical, legal and social) and the controls (legislative, judicial and administrative) provided for inmates, are described in some detail above (see paragraphs 61-63 and 65-68). In this connection, the United Kingdom Government drew attention to the necessary requirement of extra security for the safe custody of prisoners condemned to death for murder. Whilst it might thus well be justifiable in principle, the severity of a special regime such as that operated on death row in Mecklenburg is compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years.

*iii. The applicant's age and mental state*

108. At the time of the killings, the applicant was only 18 years old and there is some psychiatric evidence, which was not contested as such, that he "was suffering from [such] an abnormality of mind ... as substantially impaired his mental responsibility for his acts" (see paragraphs 11, 12 and 21 above). Unlike Article 2 (art. 2) of the Convention, Article 6 of the 1966 International Covenant on Civil and Political Rights and Article 4 of the 1969 American Convention on Human Rights expressly prohibit the death penalty from being imposed on persons aged less than 18 at the time of commission of the offence. Whether or not such a prohibition be inherent in the brief and general language of Article 2 (art. 2) of the European Convention, its explicit enunciation in other, later international instruments, the former of which has been ratified by a large number of States Parties to the European Convention, at the very least indicates that as a general principle the youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 (art. 3) of measures connected with a death sentence. It is in line with the Court's case-law (as summarised above at paragraph 100) to treat disturbed mental health as having the same effect for the application of Article 3 (art. 3).

109. Virginia law, as the United Kingdom Government and the Commission emphasised, certainly does not ignore these two factors. Under the Virginia Code account has to be taken of mental disturbance in a defendant, either as an absolute bar to conviction if it is judged to be sufficient to amount to insanity or, like age, as a fact in mitigation at the sentencing stage (see paragraphs 44-47 and 50-51 above). Additionally, indigent capital murder defendants are entitled to the appointment of a qualified mental health expert to assist in the preparation of their submissions at the separate sentencing proceedings (see paragraph 51 above). These provisions in the Virginia Code undoubtedly serve, as the American courts have stated, to prevent the

arbitrary or capricious imposition of the death penalty and narrowly to channel the sentencer's discretion (see paragraph 48 above). They do not however remove the relevance of age and mental condition in relation to the acceptability, under Article 3 (art. 3), of the "death row phenomenon" for a given individual once condemned to death. Although it is not for this Court to prejudge issues of criminal responsibility and appropriate sentence, the applicant's youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3 (art. 3).

*iv. Possibility of extradition to the Federal Republic of Germany*

110. For the United Kingdom Government and the majority of the Commission, the possibility of extraditing or deporting the applicant to face trial in the Federal Republic of Germany (see paragraphs 16, 19, 26, 38 and 71-74 above), where the death penalty has been abolished under the Constitution (see paragraph 72 above), is not material for the present purposes. . . [In the Court's opinion] sending Mr Soering to be tried in his own country would remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row. It is therefore a circumstance of relevance for the overall assessment under Article 3 (art. 3) in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case (see paragraphs 89 and 104 above).

*(c) Conclusion*

111. For any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. The democratic character of the Virginia legal system in general and the positive features of Virginia trial, sentencing and appeal procedures in particular are beyond doubt. . . However, in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3). A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration. Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3 (art. 3). . . .

*Note*

The Human Rights Committee has developed an extensive case law under the ICCPR on the relationship between the right not to be subjected to torture or other cruel, inhuman, or degrading

treatment and the application of the death penalty (Article 7 of the ICCPR). In *Kindler v. Canada*,<sup>6</sup> the Committee decided that capital punishment as such does not *per se* violate the above-mentioned right. Moreover, with respect to the so-called “death row phenomenon”, it stated that “prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.”<sup>7</sup> According to the Committee, the violation of the right not to be subjected to cruel, inhuman or degrading treatment in this context must be assessed pursuant to the circumstances of a particular case, including: the relevant personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent.<sup>8</sup> Similarly, in *Daley v. Jamaica*,<sup>9</sup> the Committee stated that detention on death row for a specific period does not violate the Covenant in the absence of further compelling reasons. In a very interesting development of its case law, the Committee decided in *Ng v. Canada*<sup>10</sup> that execution by gas asphyxiation constitutes cruel and inhuman treatment in violation of Article 7 of the Covenant. Finally, the Committee has found violations of Articles 7 and 10 of the Covenant in cases where petitioners alleged insalubrious conditions of detention.<sup>11</sup>

The Inter-American Commission of Human Rights has recently issued reports on death penalty cases in Grenada and Jamaica.<sup>12</sup> In those cases, the Commission decided that the mandatory application of capital punishment in murder cases entailed violations of Articles 4 (right to life), 5 (right to humane treatment), and 8 (fair trial) of the American Convention, but it did not address the issues of whether detention on death row for a specific period of time or a proposed method of execution -hanging - violated that treaty. In both cases, however, the Commission found that the

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<sup>6</sup> Communication No. 470/191, U.N. Doc. CCPR/C/48/D/470/1991 (November 18, 1993), <<http://sim.law.uu.nl>; <http://www.unhchr.ch>>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Communication No. 750/1991, U.N. Doc. CCPR/C/63D/750/1997 (August 3, 1998), <<http://sim.law.uu.nl>; <http://www.unhchr.ch>>.

<sup>10</sup> Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (January 7, 1994), <<http://sim.law.uu.nl>; <http://www.unhchr.ch>>.

<sup>11</sup> See, *inter alia*, *Daley v. Jamaica*, *supra*.

<sup>12</sup> *Baptiste v. Grenada*, Case 11.743, Inter-Am. C.H.R. 721, Annual Report 1999, OEA/Ser.L/V/II.106, doc. 3 (2000); *McKenzie et al. v. Jamaica*, Cases 12.023, 12.044, 12.107, 12.126, and 12.146, Inter-Am. C.H.R. 918, Annual Report 1999, *id.*

conditions in which the victims were detained amounted to a violation of their right to humane treatment under the American Convention on Human Rights. Excerpts of the case *Baptiste v. Grenada* are reproduced below.

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**Rudolph Baptiste v. Grenada**  
*Case 11.743, Inter-Am. C.H.R. 721,*  
*Annual Report 1999, OEA/Ser.L/V/II.106, doc. 3 rev. (2000)*  
*[Footnotes omitted]*

*[Mr. Baptiste was convicted of the murder of his mother and sentenced to death by hanging. He argues that the murder of his mother occurred following his intervention to prevent her from further beating his thirteen-year-old younger brother. Mr. Baptiste is currently awaiting execution at Richmond Hill Prison, in Grenada. Petitioners argue that the State has violated Mr. Baptiste's rights, inter alia, under Articles 4(1), 4(6), 5(1), 5(2), 5(6), 8, and 24 of the American Convention.]*

- a. *Articles 4, 5, 8 and 24 - The mandatory death penalty*
- ii. *Mr. Baptiste was sentenced to a mandatory death penalty*

69. Mr. Baptiste was convicted of murder pursuant to Section 234 of the Criminal Code of Grenada, which provides that “[w]hoever commits murder shall be liable to suffer death and sentenced to death.” The crime of murder in Grenada can therefore be regarded as subject to a mandatory death penalty, namely a death sentence that the law compels the sentencing authority to impose based solely upon the category of crime for which the defendant is found responsible. Once a defendant is found guilty of the crime of murder, the death penalty must be imposed. Accordingly, mitigating circumstances cannot be taken into account by a court in imposing the death penalty.

70. As indicated in Part III of this Report, Mr. Baptiste has alleged that because he was sentenced to a mandatory death penalty for the crime of murder, the State violated his rights pursuant to Articles 4(2), 4(6), 5(1), 5(2), 8 and 24 of the American Convention. Mr Baptiste has also argued that the process for granting amnesty, pardon or commutation of sentence in Grenada does not provide an adequate opportunity for considering individual circumstances, and in itself violates Article 4(6) of the Convention.

....

ii. *Articles 4, 5, and 8 of the American Convention and the mandatory death penalty*

72. In light of the allegations raised by Mr. Baptiste, the Commission must first ascertain whether the practice of imposing the death penalty for the crime of murder through mandatory sentencing is compatible with Article 4 (right to life), Article 5 (right to humane treatment), and Article 8 (right to a fair trial) of the American Convention and the principles underlying those provisions:

Article 4 of the American Convention provides as follows . . . .

73. Article 4 of the Convention permits States Parties that have not abolished the death penalty to continue to impose it. At the same time, the Convention strictly regulates the manner in which the death penalty may be imposed by States Parties in their respective States. This restrictive approach under the Convention to the perpetuation of the death penalty mirrors the treatment of the death penalty generally under contemporary international and, as Part IV of this Report will indicate, domestic practice.

74. More particularly, drawing in part upon the past experience of international human rights bodies, several general principles of interpretation can be identified in respect of the death penalty provisions of international human rights instruments in general, and Article 4 of the Convention in particular. First, the supervisory bodies of international human rights instruments have subjected the death penalty provisions of their governing instruments to a rule of restrictive interpretation. In its Advisory Opinion on Restrictions to the Death Penalty under Articles 4(1) and 4(4) of the Convention, for example, the Inter American Court of Human Rights adopted a restrictive approach to Article 4 of the Convention, finding that the text of the article as a whole reveals a clear tendency to restrict the scope of this penalty both as far as its imposition and its application are concerned.

75. Other international human rights supervisory bodies have similarly afforded a strict interpretation of the death penalty provisions in human rights treaties. The U.N. Human Rights Committee has held in the context of Article 6 of the ICCPR, which parallels Article 4 of the Convention in certain respect, that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of the state. The Committee has accordingly determined that the imposition of a sentence of death upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is possible, a violation of Article 6 of the Covenant. Its recommended remedies in such cases have included release, and commutation of the death sentence. The U.N. Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions has likewise emphasized that proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries and other strict requirements of due process. This Commission has similarly closely scrutinized the circumstances of death penalty cases to ensure strict compliance with the requirements of due process and judicial protection.

76. It is also generally recognized that the death penalty is a form of punishment that differs in substance as well as in degree in comparison to other forms of punishment. It is the absolute form of punishment that results in the forfeiture of the most-valuable of rights, the right to life, and once implemented, is irrevocable and irreparable. As the United States Supreme Court has observed, the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. In the Commission's view, the fact that the death penalty is an exceptional form of punishment must also be considered in interpreting Article 4 of the Convention.

77. Finally, with respect to the restrictions prescribed in Article 4 of the American Convention in particular, the Inter-American Court has identified three principal limitations explicitly prescribed in Article 4 on the ability of States Parties to the Convention to impose the death penalty:

Thus, three types of limitations can be seen to be applicable to States Parties which have not abolished the death penalty. First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account. [emphasis added]

78. The Court's observations therefore accentuate the significance of strict adherence to and review of due process guarantees in implementing the death penalty in accordance with Article 4 of the Convention. Moreover, as part of that process, the Court suggests that certain circumstances of individual offenses and individual defendants may bar the imposition or application of the death penalty altogether, and therefore must be taken into account in sentencing an individual to death.

79. It is in light of the foregoing interpretive rules and principles that the Commission must determine whether the practice of imposing the death penalty through mandatory sentencing is compatible with the terms of Articles 4, 5 and 8 of the Convention and the principles underlying those provisions.

80. In the Commission's view, several aspects of imposing mandatory death penalties for the crime of murder are problematic in the context of a proper interpretation and application of the Convention. First, it is well-recognized that the crime of murder can be perpetrated in the context of a wide variety of mitigating and aggravating circumstances, with varying degrees of gravity and culpability. This conclusion is illustrated by the broad definition of murder under Grenada's law, as the unlawful killing of another person with the intent to kill or to cause unlawful harm or

injury. It is also illustrated by the circumstances of Mr. Baptiste's case. Notwithstanding the existence of such disparities, however, the mandatory death penalty seeks to impose capital punishment in all cases of murder, without distinction. It subjects an individual who, for example, commits a murder in a spontaneous act of passion or anger, to the equivalent and exceptional punishment as an individual who executes a murder after carefully planning and premeditation.

81. Mandatory sentencing by its very nature precludes consideration by a court of whether the death penalty is an appropriate, or indeed permissible, form of punishment in the circumstances of a particular offender or offense. Moreover, by reason of its compulsory and automatic application, a mandatory sentence cannot be the subject of an effective review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was found guilty of a crime for which the sentence was mandated.

82. In the Commission's view, these aspects of mandatory death sentences cannot be reconciled with Article 4 of the Convention, in several respects. As noted above, the mandatory death penalty in Grenada imposes the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability. Not only does this practice fail to reflect the exceptional nature of the death penalty as a form of punishment, but, in the view of the Commission, it results in the arbitrary deprivation of life, contrary to Article 4(1) of the Convention.

83. More particularly, imposing a mandatory penalty of death for all crimes of murder prohibits a reasoned consideration of each individual case to determine the propriety of the punishment in the circumstances, despite the fact that murder can be committed under widely-differing circumstances. By its nature, then, this process eliminates any reasoned basis for sentencing a particular individual to death and fails to allow for a rational and proportionate connection between individual offenders, their offenses, and the punishment imposed on them. Implementing the death penalty in this manner therefore results in the arbitrary deprivation of life, within the ordinary meaning of that term and in the context of the object and purpose of Article 4(1) of the Convention.

84. Accepted principles of treaty interpretation suggest that sentencing individuals to the death penalty through mandatory sentencing and absent consideration of the individual circumstances of each offender and offense leads to the arbitrary deprivation of life within the meaning of Article 4(1) of the Convention. Article 31(1) of the Vienna Convention on the Law of Treaties provides that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The ordinary meaning of the term arbitrary connotes an action or decision that is based on random or convenient selection or choice rather than on reason or nature. The U.N. Human Rights Committee suggested a similar meaning for the term arbitrary in the context of Article 6(1) of the ICCPR, in the case *Kindler v. Canada*. . . .

85. The Committee has therefore suggested that an arbitrary decision includes one that is taken in the absence of a reasoned consideration of the circumstances of the case in respect of which the decision is made. In this respect, the mandatory death penalty can be regarded as arbitrary within the ordinary meaning of that term. The decision to sentence a person to death is not based upon a reasoned consideration of a particular defendant's case, or upon objective standards that guide courts in identifying circumstances in which the death penalty may or may not be an appropriate punishment. Rather, the penalty flows automatically once the elements of the offense of murder have been established, regardless of the relative degree of gravity of the offense or culpability of the offender.

86. The mandatory death penalty cannot be reconciled with Article 4 of the Convention in another significant respect. As noted previously, the Inter-American Court has emphasized several restrictions upon the implementation of the death penalty that flow directly from the terms of Article 4 of the Convention. These include considerations relating to the nature of a particular offense, for example whether it can be considered a political or related common offense, as well as factors relating to the circumstances of an individual offender, for example whether the offender was under the age of 18 or pregnant at the time he or she committed the crime for which the death penalty may be imposed. Article 4 of the Convention itself presumes that before capital punishment may be lawfully imposed, there must be an opportunity to consider certain of the individual circumstances of an offender or an offense. By its very nature, however, mandatory sentencing imposes the death penalty for all crimes of murder and thereby precludes consideration of these or any other circumstances of a particular offender or offense in sentencing the individual to death.

87. Similarly, by reason of its compulsory nature, the imposition of a mandatory death sentence precludes any effective review by a higher court as to the propriety of a sentence of death in the circumstances of a particular case. As indicated previously, once a mandatory death sentence is imposed, all that remains for a higher court to review is whether the defendant was properly found guilty of a crime for which the sentence of death was mandated. There is no opportunity for a reviewing tribunal to consider whether the death penalty was an appropriate punishment in the circumstances of the particular offense or offender. This consequence cannot be reconciled with the fundamental principles of due process under Articles 4 and 8 of the Convention that govern the imposition of the death penalty, which, as the Inter-American Court has recognized, include strict observance and review of the procedural requirements governing the imposition or application of the death penalty. The absence of effective review further illustrates the arbitrary nature of implementing the death penalty through mandatory sentencing, and lead the Commission to conclude that this practice cannot be reconciled with the terms of Article 4 of the Convention and its underlying principles.

88. The Commission is also of the view that imposing the death penalty in all cases of murder is not consistent with the terms of Article 5 of the Convention or its underlying principles. Article 5 of the Convention provides as follows . . . .

89. Among the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of their human personality. From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that individuals be treated with dignity and respect. Accordingly, Article 5(1) guarantees to each person the right to have his or her physical, mental, and moral integrity respected, and Article 5(2) requires all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person. These guarantees presuppose that persons protected under the Convention will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic rights and freedoms of an individual, such as the right to liberty. In the Commission's view, consideration of respect for the inherent dignity and value of individuals is especially crucial in determining whether a person should be deprived of his or her life.

91. The mandatory imposition of the death sentence, however, has both the intention and the effect of depriving a person of their right to life based solely upon the category of crime for which an offender is found guilty, without regard for the offender's personal circumstances or the circumstances of the particular offense. The Commission cannot reconcile the essential respect for the dignity of the individual that underlies Article 5(1) and (2) of the Convention, with a system that deprives an individual of the most fundamental of rights without considering whether this exceptional form of punishment is appropriate in the circumstances of the individual's case.

### **c. Forced Disappearances**

The discussion about whether a forced disappearance entails *ipso facto* a violation of the right not to be subjected to torture or other cruel, inhuman, or degrading treatment is reflected in the case law of international human rights supervisory bodies and in legal papers. In the first case decided on this issue, the Inter-American Court of Human Rights found a violation of that right, reasoning that the isolation to which a victim is subjected in itself constitutes cruel and inhuman treatment. This finding, however, has not been necessarily followed by other international bodies or, in some cases, even by the Inter-American System itself.<sup>13</sup> Another issue that has been raised in the context of forced disappearances is whether the right to personal integrity of the victim's next of kin becomes in any way affected as a result of the disappearance. Decisions where these two issues were considered are reproduced below:

**Velásquez Rodríguez v. Honduras**  
*Inter-Am. Ct. H.R., Judgment of July 29, 1988, (ser. C) No. 4 (1988)*  
*[For the facts of this case, see Chapter I]*

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<sup>13</sup> See, e.g., *Caballero Delgado et al. v. Colombia*, Inter-Am. Ct. H.R., Judgment of December 8, 1995, (ser. C) No. 22 (1995).

155. The 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. . . .

156. Moreover, 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 the integrity of the person . . . .

In addition, investigations into the practice of disappearances and the testimony of victims who have regained their liberty show that those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment, in violation of the right to physical integrity recognized in Article 5 of the Convention.

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**María del Carmen Almeida de Quinteros, on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf v. Uruguay**

*Communication No. 107/1981 (September 17, 1981)*

*<<http://www.sim.law.uu.nl>; <http://www1.umn.edu/humanrts/>>*

*[Ms. Almeida Quinteros filed a petition on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf. She denounced that her daughter was arrested at home in Montevideo by military personnel and that her whereabouts remain unknown. According to several witnesses, after her arrest, Elena Quinteros Almeida was taken to the Embassy of Venezuela, apparently to assist in the detention of another person. She managed to escape and entered the Embassy grounds but was dragged off by the persons accompanying her. Moreover, another witness testified that she had been held in the same place of detention as Elena and that the latter had been subjected to severe torture. The applicant claimed that Articles 7, 9, 10, 12, 14, 17, and 19 of the Covenant had been violated with respect to her daughter. She also complained that her rights have been affected as a consequence of her daughter's disappearance.]*

12.3 The Human Rights Committee, accordingly, finds that, on 28 June 1976, Elena Quinteros was arrested on the grounds of the Embassy of Venezuela at Montevideo by at least one member of the Uruguayan police force and that in August 1976 she was held in a military detention centre in Uruguay where she was subjected to torture.

13. It is, therefore, the Committee's view that the information before it reveals breaches of articles 7, 9 and 10(1) of the International Covenant on Civil and Political Rights.

14. With regard to the violations alleged by the author on her own behalf, the Committee notes that, the statement of the author that she was in Uruguay at the time of the incident regarding her daughter, was not contradicted by the State party. The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.

15. The Human Rights Committee reiterates that the Government of Uruguay has a duty to conduct a full investigation into the matter. There is no evidence that this has been done.

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### **Çakici v. Turkey**

*Eur. Ct. H.R., Judgment of July 8, 1999*

*<<http://www.echr.coe.int>>*

*[In November 1993, Mr. Akmet Çakici was detained during an operation in the village of Çitlibahçe, in southeast Turkey, carried out by gendarmes and village guards. He was held in different detention centers. In Diyarkakir, he was detained in the provincial gendarmerie headquarters with three other persons, who, after being released, testified that they had been held in custody with the victim. They also indicated that Mr. Çakici had been severely tortured. Another witness testified that he saw the victim in Kavaklibogaz, another detention center, in or about the summer of 1994, although those accounts were never confirmed. In 1996, after the petition had been filed with the European Human Rights System, Mr. Çakici's brother learned that the authorities claimed that the victim had been killed in a clash between the PKK and government forces in February 1995. The Court found that the disappearance of Mr. Çakici violated Articles 2, 3, 5, and 13 of the European Convention. His brother also alleged that Çakici's disappearance incurred additional violations of Article 3 in relation to himself and other members of the victim's family.]*

#### *B. Concerning the applicant [Mr Çakici's brother]*

94. Relying, *inter alia*, on the Court's judgment in the Kurt case (Kurt judgment, cited above, pp. 1187-88, §§ 130-34), the applicant complained that the disappearance of his brother constituted

inhuman treatment in relation to himself and other members of the family, including Remziye, Ahmet Çakici's wife, and their children. He referred to the lack of information given to them by the authorities in answer to their enquiries and to the prolonged period of uncertainty as to the fate of Ahmet Çakici which continues to trap the family in a cycle of unfounded hope and inhibits the grieving process.

95. The Government disputed that the applicant may claim to be an indirect victim of a violation of the rights of his brother. In any event, they submit that the links between the brothers were not particularly close and that this aspect of the application has not been the subject of any detailed examination necessary to reaching any findings on the point.

96. The majority of the Commission, referring to the long period of uncertainty, doubt and apprehension suffered by the applicant and to the failure of the authorities to account for what had happened to Ahmet Çakici, found that the applicant could claim to have been subjected to inhuman and degrading treatment contrary to Article 3 of the Convention. A minority of the Commission considered that the emotional stress caused to the applicant could not raise a separate issue, since otherwise the notion of victim would be extended unacceptably to a wide circle of those indirectly affected by violations of the Convention.

97. The Court notes that this complaint was examined before the Commission solely in relation to the applicant. According to the Commission's decision on admissibility, no complaint was made in respect of Ahmet Çakici's wife and children. The compass of the case before the Court being delimited by the Commission's decision on admissibility (see, amongst other authorities, the *McMichael v. the United Kingdom* judgment of 24 February 1995, Series A no. 307-B, p. 50, § 71), the Court will accordingly examine this aspect of the application in relation to the applicant alone.

98. The Court observes that in the Kurt case (Kurt judgment cited above, pp. 1187-88, §§ 130-34), which concerned the disappearance of the applicant's son during an unacknowledged detention, it found that the applicant had suffered a breach of Article 3 having regard to the particular circumstances of the case. It referred particularly to the fact that she was the mother of a victim of a serious human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress. The Kurt case does not however establish any general principle that a family member of a "disappeared person" is thereby a victim of treatment contrary to Article 3.

Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the

essence of such a violation does not so much lie in the fact of the “disappearance” of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities’ conduct.

99. In the present case, the applicant was the brother of the disappeared person. Unlike the applicant in the Kurt case, he was not present when the security forces took his brother, as he lived with his own family in another town. It appears also that, while the applicant was involved in making various petitions and enquiries to the authorities, he did not bear the brunt of this task, his father Tevfik Çakici taking the initiative in presenting the petition of 22 December 1993 to the Diyarbakir State Security Court. Nor have any aggravating features arising from the response of the authorities been brought to the attention of the Court in this case. Consequently, the Court perceives no special features existing in this case which would justify finding an additional violation of Article 3 of the Convention in relation to the applicant himself. Accordingly, there has been no breach of Article 3 as concerns the applicant in this case.

### *Note*

In a very recent decision in the case of *Villagrán Morales v. Guatemala*,<sup>14</sup> where five street children were killed by state agents, the Inter-American Court followed a similar approach to that developed by the Human Rights Committee and the European Court with respect to the victims’ next of kin. In this case, the Court considered that the State’s omissions inflicted additional pain and suffering on the victims’ families, especially the mothers. The authorities failed to identify the victims who were buried as “XX,” failed to contact the families and notify them of the victim’s death, and failed to inform the families of the criminal investigations carried out to ascertain who was responsible for the murders. This situation, along with the treatment that the victims’ remains received after death, preventing their families from burying them according to their traditions, constituted cruel and inhuman treatment in violation of Article 5 of the American Convention.

### *Questions*

1. According to the preceding case law, what is the scope of the “substantial ground” standard to prove that a person will be subjected to torture if returned to his/her country? What other elements are taken into account to prove the existence of risk? Is it possible to construe an obligation similar to the one provided in Article 3 of the U.N. Convention against Torture under Inter-American treaties? To answer this question read Articles 13 of the Inter-American Convention against Torture and 22(8) of the American Convention. Do you find it reasonable for the Committee against Torture or other international supervisory bodies to “review” decisions of

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<sup>14</sup> Inter-Am. Ct. H.R., Judgment of November 19, 1999, (ser. C) No. 63 (1999).

domestic courts that have more evidence to assess the credibility of asylum-seekers? Elaborate.

2. Did Sweden or the United Kingdom have an obligation not to expel or extradite the applicants after the decisions adopted by the Committee against Torture and the European Court in the *Haydin* and *Soering* cases? If not, what are the obligations of a State found in breach of an international human rights obligation?

3. Does the case law of international supervisory bodies establish that exposure to the so-called “death row phenomenon” constitutes *per se* a violation of the right not to be subjected to torture or other cruel and inhuman or degrading treatment? If not, what elements would you take into account to argue successfully that in a particular case exposure to death row would constitute a violation of that right? Is it possible to determine whether a particular method of execution is more cruel or inhuman than others, as decided by the Human Rights Committee in the *Ng* case?

4. Do you find convincing the argument of the Inter-American Commission in the *Baptiste* case according to which mandatory capital punishment entails, *inter alia*, a violation of the right to life and the right to personal integrity? Elaborate. Are there any other situations in which the application of the death penalty would also constitute *per se* a violation of the right to personal integrity?

5. According to the preceding case law, what are the elements that need to be present to find an additional violation of the right to personal integrity with respect to the victim’s next of kin in forced disappearances cases? What is the relevance of that finding? Does it have any impact on the awarding of monetary compensation or other forms of reparation?

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### 3. STATE DUTY TO PREVENT ACTS OF TORTURE AND OTHER CRUEL, INHUMAN, AND DEGRADING TREATMENT

#### Article 2 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. 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.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

**Article 4**  
**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

**Article 10**  
**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

1. Each State Party shall 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.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

**Article 11**  
**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

Each State Party 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 arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

**Article 15**  
**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

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.

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**Article 4**  
**Inter-American Convention to Prevent and Punish Torture**

The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability.

**Article 5**  
**Inter-American Convention to Prevent and Punish 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.

Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.

**Article 6**  
**Inter-American Convention to Prevent and Punish Torture**

In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

**Article 7**  
**Inter-American Convention to Prevent and Punish Torture**

The States Parties shall take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest.

The States Parties likewise shall take similar measures to prevent other cruel, inhuman, or degrading treatment or punishment.

**Article 10**  
**Inter-American Convention to Prevent and Punish Torture**

No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means.

**2nd General Report on the Committee for the Prevention of Torture's  
Activities Covering the Period 1 January to 31 December 1991**

*[European Committee for the Prevention of Torture  
and Inhuman or Degrading Treatment or Punishment<sup>15</sup>]*

*CPT/Inf (92) 3 (April 13, 1992)*

*<<http://www.cpt.coe.int/>>*

a. Police custody

36. The CPT attaches particular importance to three rights for persons detained by the police: the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate), the right of access to a lawyer, and the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities). They are, in the CPT's opinion, three fundamental safeguards against the ill-treatment of detained persons which should apply as from the very outset of deprivation of liberty, regardless of how it may be described under the legal system concerned (apprehension, arrest, etc).

37. Persons taken into police custody should be expressly informed without delay of all their rights, including those referred to in paragraph 36. Further, any possibilities offered to the authorities to delay the exercise of one or other of the latter rights in order to protect the interests of justice should be clearly defined and their application strictly limited in time. As regards more particularly the rights of access to a lawyer and to request a medical examination by a doctor other than one called by the police, systems whereby, exceptionally, lawyers and doctors can be chosen from pre-established lists drawn up in agreement with the relevant professional organisations should remove any need to delay the exercise of these rights.

38. Access to a lawyer for persons in police custody should include the right to contact and to be visited by the lawyer (in both cases under conditions guaranteeing the confidentiality of their discussions) as well as, in principle, the right for the person concerned to have the lawyer present during interrogation.

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<sup>15</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is a monitoring body created under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. This Convention establishes a visit-based mechanism according to which the Committee carries out on-site visits to the State Parties to examine the treatment of persons deprived of their liberty with a view to strengthening the protection of such persons from torture and from inhuman or degrading treatment or punishment. The outcome of the visit is a report in which the Committee assesses its findings and makes recommendations or comments. The report is confidential unless the State concerned authorizes publication. The main function of the Committee is preventive, and it does not have any judicial or quasi-judicial jurisdiction.

As regards the medical examination of persons in police custody, all such examinations should be conducted out of the hearing, and preferably out of the sight, of police officers. Further, the results of every examination as well as relevant statements by the detainee and the doctor's conclusions should be formally recorded by the doctor and made available to the detainee and his lawyer.

39. Turning to the interrogation process, the CPT considers that clear rules or guidelines should exist on the way in which police interviews are to be conducted. They should address inter alia the following matters: the informing of the detainee of the identity (name and/or number) of those present at the interview; the permissible length of an interview; rest periods between interviews and breaks during an interview; places in which interviews may take place; whether the detainee may be required to stand while being questioned; the interviewing of persons who are under the influence of drugs, alcohol, etc. It should also be required that a record be systematically kept of the time at which interviews start and end, of any request made by a detainee during an interview, and of the persons present during each interview.

The CPT would add that the electronic recording of police interviews is another useful safeguard against the ill-treatment of detainees (as well as having significant advantages for the police).

40. The CPT considers that the fundamental safeguards granted to persons in police custody would be reinforced (and the work of police officers quite possibly facilitated) if a single and comprehensive custody record were to exist for each person detained, on which would be recorded all aspects of his custody and action taken regarding them (when deprived of liberty and reasons for that measure; when told of rights; signs of injury, mental illness, etc; when next of kin/consulate and lawyer contacted and when visited by them; when offered food; when interrogated; when transferred or released, etc.). For various matters (for example, items in the person's possession, the fact of being told of one's rights and of invoking or waiving them), the signature of the detainee should be obtained and, if necessary, the absence of a signature explained. Further, the detainee's lawyer should have access to such a custody record.

41. Further, the existence of an independent mechanism for examining complaints about treatment whilst in police custody is an essential safeguard.

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### ***Questions***

1. Do the provisions enumerated above provide any guidance as to the content of the obligation to prevent torture or other cruel and inhuman or degrading treatment? In the context of the Inter-American System, the Inter-American Court of Human Rights ruled in the *Velásquez Rodríguez*

case<sup>16</sup> that the duty to prevent under Article 1.1 of the American Convention entails:

. . . 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. 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.

Do you find convincing and realistic the measures enumerated by the European Committee with respect to the duty to prevent torture during police custody? Would you use them to define the content of the obligation to prevent torture or other cruel and inhuman or degrading treatment enshrined in international human rights treaties?

2. Assuming that the measures enumerated by the European Committee become international standards, how would you compel States to comply with them? Would you, for example, argue that failure to comply with preventive measures must weigh against the State in cases where a petitioner makes a credible argument that he/she has been tortured while in custody but does not have any independent evidence to prove it? In this regard, see the *Tekin* case reproduced below.

3. In your opinion, would the measures enumerated by the European Committee be effective in preventing other acts of torture such as rape? If not, what additional measures should be implemented?

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4. ***STATE DUTY TO INVESTIGATE, PUNISH, AND COMPENSATE ACTS OF TORTURE OR OTHER CRUEL, INHUMAN, AND DEGRADING TREATMENT***

**Article 5**  
**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

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<sup>16</sup> Inter-Am. Ct. H.R., Judgment of July 29, 1988, (ser. C) No. 4 (1988).

- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

**Article 12**  
**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

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.

**Article 13**  
**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

Each State Party shall 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.

**Article 14**  
**Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

1. 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. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

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**Article 8**  
**Inter-American Convention to Prevent and Punish Torture**

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

**Article 9**  
**Inter-American Convention to Prevent and Punish Torture**

The States Parties undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture.

None of the provisions of this article shall affect the right to receive compensation that the victim or other persons may have by virtue of existing national legislation.

**Article 12**  
**Inter-American Convention to Prevent and Punish Torture**

Every State Party shall take the necessary measures to establish its jurisdiction over the crime described in this Convention in the following cases:

- a. When torture has been committed within its jurisdiction;
- b. When the alleged criminal is a national of that State; or
- c. When the victim is a national of that State and it so deems appropriate.

Every State Party shall also take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11.

This Convention does not exclude criminal jurisdiction exercised in accordance with domestic law.

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**Encarnación Blanco Abad v. Spain**  
*[U.N. Committee Against Torture]*  
*Communication No. 59/1996, U.N. Doc. CAT/C/20/D/59/1996 (May 14, 1998)*

<<http://sim.law.uu.nl>; <http://www.unhchr.ch>>

*[Ms. Encarnación Blanco Abad was detained with her husband on January 1992 by members of the Guardia Civil for alleged involvement with the ETA. She alleged that she was ill-treated when she was kept incommunicado under Spanish anti-terrorist legislation. When brought before a court she described the mistreatment and torture to which she had been subjected. On the basis of her account and the report of a doctor who examined her when she was transferred to a detention center, the court instituted a preliminary investigation. The proceedings were finally closed and those responsible for the ill-treatment were never identified or punished. Mrs. Blanco Abad submitted a petition to the Committee against Torture claiming violations of Articles 12, 13 and 15 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.]*

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 22, paragraph 4, of the Convention.

8.2 The committee observes that, under article 12 of the Convention, the authorities have the obligation to proceed to an investigation ex officio, wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed and whatever the origin of the suspicion. Article 12 also requires that the investigation should be prompt and impartial. The Committee observes that promptness is essential both to ensure that the victim cannot continue to be subjected to such acts and also because in general, unless the methods employed have permanent or serious effects, the physical traces of torture, and especially of cruel, inhuman or degrading treatment, soon disappear.

8.3 The Committee observes that when she appeared before the National High Court on 2 February 1992, after having been held incommunicado since 29 January, the author stated that she had been subjected to physical and mental ill-treatment, including the threat of rape. The Court had before it five reports of the forensic physician attached to the National High Court who had examined her daily, the first four examinations having taken place on Guardia Civil premises and the last on the premises of the National High Court prior to the above-mentioned court appearance. These reports note that the author complained of having been subjected to ill-treatment consisting of insults, threats and blows, of having been kept hooded for many hours and of having been forced to remain naked, although she displayed no signs of violence. The Committee considers that these elements should have sufficed for the initiation of an investigation, which did not however take place.

8.4 The Committee also observes that when, on 3 February, the physician of the penitentiary centre noted bruises and contusions on the author's body, this fact was brought to the attention of the judicial authorities. However, the competent judge did not take up the matter until 17 February and Court No. 44 initiated preliminary proceedings only on 21 February.

8.5 The Committee finds that the lack of investigation of the author's allegations, which were made first to the forensic physician after the first examination and during the subsequent examinations she underwent, and then repeated before the judge of the National High Court, and the amount of time which passed between the reporting of the facts and the initiation of proceedings by Court No. 44 are incompatible with the obligation to proceed to a prompt investigation, as provided for in article 12 of the Convention.

8.6 The Committee observes that article 13 of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence, and that it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention.

8.7 The Committee notes, as stated above, that the author's complaint to the judge of the National High Court was not examined and that, while Court No. 44 examined the complaint, it did not do so with the requisite promptness. Indeed, more than three weeks passed from the time that the court received the medical report from the penitentiary centre on 17 February 1992 until the author was brought to court and made her statement on 13 March. On that same date the court called for Section 2 of the National High Court to provide the findings of the medical examinations of the author by the forensic physician of that court, but more than two months elapsed before on 13 May they were added to the case file. On 2 June the judge requested the court's own forensic physician to report thereon, and this was done on 28 July. On 3 August the judge summoned the forensic physician of Court No. 2 who had conducted the said examinations. This physician's statement was taken on 17 November. On that same date the court requested the penitentiary centre to indicate the time at which the author had been examined in that institution and how the injuries had developed; this information was transmitted to the court on 23 December. Contrary to the State party's contention, as cited in paragraph 6.4, that there had been "no tardiness or delay in the conduct of the investigation", the Committee considers that the above chronology shows the investigative measures not to have satisfied the requirement for promptness in examining complaints, as prescribed by article 13 of the Convention, a defect that cannot be excused by the lack of any protest from the author for such a long period.

8.8 The Committee also observes that during the preliminary proceedings, up to the time when they were discontinued on 12 February 1993, the court took no steps to identify and question any of the Guardia Civil officers who might have taken part in the acts complained of by the author. The Committee finds this omission inexcusable, since a criminal investigation must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein, as required by the State party's own domestic legislation (article 789 of the Criminal Procedure Act). Furthermore, the Committee observes that, when the proceedings resumed as of October 1994, the author requested the judge on at least two occasions to allow the submission of evidence additional to that of the medical

experts, i.e. she requested the hearing of witnesses as well as the possible perpetrators of the ill-treatment, but these hearings were not ordered. The Committee nevertheless believes that such evidence was entirely pertinent since, although forensic medical reports are important as evidence of acts of torture, they are often insufficient and have to be compared with and supplemented by other information. The Committee has found no justification in this case for the refusal of the judicial authorities to allow other evidence and, in particular, that proposed by the author. The Committee considers these omissions to be incompatible with the obligation to proceed to an impartial investigation, as provided for in article 13 of the Convention.

9. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the facts before it reveal a violation of articles 12 and 13 of the Convention.

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### **Tekin v. Turkey**

*Eur. Ct. H.R., Judgment of June 9, 1998, Reports 1998 IV (1998)*

*<<http://www.echr.coe.int>>*

*[Mr. Salih Tekin, a journalist, was arrested on suspicion of threatening village guards in the hamlet of Yassitepe, while visiting his family on February 15, 1993. He was then taken to Derinsu gendarmerie headquarters and held in custody for four days. He alleged that while in detention he was held in a cell without any lighting, bed or blankets, in sub-zero temperatures, and fed only bread and water. He also claimed to have been assaulted in his cell by gendarmes. Finally, he stated that he would have died of cold had his brothers not been permitted to enter his cell and wrap him in extra clothing. Mr. Tekin was later taken to the Derik district gendarmerie headquarters where he was allegedly tortured again. He was released on February 19, 1993. Although he informed the prosecutor investigating his case that he was subjected to torture and other ill-treatment, the authorities never carried out an effective investigation.]*

### *AS TO THE LAW*

#### *I. ESTABLISHMENT OF THE FACTS*

35. The Government challenged the Commission's findings of fact.

They pointed out that had the applicant's allegations of severe ill-treatment been true, he would have required hospital treatment following his release. In these circumstances it was suspicious

that he had not produced any medical reports, particularly since his work as a journalist would have made him aware of the need for this type of evidence. His claim that his brothers had been allowed to join him in his cell was unbelievable. In addition, the facts that he had denied all the charges against him, despite allegedly having been tortured with the purpose of extracting a confession, and that he had not made any allegation concerning electric shocks in his original application to the Commission but only during the hearing of witnesses in Ankara, raised further doubts about the truth of his testimony. Furthermore, they reasoned that if it was true that he had been subjected to electric shocks on the last day of his detention, this would have been easy to establish since this kind of torture leaves marks which remain noticeable for three or four days. Finally, the Government submitted that cloth of the type which the applicant had handed to the public prosecutor could not have been used as a blindfold because of its loose style of weaving.

36. At the hearing before the Court, the Commission's Delegate stated that the applicant's account of events at the hearing in Ankara had been precise, detailed and consistent and had not given the impression of being an invented story. It was true that he had made somewhat varying and probably exaggerated assessments of the temperature in his cell in Derinsu and it could not be excluded that he had also exaggerated the nature and intensity of the ill-treatment to which he claimed to have been subjected. Nonetheless some of the details of his account had the ring of truth: for instance, it was unlikely that he would have invented the incident when his brothers joined him in his cell. What undoubtedly weakened the applicant's case was the lack of any medical evidence. The Commission had considered whether this omission was such as to undermine the reliability of his allegations in general, but considered that it could not be conclusive.

The Commission's delegates in Ankara had also found the applicant's father, Haci Mehmet, to be a credible witness who had confirmed important elements in the applicant's story. For example, he had described how he and his other sons had waited in the cold outside the gendarmerie headquarters at Derinsu and how at some stage his sons had been allowed to visit their brother in his cell and had used this occasion to warm Salih Tekin's cold body. He also confirmed that after the applicant's release there had been bruises and wounds on his body which they had treated with medication.

Against these statements had to be weighed the testimony of other witnesses.

The Commission had requested the attendance of three public prosecutors, including Mr Altun (see paragraph 11 above), whose testimony would have greatly assisted the Commission in assessing the issues under Articles 3 and 13 of the Convention. Unfortunately, none of these public prosecutors appeared to give evidence at the hearings and no valid excuse had been given for their non-attendance.

Of the witnesses for the Government who did attend the hearings, the Commission's delegates had found the evidence of the three neighbours (see paragraph 23 above), who described the applicant's return to the village after his detention, to be unconvincing, particularly their

statements concerning the applicant's praise for the quality of his treatment in police custody, which the Commission considered to be implausible in view of the fact that there was a record of Mr Tekin's complaint of ill-treatment made to the public prosecutor only hours previously.

Gendarmerie officer Altin (see paragraphs 8–9 above) had given a detailed account of the applicant's treatment at Derinsu, denying all allegations of ill-treatment and stating that Mr Tekin had been kept in good conditions, in a room which had not been cold, and had been provided with water and three meals a day. The Commission, however, had serious doubts about officer Altin's credibility in view of the fact that, two years earlier, he had told the public prosecutor that he had no recollection whatsoever of the applicant, despite the fact that there had apparently only been a small number of detainees at Derinsu gendarmerie headquarters during 1993.

When making a final evaluation of the evidence, the Commission had been convinced beyond reasonable doubt that Mr Tekin had been detained in extreme conditions and had undergone physical ill-treatment.

37. The applicant asked the Court to accept the Commission's findings of fact.

....

40. In this connection, it considers it to be of particular significance that the Commission and its delegates had the opportunity to see and hear the applicant and other witnesses give their testimony and answer questions put by the members of the Commission themselves and by lawyers for the Government and the applicant. It notes that the Commission found the applicant's testimony to be consistent and convincing, whereas it found the evidence given by the witnesses for the Government to be flawed and unreliable (see paragraph 36 above).

41. It is true that, as the Government have pointed out, the applicant was unable to provide any independent evidence, for example medical reports, to substantiate his allegations of ill-treatment. However, in this respect the Court notes that the State authorities took no steps to ensure that Mr Tekin was seen by a doctor during his time in detention or upon his release, despite the fact that he had complained of ill-treatment to the public prosecutor, Mr Altun, who was under a duty under Turkish law to investigate this complaint (see paragraphs 11 and 28 above). Furthermore, it observes that those witnesses who were best placed to shed light on the veracity or otherwise of the applicant's story, namely the public prosecutors involved in his case, and particularly Mr Altun, who saw him immediately after his release from custody, failed without good cause to comply with the Commission's requests to attend its hearings.

The Court recalls that Article 28 § 1(a) of the Convention places the State concerned under a duty to "furnish all necessary facilities" to the Commission for its investigation of the facts underlying a petition. It does not consider that, in the circumstances of the present case, when key witnesses failed to attend before the Commission, the respondent State can be justified in complaining of the insufficiency of the evidence on which the Commission based its findings.

42. In the light of the above considerations, and having itself examined the documents available in the case, the Court decides to accept the facts as found by the Commission.

. . . .

### *III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION*

48. The applicant claimed to have been tortured in violation of Article 3 of the Convention, which reads as follows . . . .

49. He submitted that his experiences of suffering whilst in detention, taken as a whole, amounted to torture. Thus, at Derinsu gendarmerie headquarters he claimed to have been blindfolded while being aggressively interrogated, assaulted and threatened with death, detained for four days in total darkness in sub-zero temperatures with no bed or blankets, and denied food and liquids; all this despite the fact that the gendarmes were aware that he only had one kidney. At Derik gendarmerie headquarters he had again been blindfolded, and also stripped naked, hosed with cold water, beaten with a truncheon on his body and the soles of his feet, and had electric shocks administered to his fingers and toes.

50. In connection with this complaint also, the Government denied that Mr Tekin had been ill-treated.

51. The Commission, taking the treatment suffered by the applicant as a whole, found that the conditions of detention and the treatment to which he had been subjected constituted at least inhuman and degrading treatment within the meaning of Article 3.

52. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see the above-mentioned Selçuk and Asker judgment, pp. 909–10, § 76).

53. The Court notes that the Commission found that the applicant was held in a cold and dark cell, blindfolded, and treated, in connection with his interrogation, in a way which left wounds and bruises on his body (see paragraph 24 above).

The Court has assessed these facts against the standards imposed by Article 3. It recalls that, in respect of a person deprived of his liberty, recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see the Ribitsch v. Austria judgment of 4 December 1995, Series A no. 336, p. 26, § 38). It considers that the conditions in which the applicant was held, and the manner in which he must have been treated in order to leave wounds and bruises on his body, amounted to inhuman and degrading treatment within the meaning of

that provision.

54. It follows that there has been a violation of Article 3.

....

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**Kadic v. Karadzic**

*[United States Court of Appeals, Second Circuit, 1995]  
70 F.3d 232 (2d. Cir. 1995), cert. denied, 518 U.S. 1005 (1996)  
[Footnotes omitted]*

*[Croat and Muslim citizens of Bosnia-Herzegovina brought actions against Radovan Karadzic, the leader of the insurgent Bosnian-Serb forces, in the United States District Court for the Southern District of New York. They alleged that they were victims, and representatives of victims, of various atrocities such as rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted during the course of the Bosnian civil war. They argued that Karadzic, President of the self-proclaimed Bosnian-Serb republic "Srpska," possessed command authority over the military forces that committed the injuries perpetrated against the plaintiffs. Also, they alleged that Karadzic acted in an official capacity either as head of the republic of Srpska or in collaboration with the government of Serbia. The plaintiffs grounded subject-matter jurisdiction in the Alien Tort Act, the Torture Victim Protection Act of 1991, the general federal-question jurisdictional statute, and principles of supplemental jurisdiction. In 1993, Karadzic was admitted to the United States on three separate occasions as an invitee of the United Nations. The plaintiffs argued that during those visits he was served with the summons and complaint in each action, though these facts have been disputed by the defendant. The District Court dismissed the actions for lack of subject-matter jurisdiction.]*

*I. Subject-Matter Jurisdiction*

Appellants allege three statutory bases for the subject-matter jurisdiction of the District Court--the Alien Tort Act, the Torture Victim Act, and the general federal-question jurisdictional statute.

*A. The Alien Tort Act*

*1. General Application to Appellants' Claims*

The Alien Tort Act provides:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350 (1988). Our decision in *Filartiga* established that this statute confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law). . . The first two requirements are plainly satisfied here, and the only disputed issue is whether plaintiffs have pleaded violations of international law.

....

*Filartiga* established that courts ascertaining the content of the law of nations “must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.” . . . We find the norms of contemporary international law by “consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.” . . . If this inquiry discloses that the defendant’s alleged conduct violates “well-established, universally recognized norms of international law,” as opposed to “idiosyncratic legal rules,” then federal jurisdiction exists under the Alien Tort Act.

Karadzic contends that appellants have not alleged violations of the norms of international law because such norms bind only states and persons acting under color of a state’s law, not private individuals. . . .

[The District Court] accepted Karadzic’s contention that “acts committed by non-state actors do not violate the law of nations,” . . . and considered him to be a non-state actor. . . .

We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy. . . Later examples are prohibitions against the trade and certain war crimes. . . .

The Restatement (Third) of the Foreign Relations Law of the United States (1986) (“Restatement (Third)”) proclaims: “*Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.*” Restatement (Third) pt. II, introductory note. The Restatement is careful to identify those violations that are actionable when committed by a state, Restatement (Third) § 702,<sup>17</sup> and a more limited category of violations of “universal concern,” *id.*

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<sup>17</sup> Section 702 provides:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,

§ 404,<sup>18</sup> partially overlapping with those in section 702. Though the immediate focus of section 404 is to identify those offenses for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders, cf. id. § 402(1)(a), (2), the inclusion of piracy and slave trade from an earlier era and aircraft hijacking from the modern era demonstrates that the offenses of “universal concern” include those capable of being committed by non-state actors. Although the jurisdiction authorized by section 404 is usually exercised by application of criminal law, international law also permits states to establish appropriate civil remedies, id. § 404 cmt. b, such as the tort actions authorized by the Alien Tort Act. . . .

Karadzic disputes the application of the law of nations to any violations committed by private individuals, relying on *Filartiga* and the concurring opinion of Judge Edwards in *Tel-Oren v. Libyan Arab Republic* . . . *Filartiga* involved an allegation of torture committed by a state official. Relying on the United Nations’ Declaration on the Protection of All Persons from Being Subjected to Torture . . . as a definitive statement of norms of customary international law prohibiting states from permitting torture, we ruled that “official torture is now prohibited by the law of nations.” . . . We had no occasion to consider whether international law violations other than torture are actionable against private individuals, and nothing in *Filartiga* purports to preclude such a result.

Karadzic also contends that Congress intended the state-action requirement of the Torture Victim Act to apply to actions under the Alien Tort Act. We disagree. Congress enacted the Torture Victim Act to codify the cause of action recognized by this Circuit in *Filartiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens. . . .

## 2. *Specific Application of Alien Tort Act to Appellants’ Claims*

In order to determine whether the offenses alleged by the appellants in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a particularized examination of these offenses, mindful of the important precept

- 
- (c) the murder or causing the disappearance of individuals,
  - (d) torture or other cruel, inhuman, or degrading treatment or punishment,
  - (e) prolonged arbitrary detention,
  - (f) systematic racial discrimination, or
  - (g) a consistent pattern of gross violations of internationally recognized human rights.

<sup>18</sup> Section 404 provides:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no other basis of jurisdiction] is present.

that “evolving standards of international law govern who is within the [Alien Tort Act’s] jurisdictional grant.” . . . In making that inquiry, it will be helpful to group the appellants’ claims into three categories: (a) genocide, (b) war crimes, and (c) other instances of inflicting death, torture, and degrading treatment.

(a) *Genocide*. . . . The Convention on the Prevention and Punishment of the Crime of Genocide,<sup>19</sup> provides a more specific articulation of the prohibition of genocide in international law. . . .

The applicability of this norm to private individuals is also confirmed by the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988), which criminalizes acts of genocide without regard to whether the offender is acting under color of law, see *id.* § 1091(a) (“[w]hoever” commits genocide shall be punished), if the crime is committed within the United States or by a U.S. national, *id.* § 1091(d).

. . . .

Appellants’ allegations that Karadzic personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly state a violation of the international law norm proscribing genocide, regardless of whether Karadzic acted under color of law or as a private individual. The District Court has subject-matter jurisdiction over these claims pursuant to the Alien Tort Act.

(b) *War crimes*. Plaintiffs also contend that the acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities, violate the law of war. Atrocities of the types alleged here have long been recognized in international law as violations of the law of war. . . . Moreover, international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of such atrocities.

. . . .

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<sup>19</sup> The Convention . . . defines “genocide” to mean 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 with the group;
- (e) Forcibly transferring children of the group to another group.

The Convention also makes clear in art. IV that “[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”

The offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in common article 3 [of the Geneva Conventions],<sup>20</sup> which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents. The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II . . . and remains today an important aspect of international law . . . The District Court has jurisdiction pursuant to the Alien Tort Act over appellants' claims of war crimes and other violations of international humanitarian law.

*(c) Torture and summary execution.* In *Filartiga*, we held that official torture is prohibited by universally accepted norms of international law . . . and the Torture Victim Act confirms this holding and extends it to cover summary execution. Torture Victim Act §§ 2(a), 3(a). However, torture and summary execution--when not perpetrated in the course of genocide or war crimes--are proscribed by international law only when committed by state officials or under color of law. See Declaration on Torture art. 1 (defining torture as being "inflicted by or at the instigation of a public official"); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment pt. I, art. 1 . . . (defining torture as "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"); Torture Victim Act § 2(a) (imposing liability on individuals acting "under actual or apparent authority, or color of law, of any foreign nation").

In the present case, appellants allege that acts of rape, torture, and summary execution were committed during hostilities by troops under Karadzic's command and with the specific intent of destroying appellants' ethnic-religious groups.

### 3. *The State Action Requirement for International Law Violations*

#### *(a) Definition of a state in international law*

The definition of a state is well established in international law:

Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities. Restatement (Third) § 201

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<sup>20</sup> Common Article 3(1) provides that persons taking no active part in the hostilities ... shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court....

....

Although the Restatement’s definition of statehood requires the capacity to engage in formal relations with other states, it does not require recognition by other states. . . .

The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states. See Restatement (Third) §§ 207, 702. It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime--sometimes due to human rights abuses--had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.

Appellants’ allegations entitle them to prove that Karadzic’s regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like “official” torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.

(b) Acting in concert with a foreign state. Appellants also sufficiently alleged that Karadzic acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia, the statehood of which is not disputed. The “color of law” jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act. . . A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid. . . The appellants are entitled to prove their allegations that Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid.

*B. The Torture Victim Protection Act*

The Torture Victim Act, enacted in 1992, provides a cause of action for official torture and extrajudicial killing . . . By its plain language, the Torture Victim Act renders liable only those individuals who have committed torture or extrajudicial killing “under actual or apparent authority, or color of law, of any foreign nation.” Legislative history confirms that this language was intended to “make[ ] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,” and that the statute “does not attempt to deal with torture or killing by purely private groups.” . . .

....

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**Section 134-Torture  
Criminal Justice Act 1988  
United Kingdom**

(1) A public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another on the performance or purported performance of his official duties.

(2) A person not falling within subsection (1) above commits the offence of torture, whatever his nationality, if --

(a) in the United Kingdom or elsewhere he intentionally inflicts severe pain or suffering on another at the instigation or with the consent or acquiescence--

(i) of a public official; or

(ii) of a person acting in an official capacity; and

(b) the official or other person is performing or purporting to perform his official duties when he instigates the commission of the offence or consents to or acquiesces in it.

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**Torture  
18 U.S.C.A. § 2340 and 2340A  
United States**

§ 2340. Definitions

As used in this chapter--

(1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from--

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures

calculated to disrupt profoundly the senses or personality; and

....

§ 2340A. Torture

(a) Offense.-- Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.-- There is jurisdiction over the activity prohibited in subsection (a) if--

- (1) the alleged offender is a national of the United States; or
- (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

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**Torture Victim Protection Act**  
**Pub. L. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350)**  
**United States**

Sec. 1. Short Title

This Act may be cited as the "Torture Victim Protection Act of 1991".

Sec. 2. Establishment of civil action

(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual;  
or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of domestic remedies. A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

....

## Questions

1. According to the preceding case law, what is the scope of the obligation to carry out a prompt and impartial investigation? What does it mean that victims have a “right” to have their case examined? Does it mean that they have a right to have a criminal investigation initiated by the State? And to have those responsible punished? If it does, is this right “absolute?” Is there any difference between the “obligation of the State” and “the right of the victim?” In *Velásquez Rodríguez*,<sup>21</sup> the Inter-American Court held as follows in regard to the duties to investigate and punish under Article 1.1 of the American Convention:

174. The State has a legal duty 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.

....

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 victim’s 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.

2. How did the European Court weigh the lack of appropriate investigation in the *Tekin* case? Compare *Aksoy v. Turkey*,<sup>22</sup> where the European Court held that:

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<sup>21</sup> See *supra* note 15.

<sup>22</sup> Eur. Ct. H.R., Judgment of December 18, 1996, Reports 1996 VI (1996), <<http://www.echr.coe.int>>.

[W]here an individual is taken into police custody in good health but is found to be injured at the time of the 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 [European] Convention . . . .

Also, in *Sevtap Veznedaroglu v. Turkey*<sup>23</sup>, where a law student was arrested for alleged links with the PKK and subjected to torture and other cruel and inhuman treatment while in police custody, the European Court held that:

30. The Court notes that the Government do not deny that the applicant sustained bruising to her person during her time in custody. However, they point to the minor nature of these injuries and stress that they are at variance with the severity of the treatment allegedly suffered. The Court for its part finds it impossible to establish on the basis of the evidence before it whether or not the applicant's injuries were caused by the police or whether she was tortured to the extent claimed. It is not persuaded either that the hearing of witnesses by the Court would clarify the facts of the case or make it possible to conclude, beyond reasonable doubt (see the *Aydin v. Turkey* judgment of 25 September 1997, Reports 1997-VI, p. 1189, § 73), that the applicant's allegations are substantiated.

31. However it would observe at the same time that the difficulty in determining whether there was a plausible explanation for the bruising found on her body or whether there was any substance to her allegations on the nature of the treatment she allegedly endured rests with the failure of the authorities to investigate her complaints.

32. In this latter connection the Court reiterates that, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, 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 an effective official investigation capable of leading to the identification and punishment of those responsible (see the *Assenov v. Bulgaria* judgment of 28 September 1998, Reports 1998-VII, p. 3290 § 102). If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (ibid.)

What is the relevance of these cases to making the prohibition against torture or other cruel and inhuman or degrading treatment more effective?

3. Do the U.N. and the Inter-American Conventions against Torture provide for universal jurisdiction over acts of torture or other cruel and inhuman or degrading treatment? Read carefully Articles 14 of the U.N. Convention against Torture and 9 of the Inter-American Convention

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<sup>23</sup> Eur. Ct. H.R., Judgment of April 11, 2000, <<http://www.echr.coe.int>>.

against Torture. Does universal jurisdiction encompass only criminal liability or does it include civil liability as well? If it is only universal criminal jurisdiction, would you argue that the Torture Victim Protection Act is incompatible with international law?<sup>24</sup>

4. Do you find convincing the statement of the Court of Appeals in *Kadic*, citing the *Filartiga* case,<sup>25</sup> that torture is prohibited by norms of customary international law? What are the legal implications of that statement? Elaborate.

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<sup>24</sup> The U.S. ratification of the U.N. Convention against Torture included the following understanding: II(3) That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in the territory under the jurisdiction of that State Party.

<sup>25</sup> *Filartiga v. Peña Irala*, 630 F.2d 876 (1980).

**CHAPTER V**  
**THE RIGHT TO A FAIR TRIAL**

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**A. THE RIGHT TO A FAIR TRIAL IN THE DETERMINATION OF CIVIL OR OTHER RIGHTS AND OBLIGATIONS OR IN THE SUBSTANTIATION OF A CRIMINAL CHARGE**

**Article 8(1)**

**American Convention on Human Rights**

1. 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.

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**Article 14(1)**

**International Covenant on Civil and Political Rights**

1. All persons shall be equal before the courts and tribunals. 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. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but 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.

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**Article 6(1)**

**European Convention for the Protection of Human Rights and Fundamental Freedoms**

1. 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, 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.

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**1. DETERMINATION OF CIVIL OR OTHER RIGHTS AND OBLIGATIONS OR SUBSTANTIATION OF A CRIMINAL CHARGE**

*Comment*

International human rights treaties ensure the right to a fair trial in the determination of civil rights and obligations or in the substantiation of a criminal charge. The American Convention on Human Rights (hereinafter “American Convention”) in Article 8, paragraph 1, expressly extends the application of those due process guarantees to the determination of additional rights such as labor and fiscal rights, and rights of “any other nature.” With few exceptions, the scope of this provision has not been interpreted by the jurisprudence of the Inter-American Commission and Court. In the European and Universal systems, the provisions of the respective treaties are not as far-reaching in scope as Article 8(1) of the American Convention. However, the case law of their supervisory bodies has shown a broad interpretation of the notion of “civil rights and obligations” that goes beyond the traditional sense of a dispute between private parties. In particular, the European Commission and Court have ruled in numerous cases that “civil rights and obligations” has an autonomous meaning, independent of the private or public law classification provided for by domestic laws. In this context, the European Court has found that the right to a fair trial as defined by Article 6 of the European Convention applies, among others, to proceedings relating to the practice of professions, the regulation of licenses required to operate a particular business, the expropriation of land, and the provision of social security benefits. Though less developed, as we will discuss later, the case law of the Human Rights Committee under the International Covenant on Civil and Political Rights (hereinafter “ICCPR”) appears to be leading in the same direction.

The European System has also interpreted the notion of “criminal charge” as having an autonomous meaning, independent of national legal systems. Moreover, the European Court has provided that the notion of “criminal charge” requires a “substantive” rather than a “formal” interpretation. This approach has been prompted by the fact that Contracting States regulate “criminal” conduct in different ways, distinguishing in particular, among criminal, disciplinary, and so-called “administrative criminal” laws. Leaving the determination of what constitutes a criminal charge exclusively with domestic authorities would risk eroding the protection afforded by the right to a fair trial since Contracting States would be allowed to “decriminalize” certain conduct to avoid the full application of the due process guarantees ensured by Article 6 of the European Convention on Human Rights (hereinafter “European Convention”). To this day, neither the Inter-American Commission and Court nor the Human Rights Committee have decided many cases where this issue was at stake. Later we will explore some cases submitted to the Commission and the Committee where the issue was argued but was rejected, or the case was

decided on different grounds, or it is currently pending.

The case law reproduced below reflects the scope of the notions of “civil rights and obligations” and “criminal charge” as they have been defined by the case law of international human rights bodies, especially the European Court of Human Rights. This section emphasizes the more developed case law of the European system, since it will serve as a guide in the interpretation of Articles 8 of the American Convention and 14 of the ICCPR.

**Loren Laroye Riebe Star *et al.* v. Mexico**

*Case 11.610, Inter-Am. C.H.R. 725,*

*Annual Report 1998, OEA/Ser.L/V/II.102, doc. 6 rev. (1999)*

*[For the facts of the case, see chapter IV; footnotes omitted]*

***B. Right to a fair trial (Article 8) and to judicial protection (Article 25)***

42. The American Convention guarantees everyone the right of recourse to the tribunals, to state their case within a framework of due process, and the right to obtain a ruling from the competent tribunal. Thus, Article 8(1) of the American convention stipulates that . . . .

43. The right to effective judicial protection is enshrined in Article 25 of the above-mentioned international instrument, the first paragraph of which reads as follows:

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.

44. In the instant case, the petition states that Fathers Riebe Star, Barón Guttlein, and Izal Elorz were denied a hearing, since they had no access to a competent authority to determine, first of all, the lawfulness of their detention; secondly, to examine the validity of the evidence compiled against them by the Migration Authorities and to present evidence countering those charges; and, thirdly, to allow them to develop the possibilities of judicial remedy under domestic law that could have enabled them to impugn the decision to deport them from Mexico. As for judicial protection, the petitioners claim that the protection of civil rights appeal (*recurso de amparo*) turned out to be neither effective, simple, or prompt in protecting Fathers Riebe Star, Barón Guttlein, and Izal Elorz against the acts that they consider violated their rights, particularly the decision to expel them from Mexico on the basis of evidence they were not allowed to challenge.

45. The Mexican State maintains that the rights reviewed in this report were respected at all times in the case of the three foreign priests, because the procedure applied “contains all the basic

elements required for the legality of the administrative procedure”, according to the pertinent law. Hence, the State alleges that when the officials at the National Migration Institute drew up the minutes, the priests were able to argue their own case; that the respective consuls and representatives of the CNDH were present at that time; that the authorities had sufficient evidence of violation by the priests of the laws governing migration; and that the priests’ lawyers were able to challenge the decision of the administrative authorities when they filed an appeal.

*i. Right to due process: prerequisites for the guarantee of a hearing*

46. The above-mentioned provisions guaranteeing the right to due process are applicable to administrative as well as judicial procedures. This emerges from the text of Article 8(1), which refers to “...the determination of his rights and obligations of a civil, labor, fiscal, or any other nature”. Here reference should be made to the jurisprudence of the Inter-American Court of Human Rights, which has established that the provisions of the American Convention “must be interpreted in the light of the concepts and provisions of instruments of a universal character.” The Inter-American Court has also stipulated that “a balanced interpretation is obtained by adopting the position most favorable to the recipient of international protection”.

47. The Commission must first determine whether the guarantees of due process enshrined in the American Convention were respected in the administrative procedure applied to verify the denunciation concerning the alleged illicit activities of the foreign priests.

48. In that regard, the IACHR notes that Article 50 of the Law of Administrative Procedures applied in the instant case stipulates that in such procedures “...any kind of proof will be admitted, except the authorities’ replies to interrogatories”. That provision was invoked by the Mexican State to justify using denunciations made by private individuals against Fathers Riebe Star, Barón Guttlein, and Izal Elorz. However the State provides no substantiation whatsoever for the authorities’ decision not to accept replies by the accused to the charges leveled against them, which would have allowed them a minimal right of defense.

49. The petitioners stress that the above mentioned authorities opted to carry out the investigations over a very short period of time, and consequently the action taken against the foreign priests is both arbitrary and disproportionate. The petition states that, in fact, the procedure was adopted merely in order to give a certain air of legality to a decision taken beforehand by the Mexican authorities: namely to accuse the foreign priests of having committed serious offenses, to arrest them, and to deport them summarily without having proved the accusations in criminal proceedings.

....

51. The Mexican authorities have stated their case regarding the essential requisites for an administrative procedure, which they describe as “those that guarantee an appropriate and timely defense prior to the privative act”. Specifically they have established that:

The guarantee of a hearing established by Article 14 of the Constitution consists of granting citizens the opportunity to defend their case prior to any act depriving them of liberty, property, possessions, or rights, and due respect for that guarantee obliges the authorities, among other things, to “comply with the formal prerequisites inherent in the procedure”. That means the formalities required to guarantee adequate defense prior to the privative act, in other words basically the following requirements: 1) notification of when the procedure begins and its consequences; 2) the opportunity to present and expound evidence supporting their case; 3) the opportunity to argue their case; 4) a verdict settling the issues raised. Failure to fulfill these requisites constitutes failure to comply with the purpose of the right to a hearing, which is to avoid leaving an affected party defenseless.

52. As regards the scope of the guarantee of a hearing, the Mexican courts have issued similar rulings:

In order to comply with the essential formalities of any procedure, be it administrative or judicial, it is not enough just to allow the person charged a hearing. It is also essential that he be permitted to produce evidence in his favor; because to deny him this right arbitrarily would render the granting of a hearing meaningless. Thus, failure to take legally proffered evidence into account constitutes failure to observe an essential procedural requirement, a negation of the right of defense, and a violation of a fundamental aspect of the guarantee of a hearing enshrined in Article 14 of the Constitution.

53. It is also worth mentioning another legal precedent applicable to the case of the foreign priests, regarding administrative procedures concerning witnesses. Here, the Mexican courts ruled that when the authorities take statements from witnesses without giving the accused “unrestricted opportunity to be present and to question the witnesses, it should be considered a violation of the guarantee of a hearing”. The Commission has reviewed numerous similar quotations in Mexican jurisprudence, all of them agreeing as to the prerequisites for fulfillment of the guarantee of a hearing contemplated in the Mexican Constitution.

54. The IACHR considers that the interpretation of the legal precedents under domestic law is applicable to the case of Fathers Riebe Star, Barón Guttlein, and Izal Elorz, given that it is compatible with the provisions of the American Convention which guarantee the right to due process. In order to establish a broader and more complete legal framework, within the scope of interpretation permitted under Article 29 of the American Convention, we shall now proceed to cite legal precedents in other human rights systems, as well as jurisprudence within the Inter-American system itself.

55. For reference purposes, the Commission notes that Protocol VII of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) prohibits the arbitrary expulsion of an alien legally residing in a particular State. Article 1 of Protocol VII stipulates that a foreigner has the right to present arguments against his being

expelled, to obtain a revision of his case, and to be represented to that end before the competent authority. The right to submit arguments against deportation is even prior to the right to have a decision revised; for that reason, the person concerned must be given a chance to cull evidence or other material with which to substantiate his case before the authority that deprived him of his liberty, or at the start of the proceedings.

....

58. The Commission also considers it appropriate to cite the following precedent in the doctrine of the Inter-American system:

As regards all kinds of trials, the elements considered to constitute the right to defense are: the right to be present during the proceedings, to be able to submit evidence, and to contradict those presented by the opposing party.

59. Within the legal framework outlined above, the IACHR will proceed to analyze the way in which domestic Mexican law was applied to the foreign priests. The facts of the instant case show that the administrative proceedings against them consisted in the procedures applied in a matter of hours at Mexico City airport. Indeed, it should be borne in mind that the priests were arrested in the afternoon or evening of June 22, 1995, taken to the capital of the State of Chiapas, and then to the national capital. By 8:30 a.m. the next day they had already been expelled from the country and to this day they have not been allowed to return. In order to evoke the circumstances surrounding those proceedings, the IACHR draws on the account by Father Riebe Star:

During the night, the immigration officers interrogated us and typed out statements for us to sign. My interrogation began around 2 a.m. Two individuals, who said they were from the Immigration Department, asked the questions and told a clerk what he should write down and when he should do so. A fourth individual identified himself as a lawyer with the Mexican National Human Rights Commission. None of these individuals showed me credentials proving their identity or position. Nobody explained why the lawyer from the National Human Rights Commission was present. He said nothing while I was in the room with the interrogators...

60. As mentioned earlier, the statements made by Fathers Jorge Barón Guttlein and Rodolfo Izal Elorz were taken under the same circumstances. It is quite clear that the three priests were not given the opportunity to prepare their defense, formulate their claims and submit evidence, taking into consideration the unreasonably short time in which the government's decision was carried out and the distance between where they were and their place of permanent residence in the State of Chiapas, where the witnesses or documents they might have produced in their defense were located.

61. In that regard, the order for the deportation of Rev. Riebe Star mentions the "analysis and evaluation of the evidence in the record...especially the claim submitted by Mr. César Augusto

Gómez Arévalo, who made direct accusations against the foreigner as well as the report of the immigration officers charged with the investigation of the claims of the aforementioned person”. These elements were used by the immigration authorities to conclude “with complete certainty” that Rev. Riebe Star had engaged in the following:

Organizing the indigenous peoples to steal cattle, to invade small plots of land, using to that end a non determined amount of catechists, inviting the faithful to join organizations that engage in illegal activities while threatening their lives if they did not accept, inciting them to act against the government and small landowners, arguing that the latter are “those who exploit the indians”, as well as leading them into crime and to gather arms distributed among the indians who sympathize with them, also causing damage to property and to those persons who choose not to join their cause. He has also used his sermons to incite the population to invade lands using violence against small landowners and ranchers, as well as the Government...

62. The three priests were charged with engaging in the same events, and it is clear from the record that they did not have the opportunity to challenge the “analysis and evaluation of the evidence” carried out by the immigration authorities to establish that those events really took place. . . .

63. Based on the aforementioned analysis, the IACHR considers that in those proceedings, the authorities did not comply with the explicit requirements of Mexican law, the jurisprudence established by that country’s legal authorities and the American Convention, to protect the right to a hearing enshrined in Article 14 of the Mexican Constitution, which is compatible with Article 8 of the American Convention and with other international human rights instruments.

64. As regards the right to representation, the petition alleges that the priests did not have access to an attorney during the administrative proceedings. For its part, the State pointed out that in the amparo proceedings regarding this case, the criminal judge established that the administrative proceedings “do not provide for the possibility that the foreigner must be assisted by an attorney to advise him”. The judge clarified that even though it is an individual guarantee under Article 20 of the Constitution, such provision alludes to criminal procedure, but is not applicable to administrative proceedings such as that carried out against the foreign priests.

65. The text of Article 8(2) of the American Convention refers to the rights of “every person accused of a criminal offense”, including “the right to be assisted by legal counsel of his own choosing”. The Commission notes that the scope of the right to a fair trial has been defined by the Inter-American Court in these words:

For cases which concern the determination of a person’s rights and obligations of a civil, labor, fiscal or any other nature, Article 8 does not specify any minimum guarantees similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for due guarantees; consequently, the individual here also has the right to the fair hearing provided for in criminal cases.

66. The European Commission on Human Rights has established, in general, that the rights to a fair trial and to defense are applicable to administrative proceedings and investigations.

67. The Commission has reviewed the jurisprudence of various States on this subject. With regard to the expulsion of foreigners, the Constitutional Tribunal of Spain has decided that in order to safeguard important values that might be at risk, it is fundamental that the foreigner potentially subjected to the measure of expulsion be given a hearing, and it is necessary to determine whether or not the foreigner had an adequate opportunity to present his reasons in favor or against the expulsion. As regards the extent of the guarantees of due legal process to be observed in administrative proceedings, the Commission notes a consensus in the jurisprudence of several countries. For example, the Constitutional Court of Colombia has established that “any administrative act shall be the result of a proceeding in which the person had an opportunity to express his opinions and present any evidence in support of his rights, and which fully observes all procedural requirements.”

68. Similarly, several authors, including specialists in criminal procedural law, regard the right to a defense as an essential component of due process, not restricted to criminal matters. For example, Prof. Julio B.J. Maier maintains that:

Even if we observe the guarantee from the perspective of criminal proceedings, it does not refer exclusively to the State’s authority in criminal matters. To the contrary, the term is broad and also includes civil, labor, and administrative proceedings, since it protects all attributes of the person (life, liberty, property, etc.), or rights that he or she might have which are susceptible to being abridged or infringed by a decision of the State ...

....

70. The circumstances of the present case show that the State should have determined the fundamental rights of the accused priests, and that the consequences of an adverse decision – such as that which ultimately resulted - warrant a reasonable interpretation, as broad as possible, of the right to due process. Therefore, bearing in mind the standards for interpretation of the American Convention, the IACHR considers that this right should have included the opportunity to be assisted by a lawyer if the accused parties had so wished, or by a representative in whom they had confidence, during the administrative proceeding that was held on the night of June 22, 1995, and in the early hours of the following day at Mexico City airport. This specific aspect will be dealt with in greater detail under the analysis of the right to effective judicial protection.

71. The Commission establishes that the Mexican State denied Fathers Loren Riebe Star, Jorge Barón Guttlein, and Rodolfo Izal Elorz the right to a hearing in order to determine their rights. This guarantee should have included the right to be assisted during the administrative sanction proceedings; to practice their right of defense, with enough time to ascertain the charges against them and hence to refute them; to have a reasonable time in which to prepare and formalize their statements; and to seek and adduce the corresponding evidence. Thus the IACHR concludes that

the aforementioned State violated said persons' right to judicial protection, in breach of Article 8 of the American Convention.

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**Bentham v. The Netherlands**  
*97 Eur. Ct. H.R. (ser. A) (1986)*  
<<http://www.echr.coe.int>>

*[The complainant applied in April 1976 to the municipal authorities of his town for a license to bring into operation an installation, comprising of a surface storage tank, for the delivery of liquid petroleum gas to motor vehicles. Neighbors opposed the installation for fear of fire or an explosion. The municipal authorities granted the license, subject to 56 safety conditions. The Regional Health Inspector lodged an appeal with the Crown. The municipal authorities informed the applicant of the appeal, but stated that since it had no suspensive effect, he could go forward with the installation. However, they also advised him that they would not be liable for any financial losses he might incur if the license were later canceled. After administrative hearings, the Crown, by decree, quashed the municipal authorities' decision, and the municipal authorities directed the applicant to cease operations. The applicant appealed the decision, but it was confirmed by the Crown. The installation was finally closed down in February 1984, at which time the applicant had been declared bankrupt. The applicant claimed that, contrary to Article 6(1) of the European Convention, his case had not been heard by an independent and impartial tribunal.]*

*I. APPLICABILITY OF ARTICLE 6 PARA. 1 (art. 6-1)*

30. According to Mr. Bentham, there was a serious dispute as to whether the issue of the licence he had sought, or on the contrary the refusal of his application, was in conformity with the Nuisance Act and, more generally, with the requirements of the rule of law.

In his view, both the initial grant of the licence by the municipal authorities and its subsequent refusal by the Crown had decisively and directly affected professional activities and contractual relations, and hence civil rights and obligations, within the meaning of Article 6 para. 1 (art. 6-1). This paragraph provides as follows . . . .

31. The Government, for their part, argued as follows. To come within the scope of Article 6 (art. 6), a decision by a public authority had to relate directly, if not to the conclusion of private-law contracts, at least to an activity involving such contracts. In addition, the person

concerned had to be carrying on his business by virtue of an irrevocable licence. However, this was not so here. Nor could Mr. Benthem pray in aid his right to the full and free enjoyment of his property, since that right was circumscribed by legal regulations. Again, this was not a case where a right previously granted had been withdrawn or suspended, but one where the creation of a new right by means of a licence was in question. Finally, the right to carry on a garage business was not at stake; nothing would have prevented Mr. Benthem from continuing it and, notably, from selling LPG [liquid petroleum gas] at a site where there was no risk for the neighbourhood.

In the alternative, the Government maintained that the right claimed by the applicant did not exist prior to the municipal authorities' decision; even thereafter, the right was only provisional until such time as the decision was reversed by the Crown.

In the Government's submission, Article 6 para. 1 (art. 6-1) was therefore not applicable in the present case.

By nine votes to eight, the Commission arrived at the same conclusion.

*A. Existence of a "contestation" (dispute) concerning a right*

*1. Principles adopted by the Court in its case-law*

32. The principles that emerge from the Court's case-law include the following:

(a) Conformity with the spirit of the Convention requires that the word "contestation" (dispute) should not be "construed too technically" and should be "given a substantive rather than a formal meaning" (see the *Le Compte, Van Leuven and De Meyere* judgment of 23 June 1981, Series A no. 43, p. 20, para. 45).

(b) The "contestation" (dispute) may relate not only to "the actual existence of a ... right" but also to its scope or the manner in which it may be exercised (see the same judgment, *loc. cit.*, p. 22, para. 49). It may concern both "questions of fact" and "questions of law" (see the same judgment, *loc. cit.*, p. 23, para. 51 in fine, and the *Albert and Le Compte* judgment of 10 February 1983, Series A no. 58, p. 16, para. 29 in fine, and p. 19, para. 36).

(c) The "contestation" (dispute) must be genuine and of a serious nature (see the *Sporrong and Lönnroth* judgment of 23 September 1982, Series A no. 52, p. 30, para. 81).

(d) According to the *Ringeisen* judgment of 16 July 1971, "the ... expression 'contestations sur (des) droits et obligations de caractère civil' [disputes over civil rights and obligations] covers all proceedings the result of which is decisive for [such] rights and obligations" (Series A no. 13, p. 39, para. 94). However, "a tenuous connection or remote consequences do not suffice for Article 6 para. 1 (art. 6-1) ...: civil rights and obligations must be the object - or one of the objects - of the 'contestation' (dispute); the result of the proceedings must be directly decisive for such a

right” (see the above-mentioned *Le Compte, Van Leuven and De Meyere* judgment, Series A no. 43, p. 21, para. 47).

2. *Application of these principles in the present case*

33. The Court considers that a “genuine and serious” contestation (dispute) as to the “actual existence” of the right to a licence claimed by the applicant arose between him and the Netherlands authorities at least after the Regional Inspector’s appeal against the decision of the Weststellingwerf municipal authorities. This is shown especially by the fact that, from 11 August 1976 to 30 June 1979, Mr. Benthem was able, without contravening the law, to exploit his installation by virtue of the licence granted by the latter authorities (see paragraph 13, sub-paragraph 2, above). In addition, the result of the proceedings complained of, which could - and in fact did - lead to a reversal of the decision under appeal, was directly decisive for the right at issue.

The Crown thus had to determine a contestation (dispute) concerning a right claimed by Mr. Benthem.

B. *Civil character of the right at issue*

1. *Principles adopted by the Court in its case-law*

34. According to the Court’s case-law, “... the concept of ‘civil rights and obligations’ cannot be interpreted solely by reference to the domestic law of the respondent State” (see the *König* judgment of 28 June 1978, Series A no. 27, pp. 29-30, paras. 88-89).

Furthermore, Article 6 (art. 6) does not cover only “private-law disputes in the traditional sense, that is disputes between individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law,” and not “in its sovereign capacity” (see the same judgment, *loc. cit.*, p. 30, para. 90). Accordingly, “the character of the legislation which governs how the matter is to be determined ... and that of the authority which is invested with jurisdiction in the matter ... are ... of little consequence”: the latter may be an “ordinary court, [an] administrative body, etc.” (see the above-mentioned *Ringeisen* judgment, Series A no. 13, p. 39, para. 94). “Only the character of the right at issue is relevant” (see the above-mentioned *König* judgment, Series A no. 27, p. 30, para. 90).

35. The Court does not consider that it has to give on this occasion an abstract definition of the concept of “civil rights and obligations”. In its view, the proper course is to apply to the present case the principles set out above.

2. *Application of these principles in the present case*

36. The grant of the licence to which the applicant claimed to be entitled was one of the

conditions for the exercise of part of his activities as a businessman. It was closely associated with the right to use one's possessions in conformity with the law's requirements. In addition, a licence of this kind has a proprietary character, as is shown, inter alia, by the fact that it can be assigned to third parties.

According to the Government, Mr. Benthem was prevented only from exploiting an LPG installation on a site of his own choosing, and could have obtained a licence for another locality. The Court is not persuaded by this argument: a change of this kind - which anyway would have involved an element of chance since it would have required a fresh application whose success was in no way guaranteed in advance - might have had adverse effects on the value of the business and of the goodwill and also on Mr. Benthem's contractual relations with his customers and his suppliers. This confirms the existence of direct links between the grant of the licence and the entirety of the applicant's commercial activities.

In consequence, what was at stake was a "civil" right, within the meaning of Article 6 para. 1 (art. 6-1). That provision was therefore applicable to the proceedings in the appeal to the Crown.

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**Feldbrugge v. The Netherlands**

99 Eur. Ct. H.R. (ser. A) (1986)

<<http://www.echr.coe.int>>

*[The applicant, a Dutch national, complained that she had not been given a fair hearing at her appeal against a decision to terminate her statutory sick leave allowance. Sometime in 1978, the applicant, who was unemployed, ceased to register at the Regional Employment Exchange, as she had been ill and did not consider herself sufficiently recovered to be able to work. In April of the same year, the Governing Board of the relevant Occupational Association in Amsterdam decided that, as of March 24, 1978, she was no longer entitled to the sickness allowances she had been receiving until then, as the Association's consulting doctor had judged her fit to resume work on that date. She appealed to the Appeals Board in Haarlem. Based on the reports of a gynecologist and an orthopedic specialist, the President of the Appeals Board ruled against the applicant. She filed an objection alleging that she had not been given a fair hearing. The Appeals Board declared the objection inadmissible. The applicant challenged this decision before the Central Appeals Board at Utrecht, arguing an infringement of Article 6 of the European Convention. The Central Appeals Board declared the appeal inadmissible. The applicant alleged that she was denied a fair hearing in that she had not had the opportunity of appearing, either in person or through counsel, to argue her case. She further complained that the reports of the two medical experts had not been made available to her. While acknowledging that the President of*

*the Appeals Board constituted an 'independent and impartial tribunal established by law,' the applicant complained to the European Court that, in the determination of her right to health insurance allowances, she had not received a fair trial before him.]*

## II. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

24. Article 6 para. 1 (art. 6-1) of the Convention reads as follows . . . .

The applicant claimed that she did not receive a fair hearing by a tribunal in the determination of her right to sickness allowances.

In view of the submissions made, the first issue to be decided concerns the applicability of paragraph 1 of Article 6 (art. 6-1), this being a matter disputed by the majority of the Commission and by the Government.

### A. Applicability of Article 6 para. 1 (art. 6-1)

#### 1. Existence of a "contestation" (dispute) over a right

25. As to the existence of a "contestation" (dispute) over a right, the Court would refer to the principles enunciated in its case-law and summarised in its Benthem judgment of 23 October 1985 (Series A no. 97, pp. 14-15, para. 32).

In the present case, it appears clear that a "contestation" (dispute) arose following the decision taken on 11 April 1978 by the Governing Board of the Occupational Association of the Banking and Insurance, Wholesale Trade and Self-Employment Sector in Amsterdam (see paragraph 11 above). This "contestation" was genuine and serious, and concerned the actual existence of the right asserted by the applicant to continue receiving a sickness allowance. The outcome of the relevant proceedings was capable of leading - and in the event did lead - to confirmation of the decision being challenged, namely the refusal of the President of the Haarlem Appeals Board to grant the claimed allowance; it was thus directly decisive for the right in issue.

The President of the Appeals Board thus had to determine a contestation (dispute) concerning a right claimed by Mrs. Feldbrugge.

#### 2. Whether the right at issue was a civil right

##### (a) Introduction

26. According to the case-law of the Court, "the notion of 'civil rights and obligations' cannot be interpreted solely by reference to the domestic law of the respondent State" (see the König judgment of 28 June 1978, Series A no. 27, pp. 29-30, paras. 88-89). In addition, Article 6 (art.

6) does not cover only “private-law disputes in the traditional sense, that is disputes between individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law”, and not “in its sovereign capacity” (see the same judgment, loc. cit., p. 30, para. 90). “The character of the legislation which governs how the matter is to be determined ... and that of the authority which is invested with jurisdiction in the matter ... are ... of little consequence”: the latter may be an “ordinary court, [an] administrative body, etc.” (see the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, para. 94). “Only the character of the right at issue is relevant” (see the above-mentioned König judgment, Series A no. 27, p. 30, para. 90).

27. As in previous cases, the Court does not consider that it has to give on this occasion an abstract definition of the concept of “civil rights and obligations”.

This being the first time that the Court has had to deal with the field of social security, and more particularly the sickness insurance scheme in the Netherlands, the Court must identify such relevant factors as are capable of clarifying or amplifying the principles stated above.

*(b) Supplementary factors disclosed by the subject matter of the litigation*

28. Under Netherlands legislation, the right in issue is treated as a public-law right (see paragraphs 16-17 above). This classification, however, provides only a starting point (see notably, mutatis mutandis, the Engel and Others judgment of 8 June 1976, Series A no. 22, p. 35, para. 82); it cannot be conclusive of the matter unless corroborated by other factors. In its König judgment of 28 June 1978, the Court stated in particular:

“Whether or not a right is to be regarded as civil ... must be determined by reference to the substantive content and effects of the right - and not its legal classification - under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States ... .” (Series A no. 27, p. 30, para. 89)

29. There exists great diversity in the legislation and case-law of the member States of the Council of Europe as regards the juridical nature of the entitlement to health insurance benefits under social security schemes, that is to say as regards the category of law to which such entitlement belongs. Some States - including the Netherlands - treat it as a public-law right, whereas others, on the contrary, treat it as a private-law right; others still would appear to operate a mixed system. What is more, even within the same legal order differences of approach can be found in the case-law. Thus, in some States where the public-law aspect is predominant, some court decisions have nonetheless held Article 6 para. 1 (art. 6-1) to be applicable to claims similar to the one in issue in the present case (for example, the judgment of 11 May 1984 by the Brussels Labour Court, *Journal des Tribunaux* 1985, pp. 168-169). Accordingly, there exists no common standard pointing to a uniform European notion in this regard.

30. An analysis of the characteristics of the Netherlands system of social health insurance discloses that the claimed entitlement comprises features of both public law and private law.

(i) *Features of public law*

31. A number of factors might tend to suggest that the dispute in question should be considered as one falling within the sphere of public law.

(1) *Character of the legislation*

32. The first such factor is the character of the legislation. The legal rules governing social security benefits in the context of health insurance differ in many respects from the rules which apply to insurance in general and which are part of civil law. The Netherlands State has assumed the responsibility of regulating the framework of the health insurance scheme and of overseeing the operation of that scheme. To this end, it specifies the categories of beneficiaries, defines the limits of the protection afforded, lays down the rates of the contributions and the allowances, etc.

In several cases (see notably König; Le Compte, Van Leuven and De Meyere; Benthem), State intervention by means of a statute or delegated legislation has nonetheless not prevented the Court from finding the right in issue to have a private, and hence civil, character. In the present case likewise, such intervention cannot suffice to bring within the sphere of public law the right asserted by the applicant.

(2) *Compulsory nature of the insurance*

33. A second factor of relevance is the obligation to be insured against illness or, more precisely, the fact of being covered by insurance in the event of fulfilling the conditions laid down by the legislation (see paragraph 38 below). In other words, those concerned can neither opt out of the benefits nor avoid having to pay the relevant contributions.

Comparable obligations can be found in other fields. Examples are provided by the rules making insurance cover compulsory for the performance of certain activities - such as driving a motor vehicle - or for householders. Yet the entitlement to benefits to which this kind of insurance contract gives rise cannot be qualified as a public-law right. The Court does not therefore discern why the obligation to belong to a health insurance scheme should change the nature of the corresponding right.

(3) *Assumption by the State of responsibility for social protection*

34. One final aspect to be considered is the assumption, by the State or by public or semi-public institutions, of full or partial responsibility for ensuring social protection. This was what happened in the present case by virtue of the health insurance scheme operated by the Occupational Association of the Banking and Insurance, Wholesale Trade and Self-Employment

Sector in Amsterdam. Whether viewed as the culmination of or a stage in the development of the role of the State, such a factor implies, *prima facie*, an extension of the public-law domain.

On the other hand - and the Court will revert to the point later (see paragraph 39 below) -, the present case concerns a matter having affinities with insurance under the ordinary law, which insurance is traditionally governed by private law. It thus seems difficult to draw from the consequences of the extent of State intervention any firm conclusion as to the nature of the right in issue.

35. In sum, even taken together the three foregoing factors, on analysis, do not suffice to establish that Article 6 (art. 6) is inapplicable.

(ii) *Features of private law*

36. In contrast, various considerations argue in favour of the opposite conclusion.

(1) *Personal and economic nature of the asserted right*

37. To begin with, Mrs. Feldbrugge was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but in her personal capacity as a private individual. She suffered an interference with her means of subsistence and was claiming a right flowing from specific rules laid down by the legislation in force.

For the individual asserting it, such a right is often of crucial importance; this is especially so in the case of health insurance benefits when the employee who is unable to work by reason of illness enjoys no other source of income. In short, the right in question was a personal, economic and individual right, a factor that brought it close to the civil sphere.

(2) *Connection with the contract of employment*

38. Secondly, the position of Mrs. Feldbrugge was closely linked with the fact of her being a member of the working population, having been a salaried employee. The applicant was admittedly unemployed at the relevant time, but the availability of the health benefits was determined by reference to the terms of her former contract of employment and the legislation applicable to that contract.

The legal basis of the work that she had performed was a contract of employment governed by private law. Whilst it is true that the insurance provisions derived directly from statute and not from an express clause in the contract, these provisions were in a way grafted onto the contract. They thus formed one of the constituents of the relationship between employer and employee.

In addition, the sickness allowance claimed by Mrs. Feldbrugge was a substitute for the salary payable under the contract, the civil character of this salary being beyond doubt. This allowance

shared the same nature as the contract and hence was also invested with a civil character for the purposes of the Convention.

(3) *Affinities with insurance under the ordinary law*

39. Finally, the Netherlands health insurance is similar in several respects to insurance under the ordinary law. Thus, under the Netherlands health insurance scheme recourse is had to techniques of risk covering and to management methods which are inspired by those current in the private insurance sphere. In the Netherlands, the occupational associations conduct their dealings, notably with those insured, in the same way as a company providing insurance under the ordinary law, for example as regards collection of contributions, calculation of risks, verification of fulfilment of the conditions for receipt of benefits, and payment of allowances.

There exists a further feature of relevance. Complementary insurance policies, taken out with friendly societies or private insurance companies, allow employees to improve their social protection at the price of an increased or fresh financial outlay; such policies constitute in sum an optional extension of compulsory insurance cover. Proceedings instituted in their connection are incontestably civil proceedings. Yet in both cases the risk insured against (for example, ill-health) is the same and, whilst the extent of the cover increases, the nature of the cover does not change.

Such differences as may exist between private sector insurance and social security insurance do not affect the essential character of the link between the insured and the insurer. Finally, the Court would draw attention to the fact that in the Netherlands, as in some other countries, the insured themselves participate in the financing of all or some of the social security schemes. Deductions at source are made from their salaries, which deductions establish a close connection between the contributions called for and the allowances granted. Thus, when Mrs. Feldbrugge was working, her employer withheld from her pay a sum paid over to the Occupational Association (see paragraph 17 above). In addition, her employer also bore a portion of the insurance contributions, which were included in the firm's accounts under the head of social insurance expenses. The Netherlands State, for its part, was not involved in the financing of the scheme.

(c) *Conclusion*

40. Having evaluated the relative cogency of the features of public law and private law present in the instant case, the Court finds the latter to be predominant. None of these various features of private law is decisive on its own, but taken together and cumulatively they confer on the asserted entitlement the character of a civil right within the meaning of Article 6 para. 1 (art. 6-1) of the Convention, which was thus applicable.

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## Note

The various translations of paragraph 1 of Article 14 of the ICCPR have raised some interpretation problems. While in English that provision refers to the determination of “rights and obligations in a suit at law,” the French and Spanish versions allude to the determination of civil rights and obligations [“*des contestations sur ses droits et obligations de caractère civil*”; “*determinación de sus derechos u obligaciones de carácter civil*”]. The Human Rights Committee settled the difference in the *Y.C. v. Canada*<sup>1</sup> case where it decided that:

the concept of a “suit at law” or its equivalent in the other languages texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review. In this regard, each communication must be examined in the light of its particular features.<sup>2</sup>

In the *Y.C. case* the petitioner was discharged from the Canadian Army on grounds that he suffered from mental disorders. On several occasions he applied for a disability pension to the Canadian Pension Commission, an administrative body functioning within the executive branch, but his claims were rejected. In his petition to the Human Rights Committee, he complained that he was not granted a fair and public hearing by a competent, independent and impartial tribunal, as required by Article 14, paragraph 1 of the ICCPR. The Committee declared the case inadmissible on the basis that the Canadian legal system provided the possibility of appeal to a Federal Court against the final decision of the administrative body. Therefore, the Committee did not rule on whether the petitioner’s pension claim encompassed the determination of a civil right. Likewise, in *I.P. v. Finland*,<sup>3</sup> the Committee did not decide whether tax related issues are “rights or obligations in a suit at law,” since the petitioner had not been denied the right to have his claim heard before an independent tribunal. In *Robert Casanovas v. France*,<sup>4</sup> however, the Committee decided that a procedure concerning the dismissal from employment of a civil servant

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<sup>1</sup> Communication No. 112/1981, April 8, 1986 (1986), <<http://sim.law.uu.nl/>; <http://www1.umn.edu/humanrts/>>.

<sup>2</sup> *Id.*

<sup>3</sup> Communication No. 450/1991, U.N. Doc. CCPR/C/48/D/450/1991, July 26, 1993 (1993), <<http://sim.law.uu.nl/>; <http://www.unhchr.ch>>.

<sup>4</sup> Communication No. 441/1990, U.N. Doc. CCPR/C/51/D/441/1990, August 10, 1994 (1994), <<http://sim.law.uu.nl/>; <http://www.unhchr.ch>>.

(an employee of a fire brigade) constituted the determination of rights and obligations in a suit at law within the meaning of Article 14, paragraph 1 of the ICCPR. This decision implies a significant departure from the case law of the European system which has considered that matters related to civil servants' employment fall outside the scope of "civil rights and obligations" as provided by Article 6 of the European Convention.<sup>5</sup>

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**Engel et al. v. Netherlands**  
22 Eur. Ct. H.R. (ser. A) (1976)  
<<http://www.echr.coe.int>>

*[This case originated in five applications lodged with the European System in 1971 by five Netherlands nationals. At the time, all five were conscript soldiers serving in different non-commissioned ranks in the Netherlands armed forces. On separate occasions, various penalties had been imposed on them by their respective commanding officers for offenses against military discipline, including impermissible absence, "irregular behavior", and the publication of materials "tending to undermine military discipline." The applicants had complained to the complaints officer, and finally to the Supreme Military Court, which in substance confirmed the decisions challenged but, in two cases, reduced the punishment imposed. In common with each other, the applicants complained, inter alia, that the proceedings before the military authorities and the Supreme Military Court were not in conformity with the requirements of Article 6 of the European Convention.]*

79. For both the Government and the Commission, the proceedings brought against Mr. Engel, Mr. van der Wiel, Mr. de Wit, Mr. Dona and Mr. Schul involved the determination neither of "civil rights and obligations" nor of "any criminal charge".

Led thus to examine the applicability of Article 6 (art. 6) in the present case, the Court will first

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<sup>5</sup> In its recent decision of *Pellegrin v. France* [Eur. Ct. H.R., Judgment of December 8, 1999, <<http://www.echr.coe.int>>], the European Court clarified that only those disputes raised by public servants "whose duties typify the specific activities of the public service in so far as the latter is acting as the depository of public authority responsible for protecting the general interests of the State or other public authorities" will be excluded from the application of Article 6 of the European Convention. In that regard, it stated that members of the armed forces and the police constitute manifest examples of the civil servants to whom that provision will not apply. In *Büker v. Turkey* [Eur. Ct. H.R., Judgment of October 24, 2000, <<http://www.echr.coe.int>>], the Court further decided that assistant professors in public universities are not civil servants in the sense established in *Pellegrin*; therefore, it found that Article 6 was applicable to the case.

investigate whether the said proceedings concerned “any criminal charge” within the meaning of this text; for, although disciplinary according to Netherlands law, they had the aim of repressing through penalties offences alleged against the applicants, an objective analogous to the general goal of the criminal law.

1. *On the applicability of Article 6 (art. 6)*

(a) *On the existence of “any criminal charge”*

80. All the Contracting States make a distinction of long standing, albeit in different forms and degrees, between disciplinary proceedings and criminal proceedings. For the individuals affected, the former usually offer substantial advantages in comparison with the latter, for example as concerns the sentences passed. Disciplinary sentences, in general less severe, do not appear in the person’s criminal record and entail more limited consequences. It may nevertheless be otherwise; moreover, criminal proceedings are ordinarily accompanied by fuller guarantees.

It must thus be asked whether or not the solution adopted in this connection at the national level is decisive from the standpoint of the Convention. Does Article 6 (art. 6) cease to be applicable just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification? This problem, the importance of which the Government acknowledge, was rightly raised by the Commission; it particularly occurs when an act or omission is treated by the domestic law of the respondent State as a mixed offence, that is both criminal and disciplinary, and where there thus exists a possibility of opting between, or even cumulating, criminal proceedings and disciplinary proceedings.

81. The Court has devoted attention to the respective submissions of the applicants, the Government and the Commission concerning what they termed the “autonomy” of the concept of a “criminal charge”, but does not entirely subscribe to any of these submissions (report of the Commission, paragraphs 33-34, paragraphs 114-119 and the separate opinion of Mr. Welter; memorial of the Government, paragraphs 25-34; memorial of the Commission, paragraphs 9-16, paragraphs 14-17 of Annex I and paragraphs 12-14 of Annex II; verbatim report of the hearings on 28 and 29 October 1975).

In the Neumeister judgment of 27 June 1968, the Court has already held that the word “charge” must be understood “within the meaning of the Convention” (Series A no. 8, p. 41, para. 18, as compared with the second sub-paragraph on p. 28 and the first sub-paragraph on p. 35; see also the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, para. 110).

The question of the “autonomy” of the concept of “criminal” does not call for exactly the same reply.

The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7 (art. 7). Such a choice, which has the effect of rendering applicable Articles 6 and 7 (art. 6, art. 7), in principle escapes supervision by the Court.

The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a “mixed” offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal.

In short, the “autonomy” of the concept of “criminal” operates, as it were, one way only.

82. Hence, the Court must specify, limiting itself to the sphere of military service, how it will determine whether a given “charge” vested by the State in question - as in the present case - with a disciplinary character nonetheless counts as “criminal” within the meaning of Article 6 (art. 6).

In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or omission allegedly contravening a legal rule governing the operation of the armed forces, the State may in principle employ against him disciplinary law rather than criminal law. In this respect, the Court expresses its agreement with the Government.

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the “criminal” sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so (see, *mutatis mutandis*, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 36, last sub-paragraph, and p. 42 in fine).

83. It is on the basis of these criteria that the Court will ascertain whether some or all of the applicants were the subject of a “criminal charge” within the meaning of Article 6 para. 1 (art. 6-1).

In the circumstances, the charge capable of being relevant lay in the decision of the commanding officer as confirmed or reduced by the complaints officer. It was undoubtedly this decision that settled once and for all what was at stake, since the tribunal called upon to give a ruling, that is the Supreme Military Court, had no jurisdiction to pronounce a harsher penalty (paragraph 31 above).

84. The offences alleged against Mr. Engel, Mr. van der Wiel, Mr. de Wit, Mr. Dona and Mr. Schul came within provisions belonging to disciplinary law under Netherlands legislation (the 1903 Act and Regulations on Military Discipline), although those to be answered for by Mr. Dona and Mr. Schul (Article 147 of the Military Penal Code), and perhaps even by Mr. Engel and Mr. de Wit (Articles 96 and 114 of the said Code according to Mr. van der Schans, hearing on 28 October 1975), also lent themselves to criminal proceedings. Furthermore, all the offences had amounted, in the view of the military authorities, to contraventions of legal rules governing the operation of the Netherlands armed forces. From this aspect, the choice of disciplinary action was justified.

85. The maximum penalty that the Supreme Military Court could pronounce consisted in four days’ light arrest for Mr. van der Wiel, two days’ strict arrest for Mr. Engel (third punishment) and three or four months’ committal to a disciplinary unit for Mr. de Wit, Mr. Dona and Mr. Schul.

Mr. van der Wiel was therefore liable only to a light punishment not occasioning deprivation of liberty (paragraph 61 above).

For its part, the penalty involving deprivation of liberty that in theory threatened Mr. Engel was of too short a duration to belong to the “criminal” law. He ran no risk, moreover, of having to undergo this penalty at the close of the proceedings instituted by him before the Supreme Military Court on 7 April 1971, since he had already served it from 20 to 22 March (paragraphs 34-36, 63 and 66 above).

On the other hand, the “charges” against Mr. de Wit, Mr. Dona and Mr. Schul did indeed come within the “criminal” sphere since their aim was the imposition of serious punishments involving deprivation of liberty (paragraph 64 above). The Supreme Military Court no doubt sentenced Mr. de Wit to twelve days’ aggravated arrest only, that is to say, to a penalty not occasioning deprivation of liberty (paragraph 62 above), but the final outcome of the appeal cannot diminish the importance of what was initially at stake.

The Convention certainly did not compel the competent authorities to prosecute Mr. de Wit, Mr. Dona and Mr. Schul under the Military Penal Code before a court martial (paragraph 14 above),

a solution which could have proved less advantageous for the applicants. The Convention did however oblige the authorities to afford them the guarantees of Article 6 (art. 6).

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**Öztürk v. Germany**  
73 Eur. Ct. H.R (ser. A) (1984)  
<<http://www.echr.coe.int>>

*[On January 27, 1978, the applicant, a Turkish national and resident of West Germany, drove his car into a parked car. Based on the police report of the incident, the administrative authorities imposed a fine on the applicant, pursuant to a section of the Regulatory Offenses Act. The applicant, through counsel, lodged an objection against the decision, and stated that he was not waiving his right to a public hearing before a court. Sitting in public hearing on August 3, 1978, the District Court heard the applicant, who was assisted by an interpreter, and three witnesses. Immediately thereafter, the applicant withdrew his objection. Accordingly, the administrative authorities' decision became final. The District Court directed that the applicant should bear the court costs, including interpreter's fees. The applicant entered an appeal against the bill of costs with regard to the interpreter's fees, relying on Article 6 of the Convention. The District Court dismissed the appeal, finding that the obligation to bear the interpreter's fees was compatible with Article 6. In his application to the European System, the applicant complained of the fact that the District Court had ordered him to bear the interpreter's fees; he relied on Article 6(3) of the Convention.]*

45. . . . In the applicant's submission, the Heilbronn District Court had acted in breach of Article 6 § 3(e) (art. 6-3-e) in ordering him to pay the costs incurred through recourse to the services of an interpreter at the hearing on 3 August 1978.

I. *APPLICABILITY OF ARTICLE 6 § 3(e) (art. 6-3-e)*

46. According to the Government, Article 6 § 3(e) (art. 6-3-e) is not applicable in the circumstances since Mr. Öztürk was not "charged with a criminal offence". Under the 1968/1975 Act, which "decriminalised" petty offences, notably in the road traffic sphere, the facts alleged against Mr. Öztürk constituted a mere "regulatory offence" (Ordnungswidrigkeit). Such offences were said to be distinguishable from criminal offences not only by the procedure laid down for their prosecution and punishment but also by their juridical characteristics and consequences.

The applicant disputed the correctness of this analysis. Neither was it shared by the Commission, which considered that the offence of which Mr. Öztürk was accused was indeed a “criminal offence” for the purposes of Article 6 (art. 6).

47. According to the French version of Article 6 § 3(e) (art. 6-3-e), the right guaranteed is applicable only to an “accusé”. The corresponding English expression (person “charged with a criminal offence”) and paragraph 1 of Article 6 (art. 6-1) (“criminal charge”/ “accusation en matière pénale”) - this being the basic text of which paragraphs 2 and 3 (art. 6-2, art. 6-3) represent specific applications (see the Deweer judgment of 27 February 1980, Series A no. 35, p. 30, § 56) - make it quite clear that the “accusation” (“charge”) referred to in the French wording of Article 6 § 3(e) (art. 6-3-e) must concern a “criminal offence” (see, *mutatis mutandis*, the Adolf judgment of 26 March 1982, Series A no. 49, p. 15, § 30).

Under German law, the misconduct committed by Mr. Öztürk is not treated as a criminal offence (Straftat) but as a “regulatory offence” (Ordnungswidrigkeit). The question arises whether this classification is the determining factor in terms of the Convention.

48. The Court was confronted with a similar issue in the case of Engel and others, which was cited in argument by the representatives. The facts of that case admittedly concerned penalties imposed on conscript servicemen and treated as disciplinary according to Netherlands law. In its judgment delivered on 8 June 1976 in that case, the Court was careful to state that it was confining its attention to the sphere of military service (Series A no. 22, p. 34, § 82). The Court nevertheless considers that the principles set forth in that judgment (*ibid.*, pp. 33-35, §§ 80-82) are also relevant, *mutatis mutandis*, in the instant case.

49. The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but it does not follow that the classification thus made by the States is decisive for the purposes of the Convention.

By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual (see, *mutatis mutandis*, the above-mentioned Engel and others judgment, *ibid.*, p. 33, § 80) as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions - which are numerous but of minor importance - of road traffic rules. The Convention is not opposed to the moves towards “decriminalisation” which are taking place - in extremely varied forms - in the member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as “regulatory” instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7), the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.

50. Having thus reaffirmed the “autonomy” of the notion of “criminal” as conceived of under Article 6 (art. 6), what the Court must determine is whether or not the “regulatory offence” committed by the applicant was a “criminal” one within the meaning of that Article (art. 6). For this purpose, the Court will rely on the criteria adopted in the above-mentioned Engel and others judgment (ibid., pp. 34-35, § 82). The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 (art. 6), to the ordinary meaning of the terms of that Article (art. 6) and to the laws of the Contracting States.

51. Under German law, the facts alleged against Mr. Öztürk - non-observance of Regulation 1 § 2 of the Road Traffic Regulations - amounted to a “regulatory offence” (Regulation 49 § 1, no. 1, of the same Regulations). They did not fall within the ambit of the criminal law, but of section 17 of the Ordnungswidrigkeitengesetz and of section 24 sub-section 2 of the Road Traffic Act (see paragraph 11 above). The 1968/1975 legislation marks an important step in the process of “decriminalisation” of petty offences in the Federal Republic of Germany. Although legal commentators in Germany do not seem unanimous in considering that the law on “regulatory offences” no longer belongs in reality to criminal law, the drafting history of the 1968/1975 Act nonetheless makes it clear that the offences in question have been removed from the criminal law sphere by that Act (see Deutscher Bundestag, Drucksache V/1269 and, inter alia, the judgment of 16 July 1969 by the Constitutional Court, Entscheidungen des Bundesverfassungsgerichts, vol. 27, pp. 18-36).

Whilst the Court thus accepts the Government’s arguments on this point, it has nonetheless not lost sight of the fact that no absolute partition separates German criminal law from the law on “regulatory offences”, in particular where there exists a close connection between a criminal offence and a “regulatory offence” (see paragraph 20 above). Nor has the Court overlooked that the provisions of the ordinary law governing criminal procedure apply by analogy to “regulatory” proceedings (see paragraph 21 above), notably in relation to the judicial stage, if any, of such proceedings.

52. In any event, the indications furnished by the domestic law of the respondent State have only a relative value. The second criterion stated above - the very nature of the offence, considered also in relation to the nature of the corresponding penalty - represents a factor of appreciation of greater weight.

In the opinion of the Commission - with the exception of five of its members - and of Mr. Öztürk, the offence committed by the latter was criminal in character.

For the Government in contrast, the offence in question was beyond doubt one of those contraventions of minor importance - numbering approximately five million each year in the Federal Republic of Germany - which came within a category of quite a different order from

that of criminal offences. The Government's submissions can be summarised as follows. By means of criminal law, society endeavoured to safeguard its very foundations as well as the rights and interests essential for the life of the community. The law on Ordnungswidrigkeiten, on the other hand, sought above all to maintain public order. As a general rule and in any event in the instant case, commission of a "regulatory offence" did not involve a degree of ethical unworthiness such as to merit for its perpetrator the moral value-judgment of reproach (Unwerturteil) that characterised penal punishment (Strafe). The difference between "regulatory offences" and criminal offences found expression both in procedural terms and in relation to the attendant penalties and other legal consequences.

In the first place, so the Government's argument continued, in removing "regulatory offences" from the criminal law the German legislature had introduced a simplified procedure of prosecution and punishment conducted before administrative authorities save in the event of subsequent appeal to a court. Although general laws on criminal procedure were in principle applicable by analogy, the procedure laid down under the 1968/1975 Act was distinguishable in many respects from criminal procedure. For example, prosecution of Ordnungswidrigkeiten fell within the discretionary power of the competent authorities and the 1968/1975 Act greatly limited the possibilities of restricting the personal liberty of the individual at the stage of the preliminary investigations (see paragraphs 21, 22 and 24 above).

In the second place, instead of a penal fine (Geldstrafe) and imprisonment the legislature had substituted a mere "regulatory" fine (Geldbusse - see paragraph 17 above). Imprisonment was not an alternative (Ersatzfreiheitsstrafe) to the latter type of fine as it was to the former and no coercive imprisonment (Erzwingungshaft) could be ordered unless the person concerned had failed to pay the sum due without having established his inability to pay (see paragraph 33 above). Furthermore, a "regulatory offence" was not entered in the judicial criminal records but solely, in certain circumstances, on the central traffic register (see paragraph 39 above).

The reforms accomplished in 1968/1975 thus, so the Government concluded, reflected a concern to "decriminalise" minor offences to the benefit not only of the individual, who would no longer be answerable in criminal terms for his act and who could even avoid all court proceedings, but also of the effective functioning of the courts, henceforth relieved in principle of the task of dealing with the great majority of such offences.

53. The Court does not underestimate the cogency of this argument. The Court recognises that the legislation in question marks an important stage in the history of the reform of German criminal law and that the innovations introduced in 1968/1975 represent more than a simple change of terminology.

Nonetheless, the Court would firstly note that, according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty.

In addition, misconduct of the kind committed by Mr. Öztürk continues to be classified as part of the criminal law in the vast majority of the Contracting States, as it was in the Federal Republic of Germany until the entry into force of the 1968/1975 legislation; in those other States, such misconduct, being regarded as illegal and reprehensible, is punishable by criminal penalties.

Moreover, the changes resulting from the 1968/1975 legislation relate essentially to procedural matters and to the range of sanctions, henceforth limited to Geldbussen. Whilst the latter penalty appears less burdensome in some respects than Geldstrafen, it has nonetheless retained a punitive character, which is the customary distinguishing feature of criminal penalties. The rule of law infringed by the applicant has, for its part, undergone no change of content. It is a rule that is directed, not towards a given group possessing a special status - in the manner, for example, of disciplinary law -, but towards all citizens in their capacity as road-users; it prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive. Indeed, the sanction - and this the Government did not contest - seeks to punish as well as to deter. It matters little whether the legal provision contravened by Mr. Öztürk is aimed at protecting the rights and interests of others or solely at meeting the demands of road traffic. These two ends are not mutually exclusive. Above all, the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 (art. 6) of the Convention, criminal in nature.

The fact that it was admittedly a minor offence hardly likely to harm the reputation of the offender does not take it outside the ambit of Article 6 (art. 6). There is in fact nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness. In this connection, a number of Contracting States still draw a distinction, as did the Federal Republic at the time when the Convention was opened for the signature of the Governments, between the most serious offences (crimes), lesser offences (délits) and petty offences (contraventions), whilst qualifying them all as criminal offences. Furthermore, it would be contrary to the object and purpose of Article 6 (art. 6), which guarantees to “everyone charged with a criminal offence” the right to a court and to a fair trial, if the State were allowed to remove from the scope of this Article (art. 6) a whole category of offences merely on the ground of regarding them as petty. Nor does the Federal Republic deprive the presumed perpetrators of Ordnungswidrigkeiten of this right since it grants them the faculty - of which the applicant availed himself - of appealing to a court against the administrative decision.

54. As the contravention committed by Mr. Öztürk was criminal for the purposes of Article 6 (art. 6) of the Convention, there is no need to examine it also in the light of the final criterion stated above (at paragraph 50). The relative lack of seriousness of the penalty at stake (see paragraph 18 above) cannot divest an offence of its inherently criminal character.

55. The Government further appeared to consider that the applicant did not have the status of a person “charged with a criminal offence” because the 1968/1975 Act does not provide for any “Beschuldigung” (“charge”) and does not employ the terms “Angeschuldigter” (“person charged”) or “Angeklagter” (“the accused”). On this point, the Court would simply refer back to

its well-established case-law holding that “charge”, for the purposes of Article 6 (art. 6), may in general be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, although “it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect” (see, as the most recent authorities, the Foti and others judgment of 10 December 1982, Series A no. 56, p. 18, § 52, and the Corigliano judgment of the same date, Series A no. 57, p. 13, § 34). In the present case, the applicant was “charged” at the latest as from the beginning of April 1978 when the decision of the Heilbronn administrative authorities was communicated to him (see paragraph 11 above).

56. Article 6 § 3(e) (art. 6-3-e) was thus applicable in the instant case. It in no wise follows from this, the Court would want to make clear, that the very principle of the system adopted in the matter by the German legislature is being put in question. Having regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6 (art. 6) (see, mutatis mutandis, the above-mentioned Deweer judgment, Series A no. 35, p. 25, § 49, and the Le Compte, Van Leuven and De Meyere judgment of 23 June 1981, Series A no. 43, p. 23, first sub-paragraph).

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**“Constitutional Challenge to the Vagrants and Delinquents Law”**  
*Supreme Court of Venezuela, Judgment of October 14, 1997 (1997)*

*[On July 17, 1985, Attorney José Fernando Nuñez, acting in his own name, filed a constitutional challenge against the “Vagrants and Delinquents Law,” based on the alleged violation of articles 60(7), 61, 68, 69 and 204 of the Venezuelan Constitution. The plaintiff argued principally that the Law violated the Constitution by allowing the application of criminal law by administrative authorities. Pursuant to the Law, such officials imposed “preventive security measures” involving deprivations of liberty and restrictions upon freedom of movement. The plaintiff further alleged that these measures effectively allowed for a person to be punished for his prior record, and to be punished more than once for the same act; he also claimed that the Law penalized individual persons themselves, rather than punishable conduct. In addition, he alleged that the Law was discriminatory, in that it applied only to the poor, and that the application of security measures by administrative officials did not afford sufficient guarantees of defense for suspects.]*

The High Court deems it proper to address the nature of the security measures established in article 4 of the Vagrants and Delinquents Law, which sets forth the following:

“To reform or place into custody the vagrants and delinquents subject to the present law, the legally qualified authorities shall pronounce and apply the measures outlined below, in the manner established in the following articles:

- a) Warning, with the obtaining of a promise by the individual being warned to mend his ways and devote himself to work.
- b) Sending the individual, in cases which so require, under custody to his city or town of origin, with prior notification to the respective authority for purposes of supervision.
- c) Confinement to a house of education and work.
- d) Obligation to or prohibition from residing for a suitable time in a particular place or part of the State, Federal District, or Federal Territory in which the proceedings has taken place.
- e) Confinement to a correctional Agricultural Colony, fixed or mobile.
- f) Confinement to a Work Colony, fixed or mobile.
- g) Subjection to supervision by the authorities. Supervision shall be of a tutelary and protective nature, and shall be exercised by the authorities designated for that purpose. A bond may serve as a substitute for this measure, but no parent, child, or spouse of the individual may act as the guarantor.
- h) Confinement. This measure consists of the obligation to reside in a particular place, for a period not to exceed three years, under supervision of the authority indicated by the Minister of Justice. This measure may be applied in addition to the measures provided in sections (c), (e) and (f) of this article, after said articles have been applied and carried out.

(...).”

This Supreme Court observes that the security measures established in sections (c), (e) and (f) are situations involving deprivations of liberty, even though technically they are not punishments. The rest of the Law’s measures, excluding the warning and the subjection to supervision by the authorities (art. 4(9)), amount to violations of the freedom of movement of the “vagrant or delinquent,” to use the pejorative terms employed in the statutory language.

The Court now finds that - as stated previously - these security measures cannot be considered punishments as such. On one hand, they are not applied by criminal courts; and on the other hand, they do not formally constitute punishment for the commission of crimes or misdemeanors.

Nevertheless, their content is materially punitive. In effect, however much the preventive character of the security measures is emphasized, as long as the punishments and other sanctions are repressive, there is no doubt - particularly in the case of the measures provided for in sections (c), (e) and (f) of article 4 - that the application of those measures produces upon the individual effects similar to those of punishments and other sanctions.

The individual's liberty is equally curtailed whether he is relegated to a particular work colony or confined to a penitentiary establishment, even though it is supposed that one deals with prevention, and the other with repression.

In light of such considerations, the constitutional challenge to the "Vagrants and Delinquents Law" can be confronted clearly and directly.

First, upon analyzing the arguments presented by the party challenging the law, this Court shall refer to certain provisions of the "Vagrants and Delinquents Law" which are in themselves unconstitutional, independent of their application, and of the context in which they are found.

Such is the following provision:

1.- Article 3(g).

"Delinquents shall include:

g) Those convicted two or more times for crimes against property."

Thus, in clause (g), reproduced above, a person who has been convicted two or more times for crimes against property is classified as a delinquent. Hypothetically, even after having completed the punishment corresponding to such offenses, an individual could be the object of a particular security measure which, as previously indicated, is of a punitive content. This, in the judgment of the Court, is incompatible with article 60(8) of the Constitution, which text establishes:

"ARTICLE 60.- Personal liberty and safety are inviolable, and consequently:

(8) No one may be tried for the same acts by virtue of which he has been judged previously."

The contradiction with article 60(8) derives from the fact that the security measures applicable to individuals convicted two or more times for crimes against property include measures which deprive a person of his or her liberty. It could occur, and in fact does occur, that a person who has already served the sentences corresponding to crimes perpetrated is later the object of a security measure that once again deprives him of his liberty, thus making a mockery of the aforementioned provision contained in article 60(8) of the Venezuelan Constitution. This

constitutes a flagrant violation of the criminal principle “Nullum Crimen Sin Lege”<sup>6</sup> and also punishes an individual for his previous record, thereby violating the universal axiom of “Non bis in idem.”<sup>7</sup>

It is fitting to observe that the principle of “non bis [in] idem” refers to a new trial, not to punishments for the same act, although strictly speaking, the punishment is a consequence of said trial.

2- In this context, article 3(g) and (h) of the Law under scrutiny provides that individuals convicted two or more times for crimes against property shall be categorized as delinquents, and therefore subject to the established security measures. The problem lies in the fact that they have not been tried.

Likewise, to apply the security measure in the hypothetical contemplated above would violate article 60(8) of the Constitution, for the reason that an individual who has already been punished would be again convicted - although not judicially - for the same acts for which the original punishment was applied. The fact that the procedural mechanism for the application of the security measure is not formally a trial does not prevent the Court from considering that, in reality, a certain measure of punitive content is being applied newly to an individual who has already served his sentence. The Court finds this to be wholly unconstitutional.

3- It is also the Court’s view that the security measures set forth in sections (c), (e) and (f) of article 4 of the Law are incongruous with the Constitution. Specifically, these sections are inimical to article 60(2) of our Constitution, which provides that:

“No one may be deprived of his liberty for obligations the non-compliance with which has not been defined by law as a crime or misdemeanor.”

This principle of legality is enshrined in this mechanism. The Court finds that, in general, only criminal courts or investigating bodies which are part of the criminal proceedings can apply measures which deprive individuals of their liberty. In other words, a person may be seized of his liberty only through the application of a punishment, upon criminal prosecution, or as execution of said punishment, upon sentencing by the criminal courts. However, this is subject to an exception according to which an individual’s liberty is not lost only with the application of a punishment, because the case of legally justified preventive detention does not entail, procedurally speaking, the application of punishment.

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<sup>6</sup> *Editor’s note:* “Nullum Crimen Sin Lege” means that no person shall be criminally prosecuted or punished on account of any act or omission which did not constitute a penal offense at the time it was committed.

<sup>7</sup> *Editor’s note:* “Non bis in Idem” means “double jeopardy.”

Under this assumption, the impugned Law violates the legal principle known as **nullum crimen nulla poena sine lege praevia, scripta et stricta**. It could be argued that the existing categories of offenses were established through this Law; but to this it must be countered that, in order to conform to the aforementioned principle of legality, the essential legal principle of the certain, concrete or particular definition of the offense is additionally required. Above all, the Court reaffirms that the unconstitutionality of the Vagrants and Delinquents Law arises fundamentally from conduct punishable from the administrative, not judicial, point of view.

4- On the other hand, beside the principle of legality, the normative aspects which must guarantee its existence, and are not contained in its text, are also violated. Criminal law must be applied by a judge; but in the case analyzed according to Chapter II, it is applied by administrative authorities.

5- In short, the application of the Vagrants and Delinquents Law is not based on the principle of culpability. This principle is seriously questioned; because of the vagueness of the categories of offenses it is not possible practically to deduce who is legally culpable when, with the motive of carrying out a particular legally indifferent act, a result is derived by imprudence, negligence, incompetence or failure to observe the rules, orders or resolutions of the authority.

6- The Vagrants and Delinquents Law is evidently designed to penalize not the punishable act, but rather the person; not the person's conduct, but rather what he is, so that this characteristic of the Law authorizes the persecution of persons, without consideration as to whether they have committed prohibited acts. Thus, the Law violates the right to personal liberty and security enshrined in clauses (1) and (2) of article 60 of the Constitution.

7- In this Court's opinion, it must be concluded that the situations referred to above are repugnant to the Constitution, as they entail privations of an individual's liberty based upon hypothetical situations that are not classified as crimes or misdemeanors. Nevertheless, the restriction or privation of liberty "as a consequence of criminal sanctions" does not appear to be unconstitutional, since the penal sanction is derived from a conviction, or - by extension - from a detention order issued within the legal framework of criminal procedure. In short, it is a question of the violation of liberty as a consequence of a criminal penalty. To this High Court, such measures are especially grave, as their maximum limit is five (5) years, according to article 5 of the challenged law.

The framers of the Constitution wished to guarantee that the deprivation of such a sacred right as personal liberty be situated only within criminal procedure, and never as the design of administrative proceedings, such as those contemplated in the "Vagrants and Delinquents Law" for the application of the security measures provided therein.

8- This Supreme Court is of the opinion that the following two provisions contained in article 14 of the impugned law are also unconstitutional:

“The disciplinary measures which for maintaining order are established in the Regulations of Houses of Correction and Work, in the Correctional Agricultural Colonies and in the Work Colonies, shall consist of warnings, moderate salary reductions during a period of time not greater than one month; **isolation, outside of work hours, not to exceed eight days, deprivation of permitted leisure activities; and in grave cases, arrest for up to fifteen (15) days.**” (emphasis added by the Court).

The disciplinary measure of isolation is clearly contrary to article 60(3) of the Constitution, which provides that:

“No one may be held *incommunicado* nor subjected to torture or to other proceedings which cause physical or moral suffering.”

The measure of arrest, by implicating deprivation of liberty imposed by a non-judicial body, is clearly unconstitutional, and incongruent with article 60(2) of the Constitution, according to the previous discussion. There exists ample precedent to this effect.

9- This Court further finds that the penultimate section of article 23 of the law in question violates the Constitution. That provision stipulates that “there shall be no appeal” from the decision of the Minister of Justice, called to put an end to the procedure of application of security measures which exceed six (6) months. Nevertheless, this Supreme Court in plenary session has determined in its jurisprudence...that:

“every act of the Executive Branch is reviewable in contentious-administrative legal proceedings, by virtue of article 206 of the Constitution.”

Accordingly, the Court observes:

It has been mentioned above that defects in the Vagrants and Delinquents Law are denounced as the presumed consequence, not solely of the negligence and arbitrariness of the agencies charged with its application, but rather of intrinsic defects in the law itself.

In view of such an assertion, it must be cautioned here that the constitutional violations generated normally by the challenged law come to be the product, fundamentally, of the absence of genuine control over the decisions which the legally qualified administrative bodies take to carry out the application of the security measures.

In effect, the officials charged with applying the security measures, according to article 17 of the law, are: the First Civil Authority of the Districts (today Municipalities) in the States, of the Departments of the Federal District and of the old Federal Territories or in the capitals of such political entities, where existing, the Head of the respective Security Force. In this sense the Court must observe that when the challenged Law was passed, the Technical Force of the Judicial Police did not exist; rather, it was the former National Security Office, which was charged with opening investigations in the proceedings of First Instance (Art. 17 of the Law). For

this reason, it would be interesting to determine whether in practice the Technical Force of the Judicial Police is legally authorized for this purpose.

In the same sense, the Court notes that a joint publication by the Ministry of the Interior and the Ministry of Justice, analyzing certain aspects of the application of the Vagrants and Delinquents Law, emphasizes that police officials in general (that is, all of those Authorities which exercise police functions) are competent to open investigations. Upon rigorous analysis of Art. 17 of the Law, this affirmation does not appear to be correct. Article 17 specifies the agencies which are competent to initiate investigations and decide in the First Instance, and indicates at the same time that:

“the Police or National Security officials shall proceed to detain the suspect and, within the specified period, they shall place the suspect at the disposition of the authorities who shall try the matter.”

From the most elemental interpretation of the above, it can be concluded that National Security, in places outside the capitals of the Federal Entities, were legally authorized to detain the suspect but not to conduct the proceedings.

The National Security Office was eliminated in 1958, and there does not seem to exist sufficient background information which would lead the Court to assume that the Technical Force of the Judicial Police was authorized to act within the procedure provided for by the Law.

Nevertheless, it is fitting to indicate that the only thing in favor of the view according to which the suggested identification could be made relates to Article 3 of the Judicial Police Law, which reads:

“When the Judicial Police authorities initiate an investigation of a punishable act or proceedings with regard to dangerous individuals, they must immediately notify a Prosecutor from the Public Prosecutor’s Office.”

In the second instance, it is the State Governors (Art. 21) who assert jurisdiction over the matter and, incidentally, when the security measure exceeds six (6) months, the Minister of Justice has jurisdiction over appeals from the Governors’ decisions.

Now, in the Court’s judgment, the application of security measures by administrative officials, in terms of hypotheticals such as those set forth in articles 2 and 3 of the impugned Law, does not offer sufficient guarantees of defense for suspects. On one hand, it has already been pointed out that the security measures which deprive persons of their liberty are, in the Court’s opinion, unconstitutional, and therefore, all of the norms relative to the application of such measures are also unconstitutional. On the other hand, situations such as confinement (art. 4(h)), obligation to or prohibition from residing in particular places (art. 4(d)), or the sending of a person under custody to his town or city of origin (art. 4(b)), tend to constitute limitations on freedom of

movement within the national territory (article 64 of the Constitution). It is evident that such orders cannot be made by administrative authorities through a procedure such as that established in articles 18, 19 and 20 of the challenged Law, and without more safeguards than the corresponding appeals before an administrative body. Under these conditions, the jurisdictional proceedings are left in last place contrary to the penultimate clause of article 23 of the law itself, the unconstitutionality of which is particularly evident.

The proceedings are initiated with the detention of the suspect (art. 18), and a probationary lapse of only three (3) business days is opened immediately following his statement regarding the acts imputed to him. He is detained at all times (art. 19). Upon a decision to apply the security measure, an appeal may be filed before the State Governor within twenty-four (24) hours from the time the suspect is informed of the decision; the case is sent to the Governor, even when there is no appeal, in consultation. The Governor, then, shall decide within three (3) days, without there being any possibility for the suspect to declare anything in his defense during this second instance (art. 21). The defense of the suspect instead remains assigned to a Prisoners' Public Defender (art. 22), and is largely a symbolic formality. In effect, the Prisoners' Public Defender limits his role to issuing a memorandum reduced to the procedural aspects of the case, but he or she is not granted the authority to submit a defense in favor of the suspect. Finally, and only in cases in which the measure exceeds six (6) months, the case shall be submitted to the Ministry of Justice, also without any means provided for the suspect to defend himself.

It may be concluded, then, that the established procedure does not offer the suspect sufficient guarantees for his defense, which, in addition to being unconstitutional in and of itself, in the opinion of this Court, tends to cause the decisions made by the administrative officials to be arbitrary and contrary to law.

In this same sense, the heading of article 12 is also unconstitutional. It provides that:

“If the time of internment should pass without the correction of the prisoner having been obtained, the Minister of Justice may extend the measure for a period of time up to the amount of the original period.”

This is done by the Minister, based upon a report prepared by the Court of Conduct established by Chapter IV of the challenged law. The Court of Conduct, in spite of its name, is an administrative body which does not provide the individual considered to be a “vagrant or delinquent” with an opportunity to be heard or make allegations in his own favor. As such, the hypothetical could be proposed, according to which an individual imprisoned five (5) years in a particular work colony, could be, upon the conclusion of the security measure, newly subjected to an additional five (5) years of the same measure, without any more safeguards than a report prepared by a certain administrative official. For the reasons discussed previously, this is repugnant to the Constitution.

This High Court considers that the imposition of security measures must be preceded by a

judgment which truly guarantees the effective defense of the suspect, with results which are perhaps more encouraging. Above all, the Court stresses that such proceedings must be held before judicial officials.

In the judgment of the Court, the Vagrants and Delinquents Law currently in effect does not survive the scalpel of constitutional analysis. It is a law which has become unconstitutional with the passage of time, and in particular, with the promulgation of the Constitution presently in force, that of January 23, 1961. Also, as it has been seen, the law has the character of complete unconstitutionality because the Constitution affects the entirety of the impugned legal text.

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### *Note*

As noted earlier, the Inter-American System has not decided many cases where the issue at stake was whether particular disciplinary or “administrative” conduct could be considered an “accusation of a criminal nature” for the purposes of Article 8(1). In *Ernesto M. Rodríguez v. Argentina*,<sup>8</sup> the petitioner, a lawyer representing the losing party in a proceeding for mortgage foreclosure, was issued a monetary sanction for delaying compliance with the order of execution against his client. The fine was equal to ten per cent of the amount of the final settlement in the case or, according to the complainant, about US\$ 10,000. Mr. Rodríguez filed an appeal which was rejected because, under Argentine law, only appeals involving a sum of money over an established amount are allowed to proceed. Against that ruling, he filed a special appeal to the Supreme Court which was ultimately rejected as well. He filed a petition with the Commission arguing, *inter alia*, that his right to appeal a judgment before a higher court or tribunal guaranteed by Article 8(2)(h) of the American Convention had been violated. Since the due process guarantees established in paragraph 2 of Article 8 are applicable only to the substantiation of accusations of a criminal nature, the Commission first analyzed whether the monetary penalty imposed upon Mr. Rodríguez was severe enough to give the sanction a “criminal” character. Without applying a particular test, the Commission ruled that the sanction against Mr. Rodríguez was not of a criminal nature because: (1) it was included in the Code of Civil and Commercial Procedure and its scope of application was restricted to particular aspects of the proceedings; (2) the amount of the sanction was not a sufficient criterion to conclude that it was criminal; and (3) the fine was analogous to a complementary indemnification for the person foreclosing rather than a sanction against the person attached, since it was imposed to compensate the former’s economic losses caused by the latter’s undue delay. Finally, the Commission concluded that these types of sanctions are the sort of measures that a State can use to ensure the proper administration of justice. The case, therefore, was declared inadmissible.

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<sup>8</sup> Case 10.382, Inter-Am. C.H.R. 180, Annual Report 1997, OEA/Ser.L/V/II.9, doc. 7 rev. (1998).

In a recent decision on admissibility,<sup>9</sup> the Commission accepted for review a case in which one of the issues is whether an administrative sanction imposed upon a lawyer for obstruction of justice has a criminal content and therefore requires that the complainant be guaranteed the due process rights enshrined in paragraph 2 of Article 8 of the American Convention. The petitioner, Mr. Horacio Schillizzi Moreno, presented several recusations against members of different courts unduly delaying the foreclosure of a mortgage. After the case was removed from several courts, a Court of Appeal denied the recusation against its members and imposed a three-day detention as a sanction for maneuvers aimed at obstructing justice. Mr. Schillizzi Moreno filed a special appeal with the Supreme Court which was rejected. Under Argentine law, the Supreme Court has full discretion to accept or reject such a motion without having to state the grounds for its decision. He filed a petition with the Inter-American Commission alleging, *inter alia*, the violation of certain due process guarantees applicable in criminal cases, in particular the right to appeal to a higher tribunal. The petitioner argued that when an administratively imposed measure is comparable in its gravity to a criminal sentence, the presumption of innocence and all other guarantees provided for criminal proceedings must be respected. The Commission declared the complaint admissible and enumerated the elements of a test that it appears will be used to determine whether the guarantees established in paragraph 2 of Article 8 are applicable to the facts of this case. It provided that factors to be taken into account include the nature of the behavior, act, or omission described, the authorities that may impose the sanctions, and the nature and gravity of the sanction imposed as well as its consequences. The Commission also underscored that those factors are not exclusive and that it may be necessary to consider other elements, depending on the unique nature of each case. The decision on the merits in the *Schillizzi* case is still pending.

Like the Inter-American Commission, the Human Rights Committee has not reviewed many communications where the issue under consideration has been the criminal nature of certain sanctions imposed in disciplinary or administrative proceedings. In a recent decision on admissibility against Spain, the Committee had the chance to address the issue but ultimately declared the case inadmissible on different grounds.<sup>10</sup> In that case, the petitioner's car was photographed by police radar while speeding. According to the applicable law, the Road Safety Act, vehicle owners have a duty to identify the driver responsible for an offense when asked by the General Department of Traffic; failure to fulfill this obligation promptly without cause makes the person subject to a fine for having committed a serious misdemeanor. In this case, the petitioner, after being requested to provide the name of the driver who committed the offense, sent a letter to the traffic authorities stating that he was not driving the vehicle at that time and that he did not know the name of the perpetrator since several people had used the car during that

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<sup>9</sup> See *Horacio Anibal Schillizzi Moreno*, Case 11.732, Inter-Am. C.H.R. 127, Annual Report 1999, OEA/Ser.L/V/II.106, doc. 3 (2000).

<sup>10</sup> See *Antonio Sánchez López v. Spain*, Communication No. 777/1997, U.N. Doc. CCPR/C/67/D/777/1997, November 25, 1999 (1999), <<http://sim.law.uu.nl>; <http://www.unhchr.ch>>.

period. He was fined for a serious misdemeanor. After exhausting domestic remedies up to the Spanish Constitutional Tribunal, he filed a complaint with the Human Rights Committee. He alleged that the offense for which he was sanctioned was of a criminal nature and that he should have enjoyed the due process guarantees ensured in criminal cases under Article 14 paragraph 2 of the ICCPR, in particular his rights to the presumption of innocence and not to testify against himself or confess guilt. The Committee, siding with the arguments of the State, decided that the sanction was not imposed as a consequence of the traffic offense but for his failure to cooperate with the authorities. The duty to cooperate fell outside the scope of Article 14 paragraph 2; therefore, there was no violation of that provision and the case was declared inadmissible.

### *Questions*

1. Do you find any differences in the language of Articles 8 of the American Convention, 14 of the ICCPR, and 6 of the European Convention that would lead you to conclude that the scope of those provisions is not similar? Explain your answer.
2. In the *Loren Laroye Riebe Star et al.* case, the Commission appears to have focused on the nature of the procedure instead of the nature of the right in issue to determine whether or not the due process guarantees enshrined in Article 8(1) were applicable to the facts of the case (*see* paragraph 46-47 of the decision). After analyzing the language of the Article itself and the decisions of other international bodies, including the decision of the Human Rights Committee in *Y vs. Canada*, do you consider the Commission's approach to be the "correct" one? If not, what was the right at stake in the above-mentioned case?
3. How would you define "determination of a right" in the context of the human rights treaties reviewed? Do you consider that the existence of a "dispute" is essential for the "determination of a right"? The case law of the European System, on the basis of the French version of Article 6 of the European Convention that refers to "contestation,"<sup>11</sup> has established that the application of that provision requires that the settlement of a dispute concerning a right or obligation be at stake. For the scope of "dispute," *see* paragraphs 32-33 of the *Bentham* case. The French version of Article 14 of the ICCPR also refers to "contestation," whereas the Spanish text refers to "determinación." The different versions of Article 8 of the American Convention speak of "determination."
4. If you had to interpret Article 8(1) of the American Convention, how helpful would you find

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<sup>11</sup> Article 6(1) provides: "Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des **contestations sur ses droits et obligations de caractère civil**, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle."

the European case law defining the scope of “civil rights and obligations,” especially given the broad language of that provision? Would your position be similar if you had to interpret Article 14(1) of the ICCPR?

5. How would you define the scope of “rights and obligations of . . . any other nature” under Article 8(1) of the American Convention? Should it be interpreted as broadly as it sounds or should a more restricted approach be devised? If so, how?

6. For a discussion on the scope of “fair trial” or “due guarantees,” *see* section B of this chapter on the “right to be heard with due guarantees.”

7. After reading the case law reproduced above, what do you think is the relevance of determining that particular conduct is of a “criminal nature?” What due process guarantees must be ensured if a person is accused of a “criminal charge” according to Articles 8 of the American Convention, 14 of the ICCPR, and 6 of the European Convention? What about the case in which a person is punished for “disciplinary misconduct?”

8. Both Articles 14 of the ICCPR and 6 of the European Convention speak of “determination of a criminal charge,” whereas Article 8 of the American Convention refers to the “substantiation of any accusation of a criminal nature.” Do you find that the scope of the provision of the American Convention is similar to that of the other conventions? What about the scope of “accusation of a criminal nature” as compared to “criminal charge?”<sup>12</sup>

9. If you were a member of the Inter-American Commission on Human Rights or the UN Human Rights Committee and you had to decide the case regarding the “*Vagrants and Delinquents Law*” in Venezuela, what test would you use to decide whether or not the application of the law violates the due process guarantees ensured in Articles 8 of the American Convention or 14 of the ICCPR?

10. What would be your decision on the merits in the *Schillizzi Moreno* case, currently pending before the Inter-American Commission on Human Rights? To answer the question, take into account the following excerpts from the *Putz v. Austria*<sup>13</sup> case decided by the European Court on Human Rights:

[In 1985 criminal proceedings in respect of, among other things, bankruptcy were instituted against the applicant, who was the manager of several commercial companies. During the proceedings, domestic courts in Austria imposed several pecuniary penalties

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<sup>12</sup> Other versions of Article 8 and 14 refer to “substantiation” also, with exception of the French version of Article 14 which speaks of “*décidera . . . du bien-fondé de toute accusation en matière pénale.*”

<sup>13</sup> Judgment of February 22, 1996, Reports 1996 I (1996), <<http://www.echr.coe.int>>.

on him for disrupting court proceedings.]

28. The applicant relied on Article 6 § § 1 and 3 of the Convention . . . In his submission, pecuniary penalties for disrupting court proceedings were “criminal” in nature and had to be imposed in a manner that satisfied the requirements of Article 6.

[The Court then proceeded to analyze the three criteria developed in its case-law: 1) legal classification in domestic law; 2) nature of the offence; and 3) nature and degree of severity of the penalty. In regard to the first one, the Court concluded that the provisions covering disruptions of court proceedings did not belong to criminal law.]

### **B. Nature of the offence**

33. The Court notes that in Austrian law unfounded accusations or offensive remarks made at a hearing are punishable under Article 235 of the Code of Criminal Procedure, whereas if such accusations or remarks have been made in writing, the applicable provisions are sections 85(1) and 97 of the Courts Act taken together with Article 220 of the Code of Civil Procedure. In both cases punishment is laid down for behaviour judged to be disruptive.

. . . Rules enabling a court to sanction disorderly conduct in proceedings before it are a common feature of the legal systems of most of the Contracting States. Such rules and sanctions derive from the inherent power of a court to ensure the proper and orderly conduct of its own proceedings. Measures ordered by courts under such rules are more akin to the exercise of disciplinary powers than to the imposition of a punishment for commission of a criminal offence (see the *Ravnsborg* judgment previously cited, p. 30, para. 34).

The Court consequently considers, like the Government and the Commission, that the kind of proscribed conduct for which the applicant was fined in principle falls outside the ambit of Article 6 (art. 6). The courts may need to respond to such conduct even if it is neither necessary nor practicable to bring a criminal charge against the person concerned (*ibid.*).

### **C. Nature and degree of severity of the penalty**

34. Notwithstanding the non-criminal nature of the proscribed misconduct, the nature and degree of severity of the penalty that the person concerned risked incurring - the third criterion - may bring the matter into the “criminal” sphere . . . .

. . . .

37. The Court notes that Article 235 of the Code of Criminal Procedure concerning responsibility for keeping order at hearings provides for the imposition of a fine not exceeding ATS 10,000 or, where essential for maintaining order, a custodial sentence not exceeding eight days. If the fine proves to be irrecoverable, the custodial sentence will be for a term of at most eight days (Article 7 of the Code of Criminal Procedure - see

paragraph 21 above). As regards written proceedings, Article 220 of the Code of Civil Procedure provides for the imposition of a fine not exceeding ATS 20,000 and, in the event of inability to pay, a custodial sentence not exceeding ten days. In the instant case the Austrian courts sentenced Mr Putz to pay fines of ATS 5,000, 7,500 and 10,000 . . . Two of them were converted into prison sentences, but after payment the applicant did not have to serve these . . . .

In this respect, the Court notes a number of dissimilarities between the instant case and the *Ravnsborg* case, in which the amount of the fines could not exceed 1,000 Swedish kronor and the decision to convert them into custodial sentences required a prior hearing of the person concerned. This finding, however, is qualified by three features of the instant case: firstly, as in the *Ravnsborg* case, the fines are not entered in the criminal record; secondly, the court can only convert them into prison sentences if they are unpaid, and an appeal lies against such decisions (see paragraph 21 above), as it does against custodial sentences imposed straight away at the hearing where that course was essential for maintaining order; lastly, whereas in the *Ravnsborg* case the term of imprisonment into which a fine could be converted ranged from fourteen days to three months, in the instant case it cannot exceed ten days.

However real they may be, the dissimilarities, which reflect the characteristics of the two national legal systems, therefore do not appear to be decisive. In both cases the penalties are designed to enable the courts to ensure the proper conduct of court proceedings (see paragraph 33 above).

Having regard to all these factors the Court considers, like the Government, that what was at stake for the applicant was not sufficiently important to warrant classifying the offences as “criminal”.

In *Ravnsborg v. Sweden*<sup>14</sup>, a case mentioned by the Court in the *Putz* decision, the petitioner was fined on three occasions for improper statements made in written observations submitted to courts dealing with a civil case to which he was a party. As in *Putz*, the Court ruled that the offense was not criminal and therefore concluded that Article 6 was not applicable. In reaching this conclusion, the Court analyzed the degree of severity of the penalty imposed upon the petitioner and gave particular weight to the fact that a decision to convert a monetary fine into a term of imprisonment required summoning the offender to appear at an oral hearing. Moreover, the petitioner had the right to appeal that decision. In its recent ruling in *T. v. Austria*,<sup>15</sup> where the petitioner was fined for abuse of process in a court proceeding, the Court decided that given the substantial amount and the punitive character of the penalty imposed by the domestic court, it warranted classifying the offense as “criminal” within the scope of Article 6 of the Convention.

If you decide that these cases could guide your decision in the *Schillizzi* case, do you find the

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<sup>14</sup> 283-B Eur. Ct. H.R. (ser. A) (1994).

<sup>15</sup> Judgment of November 14, 2000 (2000), <<http://www.echr.coe.int>>.

case law of the European Court consistent? Do you think that a more “manageable” rule should be established? If so, how would you develop that rule?

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## 2. THE RIGHT TO BE HEARD WITH DUE GUARANTEES

### a. “Access to Court”

**Palacios v. Argentina**  
Case 10.194, Inter-Am. C.H.R. 355,  
Annual Report 1999, OEA/Ser.L/V/II.106, doc. 3 rev. (2000)  
[Footnotes omitted]

*[The petitioner was dismissed from his post as municipal accountant at the Municipality of Daireaux, Province of Buenos Aires, by virtue of Administrative Decree N° 226 of June 11, 1985, issued by the mayor of that municipality. In August of 1985, the petitioner filed a contentious-administrative suit against the municipality to challenge the legality of the decree. The Supreme Court of Justice of the Province of Buenos Aires dismissed the suit in limine on grounds of formal inadmissibility by virtue of failure to submit an appeal for reversal before the administrative authority prior to instituting judicial proceedings. Appealing the court’s decision, the petitioner filed a federal extraordinary appeal with the Federal Supreme Court, alleging that the rejection in limine of his claim denied him access to justice. The Supreme Court rejected this federal extraordinary appeal on November 10, 1987, on grounds that “no arbitrary action was found that warranted its intervention in matters which...lie outside its special jurisdiction.” The petitioner alleged before the Commission a violation of the right to a fair trial (Article 8) and to effective judicial protection (Article 25).]*

46. In the instant case, the petitioner alleges violation of his rights to a fair trial and to effective judicial protection established in Articles 8 and 25 of the American Convention, on grounds that the decisions of the Provincial Supreme Court and the Supreme Court of the Nation were arbitrary by unexpectedly changing their jurisprudence on whether or not it is obligatory first to invoke administrative remedies before instituting a contentious administrative proceeding.

47. The basis of the petition alleging infringement on the rights to a fair trial and to effective judicial protection lodged by the petitioner is that, at the time he brought his contentious administrative suit against the administrative decree that mandated his dismissal, the provisions in force and the legal interpretation thereof considered the invocation of administrative remedies (for reversal and to a higher administrative authority) to be optional and not a precondition for

acceding to a judicial proceeding.

48. The Commission notes, first, that Article 89 of the provincial provision applicable to the petitioner's case, that is, General Ordinance N° 207 of October 12, 1977 (amended by General Ordinance 233), provides that the punished person shall be able to file an appeal for reversal. As one can observe, in using the verbal configuration shall be able to the provincial provision would appear to give the appellant the choice of exhausting the administrative process or straight away instituting administrative proceedings, thus confirming a system of remedies of an optional nature, such as is currently in use in the majority of modern legal systems. Furthermore, if to this literal interpretation one adds the legal interpretation that the highest provincial courts had been applying to that text at the time the petitioner brought his administrative suit, it seems clear that the rules of play that defined the principle of due process did not require exhaustion of administrative proceedings as an obligatory prerequisite for acceding to judicial proceedings.

49. Indeed, in the decision of the Provincial Supreme Court in the case of *Héctor Luis Re* of April 24, 1984, also contesting a provincial administrative decree that ordered the dismissal of provincial employee, it was stated that:

This Court has already ruled that an appeal for reversal against acts of the Provincial Executive Power (Case B.48.073, Gunawardana, Judgment of June 3, 1980, D.J.B.A., t. 119, p. 507), or against acts of the mayor in matters of his competence (Case B.48.505, Noren Plast, Judgment of September 28, 1982, D.J.B.A., t. 124, p. 82), in order to validate administrative proceedings, is optional when the challenged act has been rendered with a hearing or the participation of the interested party, unless it should prove that its filing is clearly required by the rules governing the applicable procedure (Case B.48.505. cit.; cone. Cases B.46.067, S.C.T..A.L.L., Judgment of October 18, 1977; B.48.042, Gil, Judgment of October 30, 1979; B.47.576, Fundar, Judgment of March 4, 1980, D.J.B.A., t.118, p. 151, among others).

By that token, and given that the structure of a summary disciplinary proceeding basically provides for the intervention of the interested party in exercise of his right to defense, there is no reason for the respondent Municipality to insist on the obligation to file an appeal when, on the contrary, it clearly emerges from the provision contained in Article 89 of General Ordinance N° 207 that its filing is optional.

50. Similarly, authorized doctrine had acknowledged the optional nature of provincial administrative remedies prior to the *Lesieux* decision of 1986. Thus, Cassagne, an Argentinean jurist, commenting on a later decision delivered in 1988 (Sacoar), which annulled the aforesaid *Lesieux* judgment, stated that,

The Provincial Supreme Court had performed a veritable about-turn by reverting to an old doctrine that refused access to justice based on technicalities. A conspicuous favorite among these technicalities was the mandatory nature of the appeal for reversal, despite the fact that this course is not stipulated as being obligatory and generally applicable by any provision in the provincial system of laws (Underlining added).

51. Furthermore, the current juridical interpretation of the legal text, which was applied to the petitioner in order to refuse the admissibility of his contentious administrative suit, for failure to exhaust the administrative process, consists of maintaining that these administrative remedies are of an optional nature and, therefore, do not constitute a requisite *sine qua non* for leaving the way clear for initiating judicial proceedings.

52. The Commission notes that it has been shown that, prior to the filing of the contentious administrative suit on August 23, 1985, and, moreover, after the decision in that particular case, on June 9, 1987, the correct interpretation of General Ordinance N° 207 of October 12, 1977, deemed the administrative process to be optional and, therefore, unnecessary for acceding to contentious administrative proceedings.

53. Accordingly, at the time the petitioner brought his contentious administrative suit there was no legal provision or doctrine applicable to his case that considered exhaustion of the administrative process to be a necessary prerequisite for filing a contentious administrative suit. On the contrary, it was in 1986--after the petitioner's suit had been filed--, that the Supreme Court of the Province of Buenos Aires changed its criterion in the *Lesieux* case in order then to demand exhaustion of the remedies set forth in Article 89 of General Ordinance N° 207 of October 12, 1977. Consequently, the following year, in keeping with the new line of jurisprudence, the Supreme Court of the Province of Buenos Aires rejected the suit brought by the petitioner for not having pursued the pertinent administrative remedies.

54. It now devolves upon the Commission to determine if this retroactive application of the provincial body of laws by the Supreme Court of the Province of Buenos Aires violates the rights to a fair trial and to effective judicial protection enshrined in Articles 8 and 25, respectively, of the American Convention on Human Rights.

....

56. It is clear from both provisions that everyone is guaranteed respect for the basic rules of procedure, not only as regards access to the courts, but also with respect to effective fulfillment of court decisions. On that score, this Commission has stated that the judicial protection provided by the Convention includes the right to fair, impartial and prompt proceedings which give rise to the possibility, but never the guarantee, of a favorable outcome.

57. The principle of effective judicial protection can translate as a guarantee of free access to the courts for the defense of rights and interests before the State, even should ordinary legality not recognize a concrete recourse or action. This principle logically implies a set of guarantees in processing judicial processes.

58. However, the situation may arise where uncertainty or lack of clarity in the recognition of these admissibility requirements constitutes a violation of the aforesaid fundamental right.

59. That is precisely the situation in the instant case, where failure to exhaust administrative proceedings cannot, in any way, be imputed to the petitioner, since he simply allowed himself to be guided by the correct and authorized interpretation of the provisions in force that applied to him, and which--at the time of filing his suit--allowed him to institute administrative contentious proceedings without the need to exhaust administrative remedies.

60. In effect, as the Commission has already observed *ut supra*, the rejection of the petitioner's suit was grounded on a legal interpretation after the date of filing his suit, which was applied to his case retroactively. Therefore, it was not a question of an omission or rashness on his part, but of a drastic change in interpretation of the provision that the courts applied retroactively to his detriment.

61. It is precisely this type of irregularity that the right to effective judicial protection guaranteed in Article 25 of the Convention tries to impede by preventing access to justice from becoming a disagreeable game of confusion to the detriment of members of the public. The guarantees of effective judicial protection and of a fair trial demand a fairer and more beneficial interpretation in the analysis of requirements of admission to justice, to such an extent that, under the *pro actione* principle, it is necessary to go expand possible interpretation in the direction that most favors access to justice.

62. The Argentinean State did not manage to demonstrate to the Commission that the petitioner's failure to exhaust the administrative process was due to his own negligence rather than a court interpretation applied to him retroactively. On that point, the Commission considers that the principle of legal security demands greater clarity and explicitness in the obstacles for obtaining justice.

63. At the same time, the scope of this fundamental right to effective judicial protection makes it possible to avoid new legal criteria being applied to previous situations or cases. This situation has been recognized by the Supreme Court of the Nation itself, specifically in the Tellez case, where it asserted the following:

Nevertheless, it does not escape the notice of the Court that the application in time of new established criteria, must be overseen with particular caution in order that the accomplishments achieved not be ruined at that juncture. To that end, it is necessary to fix the dividing line outlined by Benjamin N. Cardozo for the workings of new jurisprudence, supporting it on reasons of convenience, utility and the most profound sense of justice possible.

Such a need involves, in turn, fixing the precise moment from which that change begins to take effect.

... as a result of these developments, it should be mentioned that the new legal guidelines contained *in re, Strada*, must only be put into practice in the case of federal

extraordinary appeals against judgments delivered served after that precedent.

64. In a brief submitted to the Commission on May 10, 1994, the Argentinean State itself also recognizes that the effects of a change of jurisprudence apply to future cases, in accordance with the generally recognized legal principle on non-retroactivity of legal provisions.

65. In conclusion, this Commission finds that the petitioner's rights to effective judicial protection and to a fair trial, enshrined in Article 25 of the Convention, were violated when he was surprised with the retroactive imposition of a requirement of admissibility to justice that was not valid at the moment he filed suit. Legal security and the principle of clarity and certainty in respect of competent jurisdiction demand greater rigor when it comes to barring access to justice.

66. In the instant case the petitioner was prevented--by both the administrative and the judicial authorities--from obtaining justice and, in consequence, appealing the legality of the administrative decree that mandated his dismissal, by virtue of a drastic and retroactive change in the interpretation of the admissibility requirements for bringing a contentious administrative suit. This situation infringes on the right to effective judicial protection and constitutes an example of a manifest inequality.

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**Golder v. United Kingdom**  
18 Eur. Ct. H.R. (ser. A) (1975)  
<<http://www.echr.coe.int>>

*[The applicant was serving a sentence in Parkhurst Prison on the Isle of Wight in October, 1969, when a prison riot occurred. It was alleged that the applicant may have participated in the assault of a prison officer during the riot, and he was segregated from the main body of prisoners for a number of days together with other suspects. The applicant denied the allegation, and wrote several letters to his Member of Parliament and to a Chief Constable about the matter. The prison governor stopped these letters since the applicant had failed to follow official correspondence procedures. Meanwhile, the prison authorities made entries in the applicant's prison record relating to charges which might be pressed against him. However, no charges were ever pressed. In March of 1970, the applicant wrote to the Home Secretary regarding the wrongful accusation, and said he suspected that it had prevented his being recommended for parole. In the letter, he requested permission to consult an attorney. This request was subsequently denied. The applicant submitted a complaint to the European System regarding the refusal of the Home Secretary to permit him to consult an attorney; in that respect he alleged the violation of Article 6(1) of the European Convention. The government, for its part, argued that*

*that provision did not confer upon the applicant a right of access to the courts, but confers only a right in any proceedings he may institute to a hearing that is fair and in accordance with the other requirements of Article 6.]*

I. *ON THE ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)*

25. In the present case the Court is called upon to decide two distinct questions arising on the text cited above:

(i) Is Article 6 para. 1 (art. 6-1) limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined?

....

A. *On the "right of access"*

26. The Court recalls that on 20 March 1970 Golder petitioned the Home Secretary for permission to consult a solicitor with a view to bringing a civil action for libel against prison officer Laird and that his petition was refused on 6 April (paragraphs 16 and 18 above). . . By forbidding Golder to make such contact, the Home Secretary actually impeded the launching of the contemplated action. Without formally denying Golder his right to institute proceedings before a court, the Home Secretary did in fact prevent him from commencing an action at that time, 1970. Hindrance in fact can contravene the Convention just like a legal impediment.

....

The Court accordingly has to examine whether the hindrance thus established violated a right guaranteed by the Convention and more particularly by Article 6 (art. 6), on which Golder relied in this respect.

27. One point has not been put in issue and the Court takes it for granted: the "right" which Golder wished, rightly or wrongly, to invoke against Laird before an English court was a "civil right" within the meaning of Article 6 para. 1 (art. 6-1).

28. Again, Article 6 para. 1 (art. 6-1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.

29. The submissions made to the Court were in the first place directed to the manner in which the Convention, and particularly Article 6 para. 1 (art. 6-1), should be interpreted. The Court is prepared to consider, as do the Government and the Commission, that it should be guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles subject, where appropriate, to “any relevant rules of the organization” - the Council of Europe - within which it has been adopted (Article 5 of the Vienna Convention).

30. In the way in which it is presented in the “general rule” in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation; this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.

31. The terms of Article 6 para. 1 (art. 6-1) of the European Convention, taken in their context, provide reason to think that this right is included among the guarantees set forth.

32. The clearest indications are to be found in the French text, first sentence. In the field of “contestations civiles” (civil claims) everyone has a right to proceedings instituted by or against him being conducted in a certain way - “équitablement” (fairly), “publiquement” (publicly), “dans un délai raisonnable” (within a reasonable time), etc. - but also and primarily “à ce que sa cause soit entendue” (that his case be heard) not by any authority whatever but “par un tribunal” (by a court or tribunal) within the meaning of Article 6 para. 1 (art. 6-1) (Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, para. 95). The Government have emphasised rightly that in French “cause” may mean “procès qui se plaide” (Littré, Dictionnaire de la langue française, tome I, p. 509, 5°). This, however, is not the sole ordinary sense of this noun; it serves also to indicate by extension “l’ensemble des intérêts à soutenir, à faire prévaloir” (Paul Robert, Dictionnaire alphabétique et analogique de la langue française, tome I, p. 666, II-2°). Similarly, the “contestation” (claim) generally exists prior to the legal proceedings and is a concept independent of them. As regards the phrase “tribunal indépendant et impartial établi par la loi” (independent and impartial tribunal established by law), it conjures up the idea of organisation rather than that of functioning, of institutions rather than of procedure.

The English text, for its part, speaks of an “independent and impartial tribunal established by law”. Moreover, the phrase “in the determination of his civil rights and obligations”, on which the Government have relied in support of their contention, does not necessarily refer only to judicial proceedings already pending; as the Commission have observed, it may be taken as synonymous with “wherever his civil rights and obligations are being determined” (paragraph 52 of the report). It too would then imply the right to have the determination of disputes relating to civil rights and obligations made by a court or “tribunal”.

The Government have submitted that the expressions “fair and public hearing” and “within a reasonable time”, the second sentence in paragraph 1 (“judgment”, “trial”), and paragraph 3 of Article 6 (art. 6-1, art. 6-3) clearly presuppose proceedings pending before a court.

While the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded; the Delegates of the Commission rightly underlined this at paragraph 21 of their memorial. Besides, in criminal matters, the “reasonable time” may start to run from a date prior to the seisin of the trial court, of the “tribunal” competent for the “determination ... of (the) criminal charge” (Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, para. 19; Neumeister judgment of 27 June 1968, Series A no. 8, p. 41, para. 18; Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, para. 110). It is conceivable also that in civil matters the reasonable time may begin to run, in certain circumstances, even before the issue of the writ commencing proceedings before the court to which the plaintiff submits the dispute.

33. The Government have furthermore argued the necessity of relating Article 6 para. 1 (art. 6-1) to Articles 5 para. 4 and 13 (art. 5-4, art. 13). They have observed that the latter provide expressly or a right of access to the courts; the omission of any corresponding clause in Article 6 para. 1 (art. 6-1) seems to them to be only the more striking. The Government have also submitted that if Article 6 para. 1 (art. 6-1) were interpreted as providing such a right of access, Articles 5 para. 4 and 13 (art. 5-4, art. 13) would become superfluous.

The Commission’s Delegates replied in substance that Articles 5 para. 4 and 13 (art. 5-4, art. 13), as opposed to Article 6 para. 1 (art. 6-1), are “accessory” to other provisions. Those Articles, they say, do not state a specific right but are designed to afford procedural guarantees, “based on recourse”, the former for the “right to liberty”, as stated in Article 5 para. 1 (art. 5-1), the second for the whole of the “rights and freedoms as set forth in this Convention”. Article 6 para. 1 (art. 6-1), they continue, is intended to protect “in itself” the “right to a good administration of justice”, of which “the right that justice should be administered” constitutes “an essential and inherent element”. This would serve to explain the contrast between the wording of Article 6 para. 1 (art. 6-1) and that of Articles 5 para. 4 and 13 (art. 5-4, art. 13).

This reasoning is not without force even though the expression “right to a fair (or good) administration of justice”, which sometimes is used on account of its conciseness and convenience (for example, in the Delcourt judgment of 17 January 1970, Series A no. 11, p. 15, para. 25), does not appear in the text of Article 6 para. 1 (art. 6-1), and can also be understood as referring only to the working and not to the organisation of justice.

The Court finds in particular that the interpretation which the Government have contested does not lead to confounding Article 6 para. 1 (art. 6-1) with Articles 5 para. 4 and 13 (art. 5-4, art. 13), nor making these latter provisions superfluous. Article 13 (art. 13) speaks of an effective remedy before a “national authority” (“instance nationale”) which may not be a “tribunal” or

“court” within the meaning of Articles 6 para. 1 and 5 para. 4 (art. 6-1, art. 5-4). Furthermore, the effective remedy deals with the violation of a right guaranteed by the Convention, while Articles 6 para. 1 and 5 para. 4 (art. 6-1, art. 5-4) cover claims relating in the first case to the existence or scope of civil rights and in the second to the lawfulness of arrest or detention. What is more, the three provisions do not operate in the same field. The concept of “civil rights and obligations” (Article 6 para. 1) (art. 6-1) is not co-extensive with that of “rights and freedoms as set forth in this Convention” (Article 13) (art. 13), even if there may be some overlapping. As to the “right to liberty” (Article 5) (art. 5), its “civil” character is at any rate open to argument (Neumeister judgment of 27 June 1968, Series A no. 8, p. 43, para. 23; Matznetter judgment of 10 November 1969, Series A no. 10, p. 35, para. 13; De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 44, para. 86). Besides, the requirements of Article 5 para. 4 (art. 5-4) in certain respects appear stricter than those of Article 6 para. 1 (art. 6-1), particularly as regards the element of “time”.

34. As stated in Article 31 para. 2 of the Vienna Convention, the preamble to a treaty forms an integral part of the context. Furthermore, the preamble is generally very useful for the determination of the “object” and “purpose” of the instrument to be construed.

In the present case, the most significant passage in the Preamble to the European Convention is the signatory Governments declaring that they are “resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration” of 10 December 1948.

In the Government’s view, that recital illustrates the “selective process” adopted by the draftsmen: that the Convention does not seek to protect Human Rights in general but merely “certain of the Rights stated in the Universal Declaration”. Articles 1 and 19 (art. 1, art. 19) are, in their submission, directed to the same end.

The Commission, for their part, attach great importance to the expression “rule of law” which, in their view, elucidates Article 6 para. 1 (art. 6-1).

The “selective” nature of the Convention cannot be put in question. It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely “more or less rhetorical reference”, devoid of relevance for those interpreting the Convention. 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 seems both natural and in conformity with the principle of good faith (Article 31 para. 1 of the Vienna Convention) to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 para. 1 (art. 6-1) according to their context and in the light of

the object and purpose of the Convention.

This is all the more so since the Statute of the Council of Europe, an organisation of which each of the States Parties to the Convention is a Member (Article 66 of the Convention) (art. 66), refers in two places to the rule of law: first in the Preamble, where the signatory Governments affirm their devotion to this principle, and secondly in Article 3 (art. 3) which provides that “every Member of the Council of Europe must accept the principle of the rule of law ...”

And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.

35. Article 31 para. 3(c) of the Vienna Convention indicates that account is to be taken, together with the context, of “any relevant rules of international law applicable in the relations between the parties”. Among those rules are general principles of law and especially “general principles of law recognized by civilized nations” (Article 38 para. 1(c) of the Statute of the International Court of Justice). Incidentally, the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that “the Commission and the Court must necessarily apply such principles” in the execution of their duties and thus considered it to be “unnecessary” to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, Vol. III, no. 93, p. 982, para. 5).

The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally “recognised” fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6 para. 1 (art. 6-1) must be read in the light of these principles.

Were Article 6 para. 1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook (Lawless judgment of 1 July 1961, Series A no. 3, p. 52, and Delcourt judgment of 17 January 1970, Series A no. 11, pp. 14-15).

It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 (art. 6-1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.

36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1 (art. 6-1). This is not an

extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty (see the Wemhoff judgment of 27 June 1968, Series A no. 7, p. 23, para. 8), and to general principles of law.

The Court thus reaches the conclusion, without needing to resort to “supplementary means of interpretation” as envisaged at Article 32 of the Vienna Convention, that Article 6 para. 1 (art. 6-1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the “right to a court”, of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing. The Court has no need to ascertain in the present case whether and to what extent Article 6 para. 1 (art. 6-1) further requires a decision on the very substance of the dispute (English “determination”, French “décidera”).

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**b. “Fair Hearing”**

**McKenzie *et al.* v. Jamaica**

*Cases 12.023, 12.044, 12.107, 12.126, and 12.146, Inter-Am. C.H.R. 918,  
Annual Report 1999, OEA/Ser.L/V/II.106, doc. 3 rev. (2000)  
[Footnotes omitted]*

3. *Articles 4, 5, 8, and 24 - the mandatory death penalty*

c. *The victims have been sentenced to mandatory penalties of death*

172. The records in the 5 cases that are the subject of this Report indicate that all of the victims have been convicted of capital murder or multiple non-capital murders and sentenced to death. In each case, the sentence was imposed pursuant to legislation in Jamaica that prescribes the death penalty as the only punishment available when a defendant is found guilty of capital murder, or of more than one non-capital murder.

178. Crimes of capital murder and multiple non-capital murders in Jamaica can therefore be regarded as being subject to a mandatory death penalty, namely a death sentence that the law compels the sentencing authority to impose based solely upon the category of crime for which the defendant is found responsible. Once a defendant is found guilty of the crime of capital murder or of more than one non-capital murder, the death penalty must be imposed. Accordingly, mitigating circumstances cannot be taken into account by a court in sentencing an individual to death.

179. This is subject to one exception, however. Article 3(2) of the Act specifically exempts from the death penalty female offenders who are convicted of offenses punishable with death, but who are found by a jury to be pregnant . . . .

. . . .

181. [T]he Petitioners in all five of the cases before the Commission have alleged that their sentencing to a mandatory death penalty violates one or more of Articles 4(1), 4(2), 4(3), 5(1), 5(2), 5(4), 8(1), 8(2), 24 and 25 of the Convention. In particular, the Petitioners argue that although the death penalty is only imposed in capital or multiple non-capital cases, the distinction between these categories of murders and non-capital murders for which the death penalty is not imposed fails to allow for considerations of the particular circumstances of each offence and offender, including relevant aspects of the character and record of each defendant. As a consequence, the Petitioners claim that mandatory sentencing for capital and multiple non-capital murders violates the Convention. The petitioners also argue that the process for granting amnesty, pardon or commutation of sentence in Jamaica does not provide an adequate opportunity for considering individual circumstances, and in itself is inconsistent with Article 4(6) of the Convention.

. . . .

*d. Articles 4, 5 and 8 of the Convention and the mandatory death penalty*

183. In light of the allegations raised by the Petitioners, the Commission must first ascertain whether the practice of imposing the death penalty through mandatory sentencing is compatible with Article 4 (right to life), Article 5 (right to humane treatment), and Article 8 (right to a fair trial) of the Convention and the principles underlying those provisions.

[The Commission found that the practice of imposing the death penalty through mandatory sentencing violated Articles 4 and 5 of the American Convention of Human Rights. For a similar analysis, see the *Baptiste* case in Chapter IV]

. . . .

204. Finally, the Commission considers that mandatory death sentences cannot be reconciled

with an offender's right to due process, as provided for in Articles 8 of the Convention. It is well-established that proceedings leading to the imposition of capital punishment must conform to the highest standards of due process. The due process standards governing accusations of a criminal nature against an individual are prescribed in Articles 8(1) and 8(2) of the Convention, and include the right to a hearing before a competent, independent and impartial tribunal, the right of the accused to defend himself or herself, personally or by counsel, and the right to appeal the judgment to a higher court. In addition, as noted previously, Article 4 of the Convention provides that the death penalty should be imposed only for the most serious offenses, and contemplates that certain factors attributable to a particular offender or offense may bar the imposition of the death penalty altogether in the circumstances of a particular case.

205. In the Commission's view, therefore, the due process guarantees under Article 8 of the Convention, when read in conjunction with the requirements of Article 4 of the Convention, presuppose as part of an individual's defense to a capital charge an opportunity to make submissions and present evidence as to whether a death sentence may not be a permissible or appropriate punishment in the circumstances of his or her case. This may be on the basis, for example, that the crime for which they have been convicted should be considered a political or related common crime within the meaning of the Convention. The due process guarantees should also be interpreted to include a right of effective review or appeal from a determination that the death penalty is an appropriate sentence in a given case.

206. The mandatory imposition of the death sentence is inherently antithetical to these prerequisites. By its nature, it precludes any opportunity on the part of the offender to make representations or present evidence as to whether the death penalty is a permissible or appropriate form of punishment, based upon the considerations in Article 4 of the Convention or otherwise. Again, this is subject to the exception under Articles 3(2) to 3(6) of Jamaica's *Offences Against the Person Act* applicable to pregnant offenders. Also, as noted previously, mandatory sentencing precludes any effective review by a higher court of a decision to sentence an individual to death. These violations of Article 8 of the Convention in turn compound the arbitrary nature of any deprivation of life perpetrated pursuant to mandatory sentences, contrary to Article 4(1) of the Convention.

207. Contrary to the current practice in Jamaica, the Commission considers that imposing the death penalty in a manner which conforms with Articles 4, 5 and 8 of the Convention requires an effective mechanism by which a defendant may present representations and evidence to the sentencing court as to whether the death penalty is a permissible or appropriate form of punishment in the circumstances of their case. In the Commission's view, this includes, but is not limited to, representations and evidence as to whether any of the factors incorporated in Article 4 of the Convention may prohibit the imposition of the death penalty.

208. In this regard, as the following discussion of international and domestic jurisdictions will indicate, a principle of law has developed common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented

through individualized sentencing. Through this mechanism, the defendant is entitled to present submissions and evidence in respect of all potentially mitigating circumstances relating to his or her person or offense, and the court imposing sentence is afforded discretion to consider these factors in determining whether the death penalty is a permissible or appropriate punishment.

209. Mitigating factors may relate to the gravity of the particular offense or the degree of culpability of the particular offender, and may include such factors as the offender's character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender. Consistent with the foregoing discussion, the Commission considers that the high standards of due process and humane treatment under Articles 4, 5 and 8 of the Convention governing the lawful imposition of the death penalty should also to be interpreted to require individualized sentencing in death penalty cases. In the Commission's view, this is consistent with the restrictive interpretation to be afforded to Article 4 of the Convention, and in particular the Inter-American Court's view that Article 4 of the Convention should be interpreted as imposing restrictions designed to delimit strictly the scope and application of the death penalty, in order to reduce the application of the penalty to bring about its gradual disappearance.

210. As the Commission noted previously, Jamaica has already considered it appropriate to prescribe in its legislation a mechanism by which a jury may determine whether an individual female offender should be spared the death penalty because she is pregnant. The Commission therefore considers that the foundation already exists under Jamaican law to extend this mechanism, or to develop a comparable mechanism, to permit a jury to consider other potentially mitigating factors pertaining to an offender in determining whether the death penalty should be imposed in the circumstances of the offender's case.

211. In light of the foregoing analysis, the Commission considers that imposing the death penalty through mandatory sentencing, as Jamaica has done in respect of crimes of capital and multiple non-capital murders, is not consistent with the terms of Article 4(1), 5(1), 5(2), 8(1) and 8(2) of the Convention and the principles underlying those Articles.

....

*d. The cases before the Commission*

*(i) Mandatory Death Penalty*

220. As indicated previously, the victims in the five cases that are the subject of this Report were convicted of capital murder, or multiple non-capital murders, under Jamaica's *Offences Against the Person Act*. . . .

221. Consequently, in the cases within this Report, the Commission concludes that once the victims were found guilty of their crimes, the law in Jamaica did not permit a hearing by the

courts as to whether the death penalty was a permissible or appropriate penalty for those victims. There was no opportunity for the trial judge or the jury to consider such factors as the victims characters or records, the nature or gravity of the offenses, or the subjective factors that may have motivated the victims' conduct, in determining whether the death penalty was an appropriate form of punishment. The victims were likewise precluded from making representations on these matters. The courts sentenced the victims based solely upon the category of crimes for which they had been found responsible.

222. Moreover, the records before the Commission indicate that there may have been mitigating factors pertaining to certain of the victims and the circumstances of their offenses that could have been taken into account during sentencing, and which therefore may be considered to illustrate the necessity of individualized sentencing. In Case No. 12.023 (Desmond McKenzie), the record reveals evidence of Mr. McKenzie's good character. The victim was, for example, the owner of a supermarket, ran a clothing business, and managed his father's farm and a warehouse. He had no previous convictions and was actively involved in his community, where he had standing as a local politician, promoted community youth projects and provided assistance at local schools and to the elderly. There is also evidence that the victim committed his crime as revenge for earlier insults from the deceased. While this circumstance may not have satisfied the requirements of the legal defence of provocation, it nevertheless may have been probative in determining whether the victim's offense warranted the death penalty.

223. The Commission recognizes that, had the courts in these cases been presented with evidence of mitigating factors such as those noted above, and had they been permitted to consider this evidence in determining an appropriate sentence, they may well have still imposed the death penalty. The Commission cannot, and indeed should not, speculate as to what the outcome may have been. This determination properly falls to the domestic court. What is crucial to the Commission's determination that the victims' sentences violate the Convention, however, is the fact that the victims were not given an opportunity to present evidence of mitigating factors, nor did the courts have a discretion to consider evidence of this nature in determining whether the death penalty was an appropriate punishment in the circumstances of each case.

(ii) *Prerogative of mercy*

224. Contrary to the State's submissions, the Commission does not consider that the exercise of the Prerogative of Mercy by the Jamaican Privy Council provides an adequate opportunity consistent with the requirements of Articles 4, 5 and 8 of the Convention for the proper implementation of the death penalty through individualized sentencing. . . .

225. The Commission is not . . . aware of any prescribed criteria applied in the exercise of the functions or discretion of the Governor-General or Privy Council of Jamaica under Sections 90 and 91, save for the requirement in death penalty cases that the Governor-General cause a written report of the case from the trial judge, and possibly other information in the Governor-General's discretion, to be forwarded to the Privy Council. Nor is the Commission aware of any right on

the part of an offender to apply to the Privy Council, to be informed of the time when the Privy Council will meet to discuss the offender's case, to make oral or written submissions to the Privy Council or to present, receive or challenge evidence considered by the Privy Council. Indeed, the submissions of the Petitioner and the State alike confirm in this regard that the exercise of the power of pardon in Jamaica involves an act of mercy that is not the subject of legal rights and therefore is not subject to judicial review.

226. This process is not consistent with the standards prescribed under Articles 4, 5 and 8 of the Convention that are applicable to the imposition of mandatory death sentences. As outlined previously, these standards include legislative or judicially-prescribed principles and standards to guide courts in determining the propriety of death penalties in individual cases, and an effective right of appeal or judicial review in respect of the sentence imposed. The Prerogative of Mercy process in Jamaica clearly does not satisfy these standards, and therefore cannot serve as a substitute for individualized sentencing in death penalty prosecutions.

227. Moreover, based upon the information before it, the Commission finds that the procedure for granting the Prerogative of Mercy in Jamaica does not guarantee condemned prisoners an effective or adequate opportunity to participate in the mercy process, and therefore does not properly ensure the victims' right under Article 4(6) of the Convention to apply for amnesty, pardon or commutation of sentence.

228. In the Commission's view, the right to apply for amnesty, pardon or commutation of sentence under Article 4(6) of the Convention, when read together with the State's obligations under Article 1(1) of the Convention, encompasses certain minimum procedural guarantees for condemned prisoners, in order for the right to be effectively respected and enjoyed. These protections include the right on the part of condemned prisoners to apply for amnesty, pardon or commutation of sentence, to be informed of when the competent authority will consider the offender's case, to make representations, in person or by counsel, to the competent authority, and to receive a decision from that authority within a reasonable period of time prior to his or her execution. It also entails the right not to have capital punishment imposed while such a petition is pending decision by the competent authority. In order to provide condemned prisoners with an effective opportunity to exercise this right, a procedure should be prescribed and made available by the State through which prisoners may file an application for amnesty, pardon or commutation of sentence, and submit representations in support of his or her application. In the absence of minimal protections and procedures of this nature, Article 4(6) of the Convention is rendered meaningless, a right without a remedy. Such an interpretation cannot be sustained in light of the object and purpose of the Convention.

....

231. The information before the Commission indicates that the process in Jamaica for granting amnesty, pardon or commutation of sentence does not guarantee condemned prisoners, including the victims in the cases that are the subject of this Report, any procedural protections. By their

terms, Sections 90 and 91 of the Jamaican Constitution do not provide condemned prisoners with any role in the mercy process. In addition, the Petitioners have claimed that the “invariable practice” in Jamaica is that prisoners are not informed of the date on which their cases are to be considered, and that often the first time they learn of the mercy process is when they are told that the Prerogative of Mercy is not to be exercised in their case.

232. The State has suggested that condemned individuals can apply for mercy an unlimited amount of times and that they or their counsel can bring information to the Privy Council’s attention. At the same time, the State has reiterated that prisoners have no legal right to engage in the process of determining whether they should be pardoned for their crimes. Whether and the extent to which prisoners may apply for amnesty, pardon or commutation of sentence remains entirely at the discretion of the Jamaican Privy Council. The Commission has not been apprised of any procedure or mechanism through which prisoners may file an application for amnesty, pardon or commutation of sentence or to be informed as to when the Jamaican Privy Council may consider his or her case. Likewise, there appears to be no process through which a prisoner may submit representations in support of his or her application, or receive a decision. Consequently, the Commission finds that the State has failed to respect the right of the victims under Article 4(6) of the Convention to apply for amnesty, pardon or commutation of sentence.

....

#### 5. *Articles 4 and 8 - Right to a fair trial*

295. The petitioners in all of the cases that are the subject of this Report allege violations of Articles 8(1) and 8(2), based upon one or more of several grounds, namely, the manner in which the trial judge conducted the victims’ trial, the absence of adequate time and facilities to prepare the victims’ defenses and to communicate freely and privately with counsel, and the absence of competent legal representation during the victims’ criminal proceedings. Some of the Petitioners have also alleged that violations of the right of the victims in those cases to a fair trial should also be considered to render their executions unlawful contrary to Article 4 of the Convention.

296. The Commission has outlined in Part III.A.3.d of this Report the victims’ arguments in respect of the manner in which their criminal proceedings were conducted. In particular, the Petitioners in Case No. 12.023 (Desmond McKenzie) complain that the trial judge conducted himself in a manner that deprived the victim of a just and impartial trial. These allegedly included prejudicial comments made by the trial judge to the jury. The petitioners also note that, in its initial observations to their petition, the State “conceded” that the trial judge was not impartial, and suggest that the State cannot now retract its concession for the purposes of the proceeding before the Commission. In Case No. 12.044 (Andrew Downer and Alphonso Tracey), the Petitioners take issue with the trial judge’s decision to permit the prosecution to amend the victims’ indictment during the trial to add the offense of murder in the course of robbery. The petitioners in Case No. 12.107 (Carl Baker) criticize the fact that the trial judge re-sentenced the victim to death after having sentenced him to life imprisonment, when the judge realized that the

offenses for which the victim was convicted mandated the death penalty. A review of the records in these cases indicates that the victims raised or could have raised essentially the same arguments in their appeals to the Court of Appeal of Jamaica or the Judicial Committee of the Privy Council.

297. With respect to the State's purported "concession" regarding the trial judge's instructions to the jury in Case No. 12.023 (Desmond McKenzie), the Commission accepts, based upon the explanation and documentation provided by the State, that the "concession" arose as a result of an error in communicating the State's position to the Commission, and that the State, in good faith, never intended to concede this issue. As a consequence, the Commission will determine this issue based upon the remaining substantive submissions and information provided by each of the parties.

298. After carefully reviewing the victims' allegations and the information in the records before it, the Commission is of the view that the submissions in the above cases in respect of the manner in which the victims' trials were conducted are matters which are more appropriately left to the domestic courts of States Parties to the Convention. The Commission considers that it is generally for the courts of States Parties to the Convention to review the factual evidence in a given case and give directions as to the applicable domestic law. Similarly, it is for the appellate courts of States Parties, and not the Commission, to review the manner in which a trial was conducted, unless it is clear that the judge's conduct was arbitrary or amounted to a denial of justice or that the judge manifestly violated his obligation of impartiality. In the present cases, the Petitioners have failed to demonstrate that the manner in which their criminal proceedings were conducted warrants interference by this Commission. It is not evident, for example, in what respect the re-sentencing of the victim in Case No. 12.107 (Carl Baker) prejudiced the victims in the context of their cases so as to constitute a violation of the Convention. Indeed, it appears that the defense raised no objection when the re-sentencing occurred.

299. The petitioners in these cases also argue that they were not provided with adequate time and facilities to prepare their defenses because they were not provided with sufficient time and opportunity to consult with their counsel. The petitioners in Case No. 12.023 (Desmond McKenzie) claim the victim requested, and was denied, an adjournment on the first day of this trial because his counsel was not present. As a consequence, the victim had to conduct a cross-examination of the prosecution's principal witness without the assistance of counsel. In Case Nos. 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose), the Petitioners argue that the victims were not provided with adequate time to consult with their attorneys. In addition, the Petitioners in Case No. 12.126 (Dwight Fletcher) claim the victim was detained for 18 months before he was permitted to consult with an attorney, and was not provided with an attorney during his preliminary inquiry.

300. Further, some petitioners argue that they were not provided with competent legal representation. In Case No. 12.107 (Carl Baker), the Petitioners argue that the victim was not aware of the fact that he faced the death penalty until after he was re-sentenced. They also claim

that neither the victim's attorney nor the State ensured the presence at trial of Edmund Morgan, a witness who was the first person to see the victim after the fire. Similarly, in Case No. 12.126 (Dwight Fletcher), the Petitioners indicate that the victim's trial attorney failed to call the victim's alibi witnesses at trial despite the victim's requests for him to do so, and failed to object to or enter evidence in respect of the prosecution's use of a perjured witness. These victims therefore claim they have been the victims of further violations of their rights under Articles 8(1) and 8(2) of the Convention.

301. After carefully reviewing the records in these cases, the Commission does not find on the material before it that the State is responsible for any violations of Article 8(1) or 8(2) of the Convention in respect of the victims in the above cases, with the exception of Case Nos. 12.023 (Desmond McKenzie) and 12.126 (Dwight Fletcher). In each of these cases, the State fulfilled its burden of providing the victim with legal assistance in the course of their criminal proceedings. In the particular case of the provision of State-funded defense counsel, the Commission considers that it cannot hold the State responsible for actions of which it has no knowledge. The Commission shares the views of the European Court in this regard, which has observed that, as a consequence of the independence of the legal profession from the State, the conduct of the defense is essentially a matter between the defendant and his counsel, whether counsel be appointed under a legal aid scheme or be privately appointed. As a result, the Commission concludes that the competent national authorities are required under Article 8(2)(c) of the Convention to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention. The records in these cases do not indicate that the victims made it known to State officials that they considered the time and facilities for preparing their defenses or their legal representation to be inadequate, during their trials or during their appeal proceedings. Moreover, it is not apparent that any decisions made by the victims solicitors were not rendered in the exercise of their professional judgment, or that it was clear or should have been manifest to the trial or appeal judges that the lawyer's behavior was incompatible with the interests of justice.

302. In Case No. 12.023 (Desmond McKenzie), however, the State has not denied that the victim was not granted an adjournment on the first day of his trial despite the absence of this counsel, or that as a consequence the victim was required to cross-examine the prosecution's principal witness without the benefit of counsel. Rather, the State claims that the victim's counsel returned that afternoon. Consequently, on the information available, the Commission can only conclude that the victim was denied counsel at a crucial point in his trial.

303. Similarly, in Case No. 12.126 (Dwight Fletcher), the State has not denied the Petitioners' allegation that the victim was held in detention for 18 months before he was permitted to contact his attorney and that he was not provided with legal counsel during his preliminary inquiry. Rather, the State has indicated that it would investigate the Petitioner's allegations in this regard. The Commission has not been apprised of the status or results of any such investigation by the State.

304. Article 8(2)(d) of the Convention provides every person accused of a criminal offense has the right to defend himself personally or to be assisted by legal counsel of his own choosing. Article 8(2)(e) of the Convention provides every such person the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time limit established by law. Strict compliance with these and other guarantees of due process are particularly fundamental in the context of trials involving capital offenses. The Commission also considers that these rights apply at all stages of a defendant's criminal proceedings, including the preliminary process, if one exists, leading to his committal for trial, and at all stages of the trial itself. In order for these rights to be effective, a defendant must be provided with an effective opportunity to retain counsel as soon as reasonably practicable following their arrest or detention. The State's obligations in this regard involve not only making legal aid available, but facilitating reasonable opportunities for the defendant to contact and consult with their respective counsel.

305. In Case No. 12.023 (Desmond McKenzie), the victim was denied legal representation at a significant stage of his trial because the trial judge refused his request for an adjournment. Likewise, in Case No. 12.126 (Dwight Fletcher), the victim has made uncontradicted assertions that he was held in detention for 18 months before he was permitted to contact an attorney, and that he was not provided with legal representation during his preliminary inquiry. The Commission considers that these constitute serious violations of these victims' rights to counsel as provided for under Article 8 of the Convention. Moreover, these circumstances were apparent to the judge who denied an adjournment to the victim in Case No. 12.023 (Desmond McKenzie), and should have been apparent to the victim's detaining authorities, as well as to the tribunal that conducted the victim's preliminary inquiry in Case No. 12.126 (Dwight Fletcher). As a consequence, the Commission finds that the State violated Articles 8(2)(d) and 8(2)(e) of the Convention as regards the victims in Case Nos. 12.023 (Desmond McKenzie) and 12.126 (Dwight Fletcher).

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**Dombo Beheer B.V. v. The Netherlands**

*274 Eur. Ct. H.R. (ser. A) (1993)*

*<<http://www.echr.coe.int>>*

*[The applicant is a limited liability company under Netherlands law. A dispute arose between the applicant company and the Nederlandsche Middenstandsbank N.V. concerning the development of their financial relationship during the period between December 1980 and February 1981. The dispute centered around an oral agreement pertaining to the extension of the applicant company's credit limit with the bank, and the subsequent freezing of the applicant company's*

accounts with the bank. In subsequent proceedings, the national courts refused to allow the applicant company's former managing director, Mr. van Reijendam, to give evidence, whereas the branch manager of the Bank, Mr. van W., who had been the only other person present when the oral agreement was entered into, had been able to testify. The applicant company complained to the Commission that the national courts had thereby failed to observe the principle of "equality of arms," in breach of its right to a fair hearing as guaranteed by Article 6(1).]

#### I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

30. The applicant company complained about the refusal by the national courts to allow its former managing director, Mr van Reijendam, to give evidence, whereas the branch manager of the Bank, Mr van W., who had been the only other person present when the oral agreement was entered into, had been able to testify. In its contention, the national courts had thereby failed to observe the principle of "equality of arms", in breach of its right to a "fair hearing" as guaranteed by Article 6 para. 1 (art. 6-1) . . . .

This view was subscribed to by the Commission but contested by the Government.

31. The Court notes at the outset that it is not called upon to rule in general whether it is permissible to exclude the evidence of a person in civil proceedings to which he is a party.

Nor is it called upon to examine the Netherlands law of evidence in civil procedure *in abstracto*. The applicant company does not claim that the law itself was in violation of the Convention; besides, the law under which the decisions complained of were given has since been replaced. In any event, the competence of witnesses is primarily governed by national law (see, as recent authorities and *mutatis mutandis*, the Lüdi v. Switzerland judgment of 15 June 1992, Series A no. 238, p. 20, para. 43, and the Schuler-Zgraggen v. Switzerland judgment of 24 June 1993, Series A no. 263, p. 21, para. 66).

It is not within the province of the Court to substitute its own assessment of the facts for that of the national courts. The Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was permitted, were "fair" within the meaning of Article 6 para. 1 (art. 6-1) (see, *inter alia* and *mutatis mutandis*, the judgments referred to above, *loc. cit.*).

32. The requirements inherent in the concept of "fair hearing" are not necessarily the same in cases concerning the determination of civil rights and obligations as they are in cases concerning the determination of a criminal charge. This is borne out by the absence of detailed provisions such as paragraphs 2 and 3 of Article 6 (art. 6-2, art. 6-3) applying to cases of the former category. Thus, although these provisions have a certain relevance outside the strict confines of criminal law (see, *mutatis mutandis*, the Albert and Le Compte v. Belgium judgment of 10 February 1983, Series A no. 58, p. 20, para. 39), the Contracting States have greater latitude

when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases.

33. Nevertheless, certain principles concerning the notion of a “fair hearing” in cases concerning civil rights and obligations emerge from the Court’s case-law. Most significantly for the present case, it is clear that the requirement of “equality of arms”, in the sense of a “fair balance” between the parties, applies in principle to such cases as well as to criminal cases (see the *Feldbrugge v. the Netherlands* judgment of 26 May 1986, Series A no. 99, p. 17, para. 44).

The Court agrees with the Commission that as regards litigation involving opposing private interests, “equality of arms” implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.

It is left to the national authorities to ensure in each individual case that the requirements of a “fair hearing” are met.

34. In the instant case, it was incumbent upon the applicant company to prove that there was an oral agreement between it and the Bank to extend certain credit facilities. Only two persons had been present at the meeting at which this agreement had allegedly been reached, namely Mr van Reijendam representing the applicant company and Mr van W. representing the Bank. Yet only one of these two key persons was permitted to be heard, namely the person who had represented the Bank. The applicant company was denied the possibility of calling the person who had represented it, because the Court of Appeal identified him with the applicant company itself.

35. During the relevant negotiations Mr van Reijendam and Mr van W. acted on an equal footing, both being empowered to negotiate on behalf of their respective parties. It is therefore difficult to see why they should not both have been allowed to give evidence.

The applicant company was thus placed at a substantial disadvantage vis-à-vis the Bank and there has accordingly been a violation of Article 6 para. 1 (art. 6-1).

### ***Questions***

1. The *Golder* case is a very good example for understanding how international courts interpret the scope of rights protected in human rights conventions. Identify the reasons provided by the European Court to conclude that Article 6(1) ensures the right to access to court, as well as the legal sources used to sustain its arguments. Do you agree with the decision of the Court or do you find it too expansive?

2. After reading the decision of the Commission in the *Palacios* case, which provision(s) ensure the right to access to court under the American Convention? Do you find the approach of the Commission confusing? If so, on the basis of which provision would you argue the violation of the right to access to court in that case?

3. How did the European Court distinguish the scope of Articles 6(1), 5(4), and 13 of the European Convention when analyzing the right to access to court? Do you think a similar approach could be followed by the Inter-American System when defining the scope of Articles 8 and 25? For the relationship between the right to access to court and the right to an effective remedy, see section 5 of Chapter III of this book.

4. Do you consider the scope of the “right to a fair trial/hearing” under Articles 8(1) of the American Convention, 6(1) of the European Convention, and 14(1) of the ICCPR to be similar? To answer this question consider the different language used in these provisions; for example, whereas Articles 6(1) and 14(1) refer to a “right to a fair and public hearing”, Article 8(1) only allude to the “right to a hearing with due guarantees.”

5. In the *Dombo Beheer D.V.* case the European Court stated that the concept of “fair hearing” entails different requirements in cases relating to the determination of civil rights and obligations as opposed to those where a criminal accusation is at stake. Do you agree with that ruling? What are the reasons to distinguish between civil and criminal proceedings? Do you think that this case law should be followed in interpreting the scope of Articles 8 and 14 of the American Convention and the ICCPR? On this point, the Inter-American Court has stated:

24. Insofar as the right to legal counsel is concerned, this duty to organize the governmental apparatus and to create the structures necessary to guarantee human rights is related to the provisions of Article 8 of the Convention. That article distinguishes between accusation[s] of a criminal nature and procedures of a civil, labor, fiscal, or any other nature. Although it provides that [e]very person has the right to a hearing, with due guarantees ...by a... tribunal in both types of proceedings, it spells out in addition certain minimum guarantees for those accused of a criminal offense. Thus, the concept of a fair hearing in criminal proceedings also embraces, at the very least, those minimum guarantees. By labeling these guarantees as minimum guarantees, the Convention assumes that other, additional guarantees may be necessary in specific circumstances to ensure a fair hearing.

....

28. For cases which concern the determination of a person’s rights and obligations of a civil, labor, fiscal, or any other nature, Article 8 does not specify any minimum guarantees similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for due guarantees; consequently, the individual here also has the right to the fair hearing provided for in criminal cases. It is important to note here that the circumstances of a particular case or proceeding -its significance, its legal character, and its context in a particular legal system- are among the factors that bear on the determination of whether legal representation is or is not

necessary for a fair hearing.<sup>16</sup>

6. Do you agree with the holding of the Inter-American Court that the “minimum guarantees” in the context of criminal proceedings means that the American Convention “assumes that other, additional guarantees may be necessary in specific circumstances to ensure a fair hearing?” Like the Inter-American Court, the European Commission on Human Rights provided early in its case law that:

Article 6 of the Convention does not define the notion of “fair trial” in a criminal case. Para. 3 of the Article enumerates certain specific rights which constitute essential elements of that general notion, and para. 2 may be considered to add another element. The words “minimum rights”, however, clearly indicate that the six rights specifically enumerated in para. 3 are not exhaustive, and that a trial may not conform to the general standard of a “fair trial”, even if the minimum rights guaranteed by para. 3 - and also the right set forth in para. 2 - have been respected. The relationship between the general provision of para. 1 and the specific provisions of para. 3 seems to be as follows:

In a case where no violation of para. 3 is found to have taken place, the question whether the trial conforms to the standards laid down by para. 1 must be decided on the basis of a consideration of the trial as a whole, and not on the basis of an isolated consideration of one particular aspect of the trial or one particular incident. Admittedly, one particular incident or one particular aspect even if not falling within the provisions of paras. 2 or 3, may have been so prominent or may have been of such importance as to be decisive for the general evaluation of the trial as a whole. Nevertheless, even in this contingency, it is on the basis of an evaluation of the trial in its entirety that the answer must be given to the question whether or not there has been a fair trial.<sup>17</sup>

7. Assuming that the right to a “fair hearing” - or the right to a hearing with “due guarantees” - ensures due process standards additional to those expressly stated in the provisions of international human rights treaties, how do you define the scope of that right? Through a case-by-case analysis, or by developing an “objective test”?

8. In the same vein, do you agree with the holding of the Inter-American Commission in *McKenzie et al.*, according to which in capital/death penalty cases the right to a fair hearing entails the “right to have individualized sentencing”? What about the requirement that mercy process be conducted in respect of certain minimum procedural guarantees that ensure at least the participation of the condemned prisoner?

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<sup>16</sup> Inter-Am. Ct. H.R., Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46 (2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90 of August 10, 1990, (ser. A) No. 11, paras. 24, 28.

<sup>17</sup> *Nielsen case*, Eur. Comm’n H.R., Report of March 15, 1961, para. 52, from *Digest of Strasbourg Case-Law Relating to the European Convention on Human Rights*, Volume 2, Carl Heymanns-Verlag KG Köln (1984).

9. Do you find in the cases you read that the international human rights institutions were reviewing the decisions of domestic courts, rather than determining whether those decisions ensured the due process standards protected by human rights treaties? In practice, is it possible to draw a distinction between those two actions? If not, is there anything that restricts international institutions from closely scrutinizing decisions of domestic courts?

### Note

International human rights institutions have dealt in some of their cases with the scope of the right to a “fair trial or hearing,” but they have not fully decided all the challenging questions posed by this right. First, as shown by the case law reproduced above, the European System has adopted a broad interpretation of the protection afforded by Article 6(1) of the European Convention. However, the Court has not established objective criteria to determine if the right to a fair trial has been violated; instead, it has preferred a case-by-case approach based on the overall assessment of the proceedings under analysis. In that context, the Court has stated that its role is to assess “whether or not . . . proceedings taken as a whole [are] fair within the meaning of Article 6 § 1 having regard to all the relevant circumstances, including the nature of the dispute and the character of the proceedings in issue, the way in which the evidence was dealt with and whether proceedings afforded the applicant an opportunity to state his case under conditions which did not place him at a substantial disadvantage . . .”<sup>18</sup> Some of the implied aspects of the right to a fair trial that have emerged from the Court’s case law include the principle of equality of arms,<sup>19</sup> the right to have an adversarial trial,<sup>20</sup> and the right to a reasoned decision.<sup>21</sup> In addition, the European Court has found that the right to remain silent and the privilege against self-incrimination are “generally recognized international standards which lie at the heart of the notion of a fair procedure,” although this right is not specifically mentioned in Article 6 of the European Convention.<sup>22</sup>

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<sup>18</sup> *Helle v. Finland*, Eur. Ct. H.R., Judgment of December 19, 1997, Reports 1997 VIII (1997), <<http://www.echr.coe.int>>.

<sup>19</sup> *Dombo Beheer DV v. The Netherlands*, reproduced above.

<sup>20</sup> *Mantovanelli v. France*, Eur. Ct. H.R., Judgment of March 18, 1997, Reports 1997 II (1997), <<http://www.echr.coe.int>>

<sup>21</sup> *Higgins and others v. France*, Eur. Ct. H.R., Judgment of February 19, 1998, Reports 1998 I (1998), <<http://www.echr.coe.int>>.

<sup>22</sup> *John Murray v. the United Kingdom*, Eur. Ct. H.R., Judgment of February 8, 1996, Reports 1996 I (1998), <<http://www.echr.coe.int>>.

The Human Rights Committee has also addressed the issue of the scope of the right to a fair hearing under Article 14(1) of the ICCPR. In that respect, it has stated that “the concept of fair hearing in the context of article 14(1) should be interpreted as requiring a number of conditions, such as equality of arms, respect of the principle of adversary proceedings, preclusion of *ex officio reformatio in pejus* [ex officio correction worsening an earlier verdict], and expeditious procedure.”<sup>23</sup> Using an approach similar to that followed by the European Court, the Committee has interpreted “fair hearing” broadly enough to entail rights that are not expressly contained in Article 14(1), in particular the right to have a judicial decision within a reasonable time.<sup>24</sup>

The case law of the Inter-American System in this area is less extensive than that of the other human rights systems. In the *Riebe Star et al.* case, reproduced above, the Commission concluded that in deportation proceedings the right to be heard with “due guarantees” ensured in Article 8(1) of the American Convention includes the right to be assisted by a lawyer, to have an adversarial proceeding, and to have a reasonable time to prepare an adequate defense. The other two occasions on which the Inter-American Court or Commission had made reference to the scope of the right to a fair hearing are also reproduced in this chapter, namely Advisory Opinion 11, and the *McKenzie et al. v. Jamaica* case.

Finally, examining the violation of the right to a fair hearing in the context of a particular case requires in practice that international supervisory bodies review certain aspects of domestic law or domestic proceedings such as the collection and assessment of evidence. This determination is related to the breadth of the scrutiny with which international institutions examine the decisions of domestic courts or other agencies, and requires a balanced approach on the part of such institutions to avoid overstepping the restrictions imposed by the principle of subsidiarity, which is at the heart of international human rights law. To uphold this principle, human rights supervisory bodies have developed a standard of review according to which they will not substitute the determination of facts, evidence, and the application of domestic law as decided by domestic courts, unless the decision is manifestly arbitrary or amounts to a denial of justice.<sup>25</sup>

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<sup>23</sup> *Yves Morael v. France*, Communication No. 207/1986, November 4, 1988, UN Doc. Supp. No. 40 (1989), <<http://sim.law.uu.nl>; <http://www1.umn.edu/humants/>>.

<sup>24</sup> *Robert Casanovas v. France*, Communication No. 441/1990, U.N. Doc. CCPR/C/51/D/441/1990, August 10, 1994 (1994), <<http://sim.law.uu.nl>; <http://www.unhchr.ch>>; *Sandra Fei v. Colombia*, Communication No. 514/1992, U.N. Doc. CCPR/C/53/D/514/1992, April 26, 1995 (1995), <<http://sim.law.uu.nl>; <http://www.unhchr.ch>>.

<sup>25</sup> See *McKenzie et al. v. Jamaica*, reproduced above; *Ivan Petkov v. Bulgaria*, Communication No. 844/1998, U.N. Doc. CCPR/C/65/D/844/1998, March 25, 1999 (1999), <<http://sim.law.uu.nl>; <http://www.unhchr.ch>>; and *G. v. Canada*, Communication No. 934/2000, U.N. Doc. CCPR/C/69/D/934/2000, July 17, 2000 (2000), <<http://sim.law.uu.nl>; <http://www.unhchr.ch>>.

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### 3. WITHIN A REASONABLE TIME

#### **Genie Lacayo v. Nicaragua**

*Inter-Am. Ct. H.R., Judgment of January 29, 1997, (ser. C) No. 30 (1997)*

*[On October 28, 1990, Jean-Paul Genie-Lacayo, aged 16, resident of the city of Managua, was traveling by car on the road to Masaya when he came upon a convoy of vehicles transporting military personnel who, in response to his attempts to pass them, fired on him with automatic weapons. The victim did not die immediately but was left to die from hypovolemic shock induced by hemorrhage. According to the investigations, his car was fired on from two or more vehicles. Nineteen bullet impacts were found on the car, all made while the car was in motion, and three shots were fired at short range once it had stopped. Judicial action was initiated in July 1991 by the Office of the Attorney General of Justice. The courts of first instance and appeal declared themselves without competence to hear the case, considering it to belong to the military jurisdiction, and the case was referred to the Military Advocate. The petition alleged that Government agents, acting under the cover of a public function, committed acts that resulted in a denial of justice. These acts included the disappearance of evidence, the refusal of military witnesses to testify in court, the failure to institute internal proceedings within a reasonable time, and the application of norms incompatible with the object and purpose of the American Convention. Accordingly, the petition alleged, inter alia, violations of Articles 8 (Right to a Fair Trial), 25 (Right to Judicial Protection, and 24 (Right to Equal Treatment), all read in conjunction with Article 1(1) (Obligation to Respect Rights) of the Convention.]*

77. Article 8(1) of the Convention also refers to reasonable time. This is not an easy concept to define. In defining it, one may invoke the points raised of the European Court of Human Rights in various decisions in which this concept was analyzed, this article of the American Convention being equivalent in principle to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the European Court, three points must be taken into account in determining a reasonable time within which the trial must be conducted: a) the complexity of the matter; b) the judicial activity of the interested party; and c) the behavior of the judicial authorities (See, *inter alia*, *Eur. Court H.R., Motta judgment of 19 February 1991, Series A no. 195-A*, para. 30; *Eur. Court H.R., Ruiz-Mateos case v. Spain judgment of 23 June 1993, Series A no. 262*, para. 30).

78. With regard to the first point, it is clear that the matter under consideration is somewhat complex, since the investigations were very extensive and the evidence copious, owing to the wide impact of the death of young Genie-Lacayo (*supra* 69). All of this could justify the fact that the trial, which also involved many incidents and instances, lasted longer than others with

different characteristics.

79. As regards the second point, which refers to the procedural activity of the interested party, there is no record that Mr. Raymond Genie-Peñalba, the victim's father, behaved in a manner incompatible with his role as private accuser or that he obstructed the process, because he did no more than apply the impugment measures recognized in the legislation (*supra* 70).

80. With reference to the third point, that is, the behavior of the Nicaraguan judicial authorities, this Court finds that there were no excessive delays at the various stages of the proceedings, with the exception of the phase which is yet to be settled (*supra* 71), that is, the application for judicial review before the Supreme Court of Justice filed by the accusing party on August 29, 1994, admitted by that Tribunal on August 31 and which, notwithstanding the various requests from the parties, has still not been disposed of. Even considering the complexity of the case, as well as the excuses, impediments and substitution of judges of the Supreme Court of Justice, the two years that have elapsed since the application for judicial review was admitted is not reasonable; this Tribunal therefore deems it to violate Article 8(1) of the Convention. It will do so in the operative part relating to Article 1(1), which contains the general obligation to respect the Convention.

81. In addition to the examination of possible delays at the various stages of the proceeding, in determining what constitutes a reasonable time throughout the entire process; the European Court has employed what it refers to as a “*global analysis of the proceeding*” (*Motta, supra* 77, para. 24; *Eur. Court H.R., Vernillo judgment of 20 February 1991, Series A no. 198* and *Eur. Court H.R., Unión Alimentaria Sanders SA judgment of 7 July 1989, Series A, no. 157*). Even without taking into account the police investigation and the time spent by the Office of the Attorney-General of the Republic of Nicaragua in bringing the case before the court of first instance, that is, between July 23, 1991, on which date the court issued the order to initiate the proceeding, and the present time at which a firm judgment has still not been rendered, more than five years have elapsed; the Court deems this period to exceed the limits of reasonableness prescribed in Article 8(1) of the Convention.

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**Suárez Rosero v. Ecuador**

*Inter-Am. Ct. H.R., Judgment of November 12, 1997, (ser. C) No. 35 (1997)*

*[For the facts of the case, see Chapter III]*

*Violation of articles 8(1), 8(2), 8(2)(c), 8(2)(d) and 8(2)(e)*

67. The Commission contended that by subjecting Mr. Suárez-Rosero to prolonged preventive detention, the State violated:

- a.- his right to be tried within a “reasonable time”, as established in Article 7(5) of the Convention,
- b.- his right to be brought before a competent tribunal, as established in Article 8(1) of the Convention, and
- c.- the principle of presumption of innocence, as established in Article 8(2) of the Convention.

68. In that regard, Ecuador maintained in its brief of final arguments that

one cannot ignore the important fact that the courts acted with the greatest speed, given the Judiciary’s personnel and financial constraints. Its workload has been increasing with the expansion of the docket, which contains over forty-three volumes --comprising more than four thousand three hundred substantive pages-- owing to the large number of persons implicated in the so-called Operation “*Ciclón*”.

[...]

There may have been some breaches of the terms and periods established for the substantiation of an accusation, or non-observance at some time of the formalities in the courts, but let it be said that in no way did the Ecuadorian State curtail Mr. Suárez’s action, since he was able at all times adequately to exercise his legitimate right of defense. His inalienable rights were not violated nor was his sentence unjust; it is, after all, deserved, as the First Chamber of the Superior Court of Justice of Quito found.

69. Article 8(1) of the Convention establishes that . . . .

70. The purpose of the principle of “*reasonable time*” to which Articles 7(5) and 8(1) of the American Convention refer is to prevent accused persons from remaining in that situation for a protracted period and to ensure that the charge is promptly disposed of. In the instant case, the first act of the proceeding was Mr. Suárez-Rosero’s arrest on June 23, 1992, and, therefore, the time must be calculated from that moment.

71. The Court considers the proceeding to be at an end when a final and firm judgment is delivered and the jurisdiction thereby ceases (cf. *Cour eur. D.H., arrêt Guincho du 10 juillet 1984, Serie A no. 81*, para. 29) and that, particularly in criminal matters, that time must cover the entire proceeding, including any appeals that may be filed. On the basis of the evidence contained in the Case before it, the Court considers that the proceeding against Mr. Suárez-Rosero ended in the Ecuadorian jurisdiction on September 9, 1996, the date on which he was convicted by the President of the Superior Court of Justice of Quito. Although at the public hearing Mr. Suárez-Rosero referred to an appeal of that conviction, his statement was not substantiated.

72. This Court shares the view of the European Court of Human Rights, which in a number of decisions analyzed the concept of reasonable time and decided that three points should be taken into account in determining the reasonableness of the time in which a proceeding takes place: a) the complexity of the case, b) the procedural activity of the interested party, and c) the conduct of the judicial authorities (cf. *Genie Lacayo Case*, Judgment of January 29, 1997. Series C No. 30, para. 77; and cf. *Eur. Court H.R., Motta judgment of 19 February 1991, Series A No. 195-A*, para. No. 30; *Eur. Court H.R., Ruiz-Mateos case v. Spain judgment of 23 June 1993, Series A No. 262*, para. 30).

73. On the basis of the above considerations, after comprehensive analysis of the proceeding against Mr. Suárez-Rosero in the domestic courts, the Court observes that that proceeding lasted more than 50 months. In the Court's view, this period far exceeds the "reasonable time" contemplated in the American Convention.

74. Likewise, the Court considers that the fact that an Ecuadorian tribunal has found Mr. Suárez-Rosero guilty of complicity in a crime does not justify his being deprived of his liberty for more than three years and ten months, when two years is the maximum in Ecuadorian law for that offense.

75. In view of the foregoing, the Court finds that the State of Ecuador violated, to the detriment of Mr. Rafael Iván Suárez-Rosero, the right to be tried within a reasonable time or be released, as established in Articles 7(5) and 8(1) of the American Convention.

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**Corigliano v. Italy**

57 *Eur. Ct. H.R. (ser. A) (1982)*

<<http://www.echr.coe.int>>

*[In March 1973, during demonstrations in Reggio Calabria, the police arrested Mr. Santo Amodeo in a shop belonging to the applicant and in the latter's presence. The applicant gave evidence at Mr. Amodeo's trial before the Reggio Regional Court which directly contradicted that of the police officers who had made the arrest. The court upheld their version of the facts. The applicant subsequently lodged a complaint with the Reggio public prosecutor's office against the President of the Criminal Chamber of the Regional Court and the assistant public prosecutor. He accused them of various offenses, in particular of having acted out of personal interest in the exercise of their duties and having deliberately failed to declare that the police report of the arrest was false. The public prosecutor then commenced proceedings against the applicant for aggravated slander. There were two stages in the investigation of the case. The*

*first ended in a discharge and the second - following an appeal by the public prosecutor's office - in the applicant's committal for trial. On March 16, 1978, the file was transmitted to the Messina Regional Court. In March 1979, the Regional Court gave him a suspended sentence of eighteen months' imprisonment. The Appeal Court of Messina acquitted the applicant on February 19, 1980. Before the Commission, the applicant alleged a two-fold violation of Article 6(1) of the Convention: the investigation chamber of the Messina Court of Appeal was not "an independent and impartial tribunal established by law," and the "reasonable time" had been exceeded.]*

32. The Commission expressed the opinion that the applicant had been the victim of a breach of his right to a hearing "within a reasonable time", within the meaning of Article 6 § 1 (art. 6-1).

The Government disagreed with this view.

4. *The length of the proceedings*

33. The first matter that must be determined is the relevant period to be considered.

(a) *Commencement of the period to be taken into account*

34. In criminal matters, in order to assess whether the "reasonable time" requirement contained in Article 6 § 1 (art. 6-1) has been complied with, one must begin by ascertaining from which moment the person was "charged"; this may have occurred on a date prior to the case coming before the trial court (see, for example, the Deweer judgment of 27 February 1980, Series A no. 35, p. 22, § 42), such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when the preliminary investigations were opened (see the Wemhoff judgment of 27 June 1968, Series A no. 7, pp. 26-27, § 19, the Neumeister judgment of the same date, Series A no. 8, p. 41, § 18, and the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 45, § 110). Whilst "charge", for the purposes of Article 6 § 1 (art. 6-1), may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (see, inter alia, the above-mentioned Eckle judgment, Series A no. 51, p. 33, § 73).

35. The commencement of the proceedings in issue dates back to April 1973. On 21 April, the Reggio Calabria public prosecutor, having had referred to him the complaints made by the applicant against two judicial officers, requested the Court of Cassation to remit the case to another jurisdictional area; he did not inform Mr. Corigliano. Without hearing either the prosecuting authorities or the defence, the Court of Cassation made an order to this effect on 2 July, confining itself to specifying the town in question (Article 60 of the Code of Criminal Procedure - see paragraph 13 above).

The “judicial notification” issued by the public prosecutor attached to the Messina Regional Court was served on the applicant on 7 December 1973 (see paragraph 14 above). “Judicial notification” is an act of process recently introduced under Italian law, which is intended to give the person affected official notice of the commencement of criminal proceedings against him and of his entitlement to appoint a defending lawyer within three days. For his part, Mr. Corigliano did not contest that he learnt only on 7 December 1973 of the bringing of a prosecution against him. The Court takes this latter date as the date from which there was a “charge” within the meaning of Article 6 § 1 (art. 6-1).

(b) *End of the period to be taken into account*

36. The end of the period of “time” to be taken into account fell on the day the Messina Court of Appeal rendered the final judgment of acquittal, that is on 19 February 1980 (see paragraph 21 above and the above-mentioned Eckle judgment, Series A no. 51, p. 34, § 76).

5. *The reasonableness of the length of the proceedings*

37. The reasonableness of the length of the proceedings has to be assessed in each instance according to the particular circumstances. In this exercise, the Court has regard to, amongst other things, the complexity of the case, the conduct of the applicant and the conduct of the judicial authorities (see the above-mentioned Eckle judgment, *ibid.*, p. 35, § 80).

The present case concerns proceedings that extended more than six years. This would, at first sight, appear to be a considerable lapse of time for a case of this kind.

(a) *The complexity of the case*

38. In the submission of the Government, the case did involve a certain complexity as a result of its having to be remitted to a court other than the one to which Mr. Viola and Mr. Colicchia were attached.

39. Doubtless the transferral of jurisdiction to Messina did make the conduct of the case a little more complicated, but, in the opinion of the Court, the legal issues involved were in themselves relatively simple. It is noteworthy in this connection that the only measures of investigation carried out seem in fact to have been the questioning of the judicial officers complained of by Mr. Corigliano, of Mr. Corigliano himself and of one witness, as well as the examination of a number of documents (see paragraphs 17 and 18 above).

(b) *The conduct of the applicant*

40. As regards the conduct of the applicant, the Government contended that there had been abuse by the applicant of his right to appeal on a point of law to the Court of Cassation (see paragraph 16 above) - notably in respect of his last two appeals - since each time the outcome was

foreseeable. In their submission, Mr. Corigliano had also protracted the proceedings by refusing, on 17 December 1973, to appoint a defence lawyer on the occasion of his being heard by the public prosecutor's office (see paragraph 17 above).

41. On the first point, the applicant conceded that his three cassation appeals pursued substantially the same object, namely to bring to the attention of the Court of Cassation the alleged unconstitutionality of Article 48 of the Code of Criminal Procedure, which deals with joinder of cases relating to the same accused.

The Court sees no call to adjudicate on whether or not there was abuse of the right to appeal on a point of law; it confines itself to noting, as did the Commission (see paragraphs 43-44 of the report), that the effect of the cassation appeals on the length of the proceedings was limited. In point of fact, those appeals did not impede the preliminary investigation as was maintained by the Government. The appeal that required the longest time to be heard - the second - did not at all bring the activities of the Messina Regional Court to a standstill. This is borne out by the various measures that were taken in the meantime, namely the forwarding of the case-file to the Reggio Calabria Regional Court (22 April 1975), the serving of a summons to appear (21 June 1975) and the questioning of the applicant (26 June 1975) (see paragraph 17 above).

42. On the second point (refusal to designate a defence lawyer), it should be recalled that Article 6 (art. 6) does not require the person concerned actively to co-operate with the judicial authorities (see the above-mentioned Eckle judgment, Series A no. 51, p. 36, § 82).

43. To sum up, the behaviour of Mr. Corigliano did not appreciably contribute to prolonging the proceedings.

(c) *The conduct of the judicial authorities*

44. The manner in which the judicial authorities conducted the case is to be assessed by reference to three successive stages, namely the preliminary investigation, the trial at first instance and the hearing on appeal (see paragraphs 17-21 above).

(i) *The preliminary investigation*

45. The first phase of the proceedings began on 17 December 1973 and ended on 7 July 1978 with the committal for trial (see paragraphs 35 and 19 above); it thus lasted four years and seven months. The Government attributed this length of time to the cassation appeals entered by the applicant during the preliminary investigation and to the complexity of the case (see paragraphs 40 and 38 above).

46. The time devoted to hearing the cassation appeals was not excessive. Thus, the first was dismissed by the Court of Cassation after two months and ten days (11 January 1974 - 22 March 1974), the second after eight months (3 February 1975 - 3 October 1975). The third appeal was

not even registered by the Court of Cassation, which informed the applicant accordingly eleven days later (5 October 1975 - 16 October 1975).

47. The Court has already noted that the case did not involve great complexity (see paragraph 39 above). The Court would add that although the transferral of the case to the Messina Regional Court was not in itself incompatible with the proper administration of justice and although the normally resultant delays should not therefore be capable of raising an issue under Article 6 § 1 (art. 6-1), it is difficult to understand one decision entailing a delay of seven weeks (22 April - 5 June 1975), namely the decision to take evidence from Mr. Corigliano on commission at the Reggio Regional Court notwithstanding the removal of the case from the latter's jurisdiction by the Court of Cassation (see paragraph 17 above).

What also calls for comment is the absence of any measures of preliminary investigation during two periods, the first of thirteen months, the second of fourteen months (22 March 1974 - 22 April 1975 and 22 December 1975 - 19 February 1977, see paragraphs 16-18 above). The Government not having come forward with any explanation in their respect, the Court holds these two delays to be unjustified.

(ii) *The proceedings before the Messina Regional Court*

48. The procedure at first instance lasted approximately seven months: it commenced before the Messina Regional Court on 7 August 1978 and ended on 30 March 1979. The time taken does not appear unduly long, especially in view of the fact that it began to run during the legal vacation which terminated on 15 September.

(iii) *The proceedings before the Messina Court of Appeal*

49. The Messina Court of Appeal, following the reference of the case to it on 30 March 1979, received the case-file on 18 June 1979. Whilst the transmission of the case-file thus did not occur until after two and a half months, it should not be overlooked that the applicant had had twenty days for filing the grounds of his appeal (Article 201 § 1 of the Code of Criminal Procedure). In addition, with judgment being delivered by the Court of Appeal on 19 February 1980, the procedure lasted a total of less than eleven months. The time taken appears reasonable, particularly in view of the fact that the accused was not being held in custody and that the consideration of his case, since it involved no urgency, could be interrupted during the legal vacations.

(d) *Conclusion*

50. To sum up, at the stage of the preliminary investigation at Messina the proceedings brought against Mr. Corigliano were subject to delays incompatible with Article 6 § 1 (art. 6-1).

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**Guillemin v. France**

*Eur. Ct. H.R., Judgment of February 21, 1997, Reports 1997 I (1997)*

[<http://www.echr.coe.int>](http://www.echr.coe.int)

*[In 1982, the French authorities declared that it was in the public interest to expropriate land for the development of a residential area in the town of Saint-Michel-dur-Orge, known as the Fontaine de l'Orme project. The land included property owned by the applicant. The Essonne expropriations judge subsequently issued an order transferring the applicant's land to the municipality and setting the amount of compensation to be paid to her. On July 28, 1983, the development corporation informed the applicant that she should have vacated the land as of July 14. In the same month the town council demolished the fence, the buildings, the infrastructure for the supply of services, the vegetable garden and the orchard on the land. The applicant brought numerous administrative and judicial proceedings against the town council and the mayor, seeking either restoration of her rights or monetary compensation. The case was still pending when the applicant lodged a complaint with the European System in November, 1991. Invoking Articles 6(1) of the European Convention, she complained of the length of the proceedings to challenge the expropriation.]*

*II. Alleged violation of article 6 para. 1 of the convention (art. 6-1)*

32. Mrs Guillemin complained of the length of the entirety of the proceedings she had had to institute on account of the unlawful expropriation of her property. She alleged a violation of Article 6 para. 1 of the Convention (art. 6-1) . . . .

33. The Government disputed that submission, whereas the Commission accepted it.

*A. Period to be taken into consideration*

34. The Court observes that the decision whereby the Prefect declared the acquisition of land including the applicant's to be in the public interest was taken on 7 October 1982. On 19 November 1982 Mrs Guillemin applied to the administrative court to have that decision set aside. In civil cases the "reasonable time" for the purposes of Article 6 para. 1 (art. 6-1) usually begins to run when the application is made to the court. In the present case the period to be taken into consideration began on 19 November 1982 at the latest.

35. As to the end of the proceedings, the Government maintained that the compensation proceedings, which were instituted by Mrs Guillemin after she had lodged her application with the Commission . . . . should fall outside the scope of the Court's consideration of the case. The total length of the proceedings was therefore eight years and two months.

36. Like the Commission, the Court does not accept this argument. It has consistently held in relation to the application of Article 6 para. 1 (art. 6-1) that the period whose reasonableness falls to be reviewed takes in the entirety of the proceedings, right up to the decision which disposes of the dispute (“contestation”) (see, *mutatis mutandis*, the *Guincho v. Portugal* judgment of 10 July 1984, Series A no. 81, p. 13, para. 29, and the *Erkner and Hofauer v. Austria* judgment of 23 April 1987, Series A no. 117, p. 62, para. 65). In the instant case, resolving the dispute, which could have been amicably settled, entailed bringing two sets of proceedings: the first in the administrative courts, which alone have jurisdiction to assess whether the public interest of an expropriation is lawful, and the second, conducted in both the administrative and the ordinary courts simultaneously, to secure compensation for the applicant for the illegal expropriation of her property by the public authorities. The latter proceedings are still pending. The length of time to be considered accordingly exceeds fourteen years already (19 November 1982 - 22 January 1997).

37. Such a lapse of time would at first sight seem unreasonable and therefore calls for close examination under Article 6 para. 1 (art. 6-1) (see the *Guincho* judgment cited above, p. 14, para. 30).

*B. Reasonableness of the length of the proceedings*

38. The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case, which here call for an overall assessment, and having regard to the criteria laid down in the Court’s case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities (see, as the most recent authority, the *Katikaridis and Others v. Greece* judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, p. 1687, para. 41).

39. The applicant pointed out that while the expropriation of her property had been carried out swiftly, she had still not managed to obtain compensation in the domestic courts for her loss, even though those courts had held that the expropriation had been unlawful and that she was in principle entitled to compensation. She complained of the organisational complexity of expropriation law and in particular of the lack of any effective means of securing fair and swift compensation where an expropriation had been held to be unlawful in its entirety but restoration of the status quo ante was no longer possible.

40. The Commission considered that most of the delays it had noted in the proceedings were attributable to the State.

41. The Government relied on the inherent complexity of expropriation proceedings. It was first necessary to have the public-interest declaration set aside by the administrative courts before seeking to have the expropriation order set aside by the ordinary courts. Only once the courts of both sets had given a final decision could compensation be sought in the ordinary courts for the loss arising from the illegal expropriation. They also said that the applicant could not hold the

national authorities responsible for the delay in the proceedings pertaining to the application for compensation which she had erroneously made to the administrative court.

42. The Court recognises that expropriation proceedings are relatively complex, in particular in that they come under the jurisdiction of both sets of courts - the administrative courts in respect of the lawfulness of expropriation measures and the ordinary courts in respect of the transfer of the property in question, the assessing of compensation and, in general, interferences with private property. Furthermore, as in the present case, an administrative court may have to rule on the lawfulness of the initial stage of the proceedings at the same time as an ordinary court has to deal with the consequences of an expropriation order whose lawfulness has been challenged in the other court. Such a situation may give rise to conflicting decisions, and this is a risk which prompt consideration of claims might help to diminish. The Court notes that the division of jurisdiction between the courts was not obvious to the Evry tribunal de grande instance; on 1 February 1993 it deferred judgment until the Versailles Administrative Court, to which a compensation claim had likewise been made but which theoretically had no jurisdiction in the matter, ruled on 24 May 1994. . . . The applicant consequently cannot be criticised for not bringing her action for compensation before the right court.

43. Like the Commission, the Court notes that, in addition to the delays due to organisational difficulties (see paragraph 42 above), Mrs Guillemin cannot be held responsible for other delays either. The proceedings to challenge the lawfulness of the public-interest declaration continued for nearly three years in the Versailles Administrative Court (see paragraph 10 above) and then three years and nearly three months in the Conseil d'Etat (see paragraph 11 above), and the expropriating town council of Saint-Michel-sur-Orge was late in filing its pleadings (*ibid.*). Once the expropriation measures had been set aside, the town council did not respond to the applicant's claims, and this further delayed the end of the proceedings (see paragraph 13 above). Lastly, the compensation proceedings which were instituted in the Evry tribunal de grande instance on 13 January 1992 and entered in the court's list again on 25 November 1994, two years and eleven months later, are still pending (see paragraphs 16 and 19-22 above); moreover, an appeal will lie against the judgment to be delivered.

44. Like the Commission, the Court considers that the total delay noted above already exceeds what could be regarded as "reasonable" within the meaning of Article 6 para. 1 of the Convention (art. 6-1).

45. There has accordingly been a violation of that provision (art. 6-1).

### ***Questions***

1. Articles 8(1) of the American Convention and 6(1) of the European Convention ensure the right to be heard within a reasonable time, whereas Articles 7(5) and 5(3) of the same treaties

protect the right to be tried within a reasonable time or to be released pending trial.<sup>26</sup> Do you consider that the scope of protection afforded by these provisions is different? Consider the following statement of the European Court and compare it to the excerpts of the *Suárez Rosero* case reproduced above:

5. On the other hand, there is no confusion between the stipulation in Article 5(3) (art. 5-3) and that contained in Article 6(1) (art. 6-1). The latter provision applies to all parties to court proceedings and its aim is to protect them against excessive procedural delays; in criminal matters, especially, it is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate.

Article 5(3) (art. 5-3), for its part, refers only to persons charged and detained. It implies that there must be special diligence in the conduct of the prosecution of the cases concerning such persons. Already in this respect the reasonable time mentioned in this provision may be distinguished from that provided for in Article 6 (art. 6).

2. How would you articulate the test to determine “reasonableness” in the context of the case law that you read? Do you consider this test to be an “objective standard?” How manageable is this standard to be applied by domestic courts?

3. Does “reasonable time” have a similar scope in the context of civil and criminal cases? What is the rationale behind the distinction?

4. How do you determine the relevant time period to be assessed? Is there any difference between civil and criminal cases in relation to this period? Can a “short period of time” be considered “unreasonable?”

5. One important aspect of the international case law in this area is that backlog of the courts in general has not been considered a legitimate justification for the State’s failure to ensure the right to be tried within a reasonable time. In this regard, the European Court has consistently stated that

Article 6 para. 1 (art. 6-1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time.

Moreover, a temporary backlog of court business does not entail a Contracting State’s international liability if it takes appropriate remedial action with the requisite promptness . .

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<sup>26</sup> Article 14(1) of the ICCPR does not expressly provide for the right to a fair hearing within a reasonable time; the Human Rights Committee, however, has ruled that this due process guarantee is protected by the right to a fair hearing (*see the Robert Casanovas v. France*, and *Sandra Fei v. Colombia* cases cited above). In the context of criminal proceedings, Article 14(2)(c) ensures the right to be tried without undue delay.

However, according to the Court's established case-law, a chronic overload . . . cannot justify an excessive length of proceedings.<sup>27</sup>

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#### 4. **COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL, ESTABLISHED BY LAW**

##### **Castillo Petruzzi v. Peru**

*Inter-Am. Ct. H.R., Judgment of May 30, 1999, (ser. C) No. 52 (1999)*

*[For the facts of the case, see Chapter IV; footnotes omitted]*

123. The Commission argued that in the military court proceedings against Mr. Castillo Petruzzi, Mr. Mellado Saavedra, Mr. Astorga Valdéz and Mrs. Pincheira Sáez for the crime of treason, the State violated the following rights and guarantees of due process of law contemplated in the American Convention: the right to a hearing by an independent and impartial tribunal [Article 8(1)] . . . .

124. Arguments of the Commission:

a) Article 8(1) of the Convention recognizes every person's right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal previously established by law. While at the international level trial by military tribunals is not, *per se*, regarded as a violation of the right to a fair trial, "an international consensus has developed in favor of the need to restrict it whenever possible, and to prohibit exercise of military jurisdiction vis-à-vis civilians, especially in emergency situations";

b) The United Nations Human Rights Committee found that the practice of military or special tribunals trying civilians "could present serious problems as far as the equitable, impartial and independent administration of justice is concerned . . . While the [International] Covenant [of Civil and Political Rights] 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 . . .";

c) "A military court is a special and purely functional court designed to maintain discipline in the military and police." As the Commission stated in its 1993 Annual Report, placing civilians under the jurisdiction of the military courts is patently contrary

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<sup>27</sup> *Pammel v. Germany*, Eur. Ct. H.R., Judgment of July 1, 1997, Reports 1997 IV (1997), <<http://www.echr.coe.int>>.

to the rights and guarantees protected under the Articles 8 and 25 of the American Convention, specifically the right to a hearing by a competent, independent and impartial tribunal previously established by law;

d) Because the armed forces are performing dual roles -combating terrorism and exercising jurisdictional functions that properly pertain to the judicial branch of government-, “there are some serious and legitimate doubts about the impartiality of a military court in such cases, as the court would be both judge and prosecutor.” The conduct of the military judge of inquiry who ordered the defendants detained, attached their property and then examined the witnesses and the suspects, was a violation of the right to an impartial tribunal, since the same judge or court conducted both the preliminary inquiry and the trial;

e) members of military tribunals are appointed by the military hierarchy, which means they exercised jurisdictional authority at the discretion of the executive branch. This would be understandable only when the crimes being prosecuted are military offenses. Whereas the Statute of Military Justice provides, under its preliminary title, that military tribunals are autonomous, elsewhere that same body of law stipulates that such courts are answerable to the executive branch; nowhere does it stipulate that military tribunals shall be composed of legal professionals. Article 23 of the Statute provides that the minister of the pertinent sector shall designate the members of the Supreme Court of Military Justice. In practice, military judges continue to be subordinate to their superiors and must respect the established hierarchy. For these reasons, such tribunals do not “provide civilians with guarantees of impartiality and independence, since the military judges act according to military logic and their own principles”;

f) the very concept of a tribunal previously established by law “means that judicial competence can be neither derogated nor removed; in other words, absolute adherence to the law is required and judicial competence may not be arbitrarily altered.” In the case of Peru, the *nomen iuris* of treason is one element used to “cloak this arbitrary mutation in the guise of legality” and to remove jurisdiction from the tribunal previously established by law to the military courts. But, “for a tribunal established by law to exist it is not sufficient that it be provided for by law; such a tribunal must also fulfill all the other requirements stipulated in Article 8 of the American Convention and elsewhere in international law;” and

g) Article 15, paragraph 1 of the Decree-Law No. 25,475 provides that those military who are officers of the court in cases involving crimes of terrorism shall keep their identity secret, wherefore decisions and judgments are to be unsigned. The use of “faceless” tribunals denies the accused his right to be judged by an independent and impartial tribunal, the right to defend himself and the right to due process. Trials of this type make it difficult for the accused to know whether the judge is competent and impartial.

126. Arguments for the State:

a) Decree-Laws Nos. 25,475 and 25,659 were promulgated under the National Emergency and Reconstruction Government. “Subsequently, the 1993 Constitution recognized the competence of the military courts to prosecute civilians in the cases specifically listed in its Article 173.” Article 139 of the Constitution now in force in Peru establishes the independence of the courts and, by extension, the independence of the military courts. It also provides that rulings of military courts “do not apply to civilians, except in the case of crimes of treason and terrorism that the law specifies”;

b) Article 139.1 of the Constitution now in force provides that the judicial function rests entirely and exclusively with the judicial branch of government, “except in the case of military law and arbitration law.” This is consistent with Article 233 paragraph 1 of the 1979 Constitution and Article 1 of the Statute of the Judiciary. And on this basis, Article 229 of the Constitution stipulates that a law shall determine the organization and attributes of the military courts. It is thus “patently clear that Peru’s constitutions and laws have consistently provided that the military system of justice will be separate and independent”;

c) the practice of trying civilians in military tribunals must be examined in light of Article 27 of the Convention, which allows states the possibility of extraordinary measures “in time of war, public danger, or other emergency that threatens the independence or security of a State Party;”

d) the right to a hearing by a tribunal previously established by law implies that “the accused must be tried by judges appointed prior to the facts in the case, with the express stipulation that the individual shall be brought before a tribunal previously established by law”; it does not stipulate whether the tribunals or judges are to be military or civilian;

....

127. The Court considers that under Peru’s Code of Military Justice, military courts are permitted to try civilians for treason, but only when the country is at war abroad. A 1992 decree-law changed this rule to allow civilians accused of treason to be tried by military courts regardless of temporal considerations. In the instant case, DINCOTE was given investigative authority, and a summary proceeding “in the theater of operations” was conducted, as stipulated in the Code of Military Justice.

128. The Court notes that several pieces of legislation give the military courts jurisdiction for the purpose of maintaining order and discipline within the ranks of the armed forces. Application of this functional jurisdiction is confined to military personnel who have committed some crime or were derelict in performing their duties, and then only under certain circumstances. This was the definition of Peru’s own law (Article 282 of the 1979 Constitution). 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, 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 questions.

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.”

132. In the instant case, the Court considers 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.

133. What is more, because judges who preside over the treason trials are “faceless,” defendants have no way of knowing the identity of their judge and, therefore, of assessing their competence. Compounding the problem is the fact that the law does not allow these judges to recuse themselves.

134. The Court therefore finds that the State violated Article 8(1) of the Convention.

**THE ADMINISTRATION OF JUSTICE SYSTEM IN PERU (NOV. 1993)**  
*[Professor Robert Goldman (President); Dr. León C. Arslanian;  
Dr. Ferdinando Imposimato; and Dr. Jose Rafucci]*

**CHAPTER III**

....

**II. APPLICABLE STANDARDS GOVERNING JUDICIAL INDEPENDENCE AND IMPARTIALITY**

[T]he International Covenant, the American Convention and common Article 3 provide that every person has a right to be tried by an “independent” and “impartial” tribunal. Although these terms are not defined in these instruments, they are not so elusive as to have no general meaning. In fact, these terms have been extensively studied by many international bodies and have been defined and elaborated on by intergovernmental organizations and respected organizations of judges and lawyers.

For example, Principle 2 of the United Nations Basic Principles on the Independence of the Judiciary addresses the requirements of judicial independence and impartiality as follows:

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.

The Draft Universal Declarations on the Independence of Justice, also known as the “*Singhvi Declaration*,” defines the concept of independence similarly, but additionally states that the “judiciary shall be independent of the Executive and the Legislature.” (Article 4) It also declares in this regard:

Art. 5:

(h) The Executive shall not have control over the judicial functions of the courts in the administration of justice.

(i) The Executive shall not have the power to close down or suspend the operations of the courts.

(j) The Executive shall refrain from any act or omission which pre-empt the judicial resolution of a dispute or frustrates the proper execution of a court decision.

Art. 6:

No legislation or executive decree shall attempt retroactively to reverse specific court decisions or to change the composition of the court to affect its decision-making.

The International Bar Association in its Minimum Standards of Judicial Independence define judicial independence both in personal and structural terms:

(b) Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.

(c) Substantive independence means that in the discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience.

The common theme of these declarations is that judicial independence requires freedom from interference by the executive or legislative branches in the administration of justice. These standards also recognize the principle of irremovability of the judiciary and duly regulated security of tenure as indispensable conditions for guaranteeing a judge's personal independence and impartiality. . . .

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**Figueredo Planchart v. Venezuela**

*Case 11.298, Inter-Am. C.H.R. 1313,*

*Annual Report 1999, OEA/Ser.L/V/II.106, doc. 3 rev. (2000)*

*[Footnotes omitted]*

*[The petitioner was accused of having misappropriated and embezzled funds during his tenure as Minister of the Presidential Secretariat and Minister of Foreign Affairs. An investigation was carried out by the Office of the Comptroller General, which office did not advise the petitioner that he was being investigated, did not inform him of the evidence being used against him, gave him no opportunity to defend himself or to present evidence, refused him a copy of the report incriminating him, and did not reply to his request that an administrative inquiry into the charge against him be opened in accordance with due process of law. In May 1993, the petitioner was stripped of his parliamentary immunity, and removed from his position as a Deputy in the Nation's Congress. The Supreme Court, trying him directly, did not permit him to know what he was accused of. The Court denied the petitioner access to the evidence against him, as well as the right to present evidence and enter pleas, and to take any action in his own defense. His testimony was taken in a secret hearing, and his attorney was not allowed to be present. No appeals were allowed. The petitioner alleged, inter alia, the violation of his rights under Article 8 of the Convention.]*

94. *Right to a natural judge and competent tribunal*

Article 8(1) of the Convention provides, among other rights and guarantees, that every person has the right to a hearing (...) by a competent (...) tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him. The Inter-American Court, on examining the natural judge issue, declared, *inter alia*, that “it is a basic principle relating to the independence of the judicature that every person has the right to be tried in the ordinary courts of justice in accordance with legally established procedures.”

95. The Commission observes in the record that the Supreme Court of Justice ordered on June 8, 1993, that the trial of the then-President of the Republic, Carlos Andrés Pérez, continue in conjunction with that of Reinaldo Figueredo Planchart, and “with the trial of those other persons who merited prosecution for the same acts, until final judgment is rendered.” The Supreme Court cited Article 215(1) of the Constitution as legal basis for making such a decision.

96. Article 215(1) of the Constitution of Venezuela states, to the letter, the following:

The Supreme Court of Justice has the power:

1. To declare whether or not there are grounds to try the President of the Republic, or whomsoever acts in his stead, and, in the event of the affirmative, to continue, subject to authorization from the Senate, to hear the case and to render final judgment thereon.

97. As can be observed, the constitutional provision, a norm of the highest rank, clearly establishes the procedure that the Supreme Court must follow in order to try the President of the Republic in a single-court proceeding ending with a final judgment. The Commission further finds that the Venezuelan Constitution leaves no void or legal loophole in respect of the procedure to follow when the defendant is a member of the Congress of the Republic, as Reinaldo Figueredo Planchart was. In the second clause of the same article (Article 215), the Constitution signals that the aforesaid court has the power:

**To declare whether or not there are grounds to try members of the Congress**, or of the Court itself, Ministers, the Attorney General, the Prosecutor General, or the Comptroller General of the Republic **and, in the event of the affirmative, to refer the record to the competent ordinary court, should the offence be a common one**, or, if the case concerns political crimes, to continue to hear the case and to render final judgment thereon, except as provided otherwise in Article 144 with respect to members of the Congress. (emphasis added).

98. Given that the crimes with which Reinaldo Figueredo Planchart was charged were common ones — generic misappropriating and embezzlement of funds — the Supreme Court, having decided that there were grounds to prosecute the accused, should have complied with the constitutional mandate and referred the record to the competent tribunal of the general jurisdiction — in this case, the Superior Tribunal for the Protection of Public Assets.

99. The Government itself confirmed the foregoing in its communication of January 23, 1996,

when it said, *inter alia*, that:

Had the Superior Tribunal for the Protection of Public Assets determined that the claimant in his dual capacity as a former cabinet minister and a parliamentarian was implicated in the unlawful acts under investigation, by law the aforementioned court had the opportunity to try him, once the preliminary hearing on merits had been conducted and, as applicable, once the claimant had been stripped of his parliamentary immunity (Article 144 of the Constitution and Article 87 of the Organic Law on Protection of Public Assets).

100. The Commission does not share the Government's view that the Superior Tribunal for the Protection of Public Assets "had the opportunity to try him" given that the constitutional mandate was very clear: the Supreme Court of Justice may only try in a single-court proceeding ending with a final judgment a person who acts in the capacity of President of the Republic, but not a member of congress or a parliamentarian. In the Commission's opinion, the Supreme Court of Justice encroached upon the jurisdiction that belonged to the Superior Tribunal for the Protection of Public Assets. Moreover, the latter should have acted as a court of first instance, so that the accused could appeal to a higher court if the decision was unfavorable to him. That was denied to him in practice by the Supreme Court, which tried him in a single-court proceeding that ended with the final judgment and conviction it issued on May 30, 1996.

101. In consequence, the Commission finds that the Venezuelan Government violated Reinaldo Figueredo Planchart's right to a hearing by a competent tribunal in the substantiation of a criminal accusation against him, recognized in Article 8(1) of the Convention.

....

137. *Right to an impartial tribunal [Article 8(1) of the Convention]*

Article 8(1) of the Convention provides that every person has the right to a hearing by an impartial tribunal. The scope of the term independent has been analyzed, developed and applied by international jurisprudence on human rights. The European Court of Human Rights, for instance, has developed abundant and coherent case law on this subject. Analysis of that practice permits one to surmise that certain structural and functional conditions must be satisfied, in order to determine a tribunal to be independent.

138. Impartiality supposes that the judge or tribunal does not have any preconceptions on the case *sub lite* and, in particular, that he or it does not assume the accused to be guilty. For the European Court of Human Rights the impartiality of the judge is composed of subjective and objective elements. The subjective impartiality of the judge is assumed in a given case until proved otherwise. His objective impartiality, for its part, requires that the court offer guarantees sufficient to exclude any legitimate doubt in respect of its impartiality in the proceeding. The European Court further adds that, "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. What is decisive is whether this fear can be regarded as objectively justified.” In sum, the aforesaid court concluded that, “justice must not only be done; it must also be seen to be done.”

139. Bearing these principles in mind, the Commission finds that the different stages of the proceedings in this case have been plagued by numerous irregularities that raise serious doubts about the independence and impartiality of the government organs tasked with trying the case of Reinaldo Figueredo Planchart. Following, the Commission lists and examines the irregularities committed:

a.- El Nacional newspaper of March 16, 1993, --pages A- 1 and D- 1-- reports on the investigations of Reinaldo Figueredo Planchart (hereinafter “RFP”) carried out by the Office of the Comptroller General of the Republic. It should be borne in mind that this government organ, on March 17, 1993, refused RFP a copy of the report with 12 annexes that it had drawn up. It should also be borne in mind that on the day after this press article, that is March 17, 1993, the Supreme Court of Justice admitted the criminal indictment filed by the Attorney General of the Republic against RFP.

b.- El Nacional newspaper of May 5, 1993 --page D-1-- and El Universal newspaper of May 6, 1993, published the proposed judgment of the Supreme Court of Justice citing the grounds for prosecuting RFP. It should be mentioned that RFP still did not have access to the record or the right to defense counsel and that on May 11, 1993, the Supreme Court denied access to a copy of the prosecutor’s indictment on the basis that that is applicable only “when it has been declared beforehand that there are grounds for prosecution.” It is also important to note that 15 days after this news was published by the press, that is, May 20, 1993, the Supreme Court declared that there were grounds for the prosecution of RFP.

c.- El Universal newspaper of April 15 and 30, 1994 published part of the text that contains the warrant for the arrest of RFP. It should be mentioned that RFP only had access to the record and, therefore, the right to be assisted by an attorney in his defense in the interrogatories, from June 22, 1994. It is important to underscore, furthermore, that the attorneys of RFP filed a petition with the Supreme Court of Justice denouncing the leak. The Supreme Court issued a warrant for the arrest of RFP on May 18, 1994, three weeks after the aforesaid leak.

d.- On February 16, 1995, Supreme Court Justice Rafael Alfonzo Guzmán gave statements to El Universal page 21--, making value judgments on the accused in this case and labeling them as offenders. These same statements appeared on Friday, February 17, 1995, in the 8:00 p.m. news program broadcast by Channel 10, which is owned by TELEVEN. The attorneys for RFP filed a request for recusation of said justice. However, the recusation was disallowed. It should be mentioned that this same justice was subsequently elected President of the Supreme Court, and that at the time of making his statements a conviction had not yet been issued.

e.- El Nacional newspaper of January 25, 1996, published an interview with the then-President of the Republic Rafael Caldera in which he considered that to grant a pardon the accused persons would be a failure to recognize the conviction that it behooves the Supreme Court of Justice to hand down. The Supreme Court had yet to pass judgment on the case.

f.- El Nacional newspaper of February 1, 1996, published statements made by the then-Prosecutor General of the Republic, Jesús Petit Da Costa, in which he regards the lodging of a petition with the IACHR as a method used by the accused to exert pressure on the Government.

g.- El Nacional newspaper of April 19, 1996, transcribed extracts from the proposed judgment convicting RFP. Two weeks later, on May 30, 1996, the Supreme Court of Justice issued its final judgment on the case, sentencing RFP to two years and four months imprisonment. It should be mentioned that the text of the judgment matched that published in the press.

140. In the opinion of the Commission, the leaks to the press by the organs in charge of administration of justice in Venezuela before the accused could exercise his right of defense gravely corrupt the proceeding and cast serious doubt on the impartiality of the judicial authorities. These facts, coupled with the statements made by a number of justices in which they prejudge or advance judgment, and refer to the accused as an offender prior to his conviction, demonstrate the bias of that judicial body toward one of the parties in the proceeding --in this case the Government-- and disqualifies it as an independent and impartial tribunal in accordance with the principles set forth by the American Convention.

....

143. The European Commission of Human Rights has stated that “the Government has the obligation to ensure that everyone subject to its jurisdiction and accused of a crime has a fair trial and not what is sometimes termed a trial by the press.” That Commission also declared that “a virulent press campaign can adversely affect the fairness of the proceeding and entail the responsibility of the Government, particularly when it is encouraged by one of the organs of the Government itself.”

144. Like the European Commission, the Inter-American Commission considers that biased publicity highlights even more starkly the absence of transparency and lack of procedural equality in the case *sub lite*, since the administrative authority, the prosecutor, the judges, and even the written and televised press had access to the record, while the interested party, who was harmed by his failure to receive a fair trial, did not. Furthermore, these indications, taken in conjunction, are more than sufficient for it legitimately to appear that the government organs entrusted with substantiating the accusation made against Reinaldo Figueredo Planchart lacked impartiality. Accordingly, Venezuela, as a state party to the Convention, failed to fulfill its positive duty to ensure for the accused the guarantees of due process of law to which he was

entitled. Therefore, it violated Article 8(1) of the above-cited international instrument.

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**Campbell and Fell v. United Kingdom**

80 Eur. Ct. H.R. (ser. A) (1984)

<<http://www.echr.coe.int>>

*[The petitioners were prisoners at the Albany Prison, Isle of Wight. The offenses of which they were convicted were allegedly connected to activities of the Irish Republican Army (IRA). In September 1976, the petitioners and four others engaged in a protest at the treatment of another prisoner by sitting down in a corridor and refusing to move. They were removed by prison officials after a struggle, and injuries were sustained by staff members and by both applicants. The prisoners involved were all charged with and found guilty by the Prison Board of Visitors of disciplinary offenses. Mr. Campbell refused to attend the hearings unless he was represented by counsel. Consequently, the Board found him guilty in his absence. Both petitioners sought permission to consult with their attorneys in connection with personal injury claims against prison officials. Their requests were denied on several occasions since the "prior ventilation rule" allowed prisoners to seek legal advice only after their complaints had been investigated internally. Written correspondence with their attorneys was also prohibited. When Father Fell was finally allowed to receive his attorneys, he was informed that the visit would have to take place within sight and hearing of an officer. Both applicants further alleged that they were denied permission to be examined by an independent doctor, and Father Fell complained that his personal correspondence was unduly restricted. Both applicants were eventually allowed to obtain legal advice, and in September 1979 they instituted proceedings, alleging assault against individual prison officers, the Deputy Governor and the Home Office. Before the European System, they alleged, inter alia, the violation of Article 6 of the Convention.]*

1. *Article 6 para. 1 (art. 6-1)*

76. Article 6 para. 1 (art. 6-1) of the Convention reads as follows . . . It was not disputed in the present case that a Board of Visitors, when carrying out its adjudicatory tasks, is a "tribunal established by law". It is, in fact, clear that the relevant English legislation confers on Boards a power of binding decision in the area in question and the dicta in the St. Germain case show that this is a judicial function (see paragraphs 38 and 39 above). Again, the word "tribunal" in Article 6 para. 1 (art. 6-1) is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country (see, mutatis mutandis, the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 23, para. 53).

(a) *“Independent” tribunal*

77. Mr. Campbell alleged that the Board of Visitors which heard his case was not an “independent” tribunal, within the meaning of Article 6 para. 1 (art. 6-1). He contended that Boards were mere “cyphers”, were not seen by prisoners to be independent and were, in practice, an arm of the executive: as regards many of their functions, they were under the control of the prison authorities and had to accept the Home Secretary’s directions. In particular, it was submitted that they were not independent in exercising their adjudicatory role.

The Commission, whilst recognising that Boards were under a legal obligation to act independently and impartially, stated that this was not of itself sufficient: to be truly “independent” the body concerned must be independent of the executive in its functions and as an institution, such independence ensuring, notably, that justice is seen to be done. In the Commission’s view, a Board did not possess the necessary institutional independence: firstly, its members were appointed for limited periods by the Home Secretary and did not appear to be irremovable; secondly, although a Board was not part of the administration, its other functions were such as to bring it into day to day contact with the officials of the prison in such a way as to identify it with the management of the prison.

This conclusion was contested by the Government. They maintained, inter alia, that a Board was not part of the management structure of the prison: it was independent of the prison administration locally and nationally and, in discharging its administrative role, did not act on behalf of the executive.

78. In determining whether a body can be considered to be “independent” - notably of the executive and of the parties to the case (see, inter alia, the *Le Compte, Van Leuven and De Meyere* judgment of 23 June 1981, Series A no. 43, p. 24, para. 55) -, the Court has had regard to the manner of appointment of its members and the duration of their term of office (ibid., pp. 24-25, para. 57), the existence of guarantees against outside pressures (see the *Piersack* judgment of 1 October 1982, Series A no. 53, p. 13, para. 27) and the question whether the body presents an appearance of independence (see the *Delcourt* judgment of 17 January 1970, Series A no. 11, p. 17, para. 31).

The factors which were relied on in the present case as indicative of the Board’s lack of “independence” will be considered in turn.

79. Members of Boards are appointed by the Home Secretary, who is himself responsible for the administration of prisons in England and Wales (see paragraphs 26 and 32 above).

The Court does not consider that this establishes that the members are not independent of the executive: to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not “independent”. Moreover, although it is true that the Home Office may issue Boards with

guidelines as to the performance of their functions (see paragraph 35 above), they are not subject to its instructions in their adjudicatory role.

80. Members of Boards hold office for a term of three years or such less period as the Home Secretary may appoint (see paragraph 32 above).

The term of office is admittedly relatively short but the Court notes that there is a very understandable reason: the members are unpaid (*ibid.*) and it might well prove difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period were longer.

The Court notes that the Rules contain neither any regulation governing the removal of members of a Board nor any guarantee for their irremovability.

Although it appears that the Home Secretary could require the resignation of a member, this would be done only in the most exceptional circumstances and the existence of this possibility cannot be regarded as threatening in any respect the independence of the members of a Board in the performance of their judicial function.

It is true that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 para. 1 (art. 6-1). However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present (see the above-mentioned Engel and Others judgment, Series A no. 22, pp. 27-28, para. 68).

81. There remains the question of the Board's independence having regard to the fact that it has both adjudicatory and supervisory roles (see paragraph 33 above).

In that latter role, a Board is, as the Government pointed out, intended to exercise an independent oversight of the administration of the prison. In the nature of things, supervision must involve a Board in frequent contacts with the prison officials and just as much with the inmates themselves; yet this in no way alters the fact that its function, even when discharging its administrative duties, is to "hold the ring" between the parties concerned, independently of both of them. The impression which prisoners may have that Boards are closely associated with the executive and the prison administration is a factor of greater weight, particularly bearing in mind the importance in the context of Article 6 (art. 6) of the maxim "justice must not only be done: it must also be seen to be done". However, the existence of such sentiments on the part of inmates, which is probably unavoidable in a custodial setting, is not sufficient to establish a lack of "independence". This requirement of Article 6 (art. 6) would not be satisfied if prisoners were reasonably entitled, on account of the frequent contacts between a Board and the authorities, to think that the former was dependent on the latter (see, *mutatis mutandis*, the above-mentioned Piersack judgment, Series A no. 53, p. 15, para. 30 in fine); however, the Court does not consider

that the mere fact of these contacts, which exist also with the prisoners themselves, could justify such an impression.

82. In the light of the foregoing, the Court sees no reason to conclude that the Board in question was not “independent”, within the meaning of Article 6 (art. 6).

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**Piersack v. Belgium**  
*53 Eur. Ct. H.R. (ser. A) (1982)*  
<<http://www.echr.coe.int>>

*[The applicant, a Belgian gunsmith, was convicted of murder in November 1978 and sentenced to eighteen years' hard labor. On February, 4 1977, Mr. Preuveneers, an investigating judge at the Brussels Court of First Instance, had written to the Brussels public prosecutor in regard to the case. On his cover note, the judge added in manuscript, the words "for the attention of Mr. P. Van de Walle." In December 1977, Mr. Van de Walle took his oath as a judge on the Brussels Court of Appeal. Most of the investigations in the applicant's case had been completed by that time. The applicant's trial took place in November 1978 before the Brabant Assize Court which was presided over by the same Mr. Van de Walle. The applicant appealed his conviction to the Court of Cassation, in part on the ground that there had been a violation of Article 27 of the Judicial Code, which provided that "proceedings before an assize court shall be null and void if they have been presided over by a judicial officer who has acted in the case as public prosecutor." The Court of Cassation dismissed the appeal, finding that the mere dispatch of the cover letter of February 4 1977 did not necessarily show that Mr. Van de Walle had "acted in the case as public prosecutor," and noting that it was not Van de Walle who had replied to that note. In his application to the Commission, Mr. Piersack alleged a violation of Article 6(1), as he had not received a hearing by "an independent and impartial tribunal established by law."]*

I. *THE ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1)*

26. Under Article 6 § 1 (art. 6-1) of the Convention,

“In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing ... by an independent and impartial tribunal established by law. ...”

....

## 2. “Impartial tribunal”

28. Mr. Van de Walle, the judge who presided over the Brabant Assize Court in the instant case, had previously served as a senior deputy to the Brussels procureur du Roi; until his appointment to the Court of Appeal, he was the head of section B of the Brussels public prosecutor’s department, this being the section dealing with indictable and non-indictable offences against the person and, therefore, the very section to which Mr. Piersack’s case was referred (see paragraphs 9-12, 14 and 19 above).

29. On the strength of this fact the applicant argued that his case had not been heard by an “impartial tribunal”: in his view, “if one has dealt with a matter as public prosecutor for a year and a half, one cannot but be prejudiced”.

According to the Government, at the relevant time it was the procureur du Roi himself, and not the senior deputy, Mr. Van de Walle, who handled cases involving an indictable offence; they maintained that each of the deputies - on this occasion, Mrs. del Carril and then Mr. De Nauw - reported to the procureur on such cases directly and not through Mr. Van de Walle, the latter’s role being principally an administrative one that was unconnected with the conduct of the prosecution and consisted, inter alia, of initialling numerous documents, such as the covering notes of 13 January and 20 June 1977 (see paragraphs 9, 11 and 19 above). As regards the covering note of 4 February 1977 (see paragraph 10 above), the investigating judge, Mr. Preuveneers, was said to have written thereon the words “for the attention of Mr. P. Van de Walle” solely because he knew that Mrs. del Carril was frequently on sick-leave. In addition, so the Government stated, there was no evidence to show that Mr. Van de Walle had received that note and, in any event, it was not he but Mrs. del Carril who had replied to Mr. Preuveneers.

30. Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (art. 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.

(a) As regards the first approach, the Court notes that the applicant is pleased to pay tribute to Mr. Van de Walle’s personal impartiality; it does not itself have any cause for doubt on this score and indeed personal impartiality is to be presumed until there is proof to the contrary (see the *Le Compte, Van Leuven and De Meyere* judgment of 23 June 1981, Series A no. 43, p. 25, § 58).

However, it is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance (see the *Delcourt* judgment of 17 January 1970, Series A no. 11, p. 17, § 31). As the Belgian Court of Cassation observed in its judgment of 21 February 1979 (see paragraph 17 above), any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the

courts must inspire in the public in a democratic society.

(b) It would be going too far to the opposite extreme to maintain that former judicial officers in the public prosecutor's department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never had to deal with the case themselves. So radical a solution, based on an inflexible and formalistic conception of the unity and indivisibility of the public prosecutor's department, would erect a virtually impenetrable barrier between that department and the bench. It would lead to an upheaval in the judicial system of several Contracting States where transfers from one of those offices to the other are a frequent occurrence. Above all, the mere fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that he lacks impartiality; the Court concurs with the Government on this point.

(c) The Belgian Court of Cassation, which took Article 6 § 1 (art. 6-1) into consideration of its own motion, adopted in this case a criterion based on the functions exercised, namely whether the judge had previously intervened "in the case in or on the occasion of the exercise of ... functions as a judicial officer in the public prosecutor's department". It dismissed Mr. Piersack's appeal on points of law because the documents before it did not, in its view, show that there had been any such intervention on the part of Mr. Van de Walle in the capacity of senior deputy to the Brussels procureur du Roi, even in some form other than the adoption of a personal standpoint or the taking of a specific step in the process of prosecution or investigation (see paragraph 17 above).

(d) Even when clarified in the manner just mentioned, a criterion of this kind does not fully meet the requirements of Article 6 § 1 (art. 6-1). In order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality.

31. This was what occurred in the present case. In November 1978, Mr. Van de Walle presided over the Brabant Assize Court before which the Indictments Chamber of the Brussels Court of Appeal had remitted the applicant for trial. In that capacity, he enjoyed during the hearings and the deliberations extensive powers to which, moreover, he was led to have recourse, for example the discretionary power conferred by Article 268 of the Judicial Code and the power of deciding, with the other judges, on the guilt of the accused should the jury arrive at a verdict of guilty by no more than a simple majority (see paragraphs 13-14 and 20-21 above).

Yet previously and until November 1977, Mr. Van de Walle had been the head of section B of the Brussels public prosecutor's department, which was responsible for the prosecution instituted against Mr. Piersack. As the hierarchical superior of the deputies in charge of the file, Mrs. del Carril and then Mr. De Nauw, he had been entitled to revise any written submissions by them to

the courts, to discuss with them the approach to be adopted in the case and to give them advice on points of law (see paragraph 19 above). Besides, the information obtained by the Commission and the Court (see paragraphs 9-11 above) tends to confirm that Mr. Van de Walle did in fact play a certain part in the proceedings.

Whether or not Mr. Piersack was, as the Government believe, unaware of all these facts at the relevant time is of little moment. Neither is it necessary to endeavour to gauge the precise extent of the role played by Mr. Van de Walle, by undertaking further enquiries in order to ascertain, for example, whether or not he received the covering note of 4 February 1977 himself and whether or not he discussed this particular case with Mrs. del Carril and Mr. De Nauw. It is sufficient to find that the impartiality of the “tribunal” which had to determine the merits (in the French text: “bien-fondé”) of the charge was capable of appearing open to doubt.

32. In this respect, the Court therefore concludes that there was a violation of Article 6 § 1 (art. 6-1).

### **Questions**

1. After reading the case law reproduced above, how would you articulate the test to determine whether the right to an “independent and impartial tribunal” has been ensured? Are “independence” and “impartiality” similar concepts? Explain.

2. Do you agree with the finding of the European Court in the *Campbell and Fell* case regarding “independence?” How would you distinguish that case from the *Castillo Petruzzi* case, where the Inter-American Court found that the military courts in Peru were not independent as required by Article 8(1) of the American Convention?

3. Do you consider that the Inter-American Court in *Castillo Petruzzi* held that in every case where a military court tries a civilian there is a violation of the right to a competent, impartial, and independent tribunal? If not, how would you articulate the test to distinguish cases where this jurisdiction should be permitted? Is the right to a competent, impartial, and independent tribunal derogable under Article 27 of the American Convention? How did the Court decide this issue in the *Castillo Petruzzi* case?

4. Do you consider that the rationale provided in *Castillo Petruzzi* to find a violation of the right to an independent and impartial tribunal can be used to find a similar violation in cases where military courts try military personnel? In which context could this issue arise? To reflect on this issue review the following excerpts from the *Third Report on the Human Rights Situation in Colombia* (footnotes omitted),<sup>28</sup> adopted by the Inter-American Commission on Human Rights:

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<sup>28</sup> Inter-Am. C.H.R., OEA/Ser.L/V/II.102, doc. 9 rev. 1, February 26, 1999 (1999).

17. The problem of impunity is aggravated by the fact that the majority of cases involving human rights violations by members of the State's public security forces are processed by the military justice system. The Commission has repeatedly condemned the military jurisdiction in Colombia and in other countries for failing to provide an effective and impartial judicial remedy for violations of Convention-based rights, thereby insuring impunity and a denial of justice in such cases. In Colombia specifically, the military courts have consistently failed to sanction members of the public security forces accused of committing human rights violations.

....

19. The problem of impunity in the military justice system is not tied only to the acquittal of defendants. Even before the final decision stage, the criminal investigations carried out in the military justice system impede access to an effective and impartial judicial remedy. When the military justice system conducts the investigation of a case, the possibility of an objective and independent investigation by judicial authorities which do not form part of the military hierarchy is precluded. Investigations into the conduct of members of the State's security forces carried out by other members of those same security forces generally serve to conceal the truth rather than to reveal it. Thus, when an investigation is initiated in the military justice system, a conviction will probably be impossible even if the case is later transferred to the civil justice system. The military authorities will probably not have gathered the necessary evidence in an effective and timely manner. In those cases which remain in the military justice system, the investigation will frequently be conducted in such a manner as to prevent the case from reaching the final decision stage.

20. The military criminal justice system has several unique characteristics which prevent access to an effective and impartial judicial remedy in this jurisdiction. First, the military justice system may not even be properly referred to as a true judicial forum. The military justice system does not form part of the judicial branch of the Colombian State. Rather, this jurisdiction is operated by the public security forces and, as such, falls within the executive branch. The decision-makers are not trained judges, and the Office of the Prosecutor General does not fulfill its accusatory role in the military justice system.

21. Second, the judges in the military justice system are generally members of the military in active service. The courts martial ("consejos verbales de guerra") are also generally composed of members in service. In 1995, the Constitutional Court interpreted the Constitution as allowing only retired, not active, military officers to serve on courts martial. The Court decided that these entities administered justice, even though they did not form part of the judicial branch. The constitutional principles requiring impartiality and objectivity in the administration of justice thus applied to their actions. The Court determined that these principles were compromised where members of the armed forces in active service served on the courts martial. . . .

22. The Commission believes that the reasoning set forth by the Constitutional Court explains one of the most serious problems inherent in the processing of human rights cases by the military justice system. Nonetheless, the Colombian legislature responded to

the Constitutional Court decision by modifying Article 221 of the Constitution to provide specifically that active military officials may serve on the courts martial.

23. Thus, currently, the commander of the respective division, brigade or battalion serves as the judge in first instance in cases brought against members of the public security forces in the military justice system. The commander carries out the activities of a first instance tribunal in conjunction with the officers which he names to participate in courts martial. The decision at the first instance level is then subject to appeal to the Superior Military Tribunal. The President of the Superior Military Tribunal is the general commander of the Military Forces.

24. This arrangement allows for military officials to serve as judges of first instance over incidents which occurred in operations that they ordered and directed, as commanders of the military unit involved. . . .

25. In addition, the proceeding takes place within the hierarchy of the security forces. The members of the courts martial respond hierarchically to their superiors in almost all aspects of their lives as soldiers or police officers. Pursuant to the norms governing the public security forces, they are bound to follow the orders of their superiors or face severe consequences. It is thus difficult, if not impossible, for these individuals to become independent and impartial judges free from the influence of their commanders or other superiors. As noted above, their commanders may also have ordered and directed the very operation which they are asked to analyze as members of a court martial. Their commanders may face responsibility if any irregularities are found. This situation may lead to pressure by commanders on the courts martial or outright orders designed to obtain a verdict absolving soldiers of all responsibility for any acts they allegedly committed in violation of human rights.

26. Also, throughout the proceedings in the military justice system, members of the military are engaged in judging the actions of their military colleagues, making impartiality difficult to achieve. Members of the military often feel bound to protect their colleagues who fight by their side in a difficult and dangerous context. This problem was raised by the Constitutional Court in its 1995 decision regarding the courts martial. Other Colombian State authorities have also noted that members of the State's security forces have "a deep-seated sense of esprit de corps" which is sometimes misinterpreted as requiring them to cover up or remain silent about crimes committed by fellow soldiers or police officers.

27. The Commission understands that certain crimes truly relating to military service and military discipline may be tried in military tribunals with full respect for judicial guarantees. Thus, the Colombian Constitution provides, in Article 221, that crimes committed by members of the armed forces "in active service, and related to that service" will fall under the jurisdiction of military tribunals. The Commission considers, however, that various state entities have interpreted excessively broadly the notion of crimes committed in relation to military service.

5. How would you define "tribunal" in the context of Articles 8(1) of the American Convention,

14(1) of the ICCPR, and 6(1) of the European Convention? Does it need to be a “court”? In this regard, compare the *Campbell and Fell* case with the *H. v. Belgium* case<sup>29</sup> where the Court stated that “a ‘tribunal’ is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner.”

According to well-established case law, in cases where the requirements of Article 6(1) are not met, the European Court will consider whether the decision challenged is subject “to subsequent control by a judiciary body that has full jurisdiction and ensures respect for the guarantees laid down in that provision . . . .,”<sup>30</sup> in which case it will find no violation of that Article.

5. How would you define the scope of “competent tribunal” as ensured by Articles 8(1) of the American Convention and 14(1) of the ICCPR? How would you argue for the finding of a similar violation under Article 6(1) of the European Convention given that this provision does not expressly protect the right to a “competent tribunal?” What about the scope of “established by law” under the three provisions of the human rights treaties mentioned above?

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<sup>29</sup> 127-B Eur. Ct. H.R. (ser. A) (1987), <<http://www.echr.coe.int>>.

<sup>30</sup> *Helle v. Finland*, Eur. Ct. H.R., Judgment of December 19, 1997, Reports 1997 VIII (1997), <<http://www.echr.coe.int>>.

## **B. DUE PROCESS GUARANTEES APPLICABLE IN CRIMINAL PROCEEDINGS**

### **Article 8(2), (3), (4) and (5) American Convention on Human Rights**

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- a. 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;
  - b. prior notification in detail to the accused of the charges against him;
  - c. adequate time and means for the preparation of his defense;
  - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
  - e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
  - f. the right of the defense 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;
  - g. the right not to be compelled to be a witness against himself or to plead guilty; and
  - h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

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### **Article 14(2), (3), (4), (5), (6), and (7) International Covenant on Civil and Political Rights**

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and 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;
- (e) 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;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. 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.

7. 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 6(2) and (3)**  
**European Convention for the Protection of Human Rights and Fundamental Freedoms**

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b. to have adequate time and facilities for the preparation of his defence;
  - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d. 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;
  - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

**Articles 2 and 4**  
**Protocol 7 to the European Convention**  
**for the Protection of Human Rights and Fundamental Freedoms**

Article 2

“1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right 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 the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

Article 4

“1. 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.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, 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.”

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## 1. THE RIGHT TO BE PRESUMED INNOCENT

**Raquel Martín de Mejía v. Perú**  
*Case 10.970, Inter-Am. C.H.R. 157,*  
*Annual Report 1995, OEA/Ser.L/V/II.91, doc. 7 rev. (1996)*  
*[For the facts of the case, see chapter III; footnotes omitted]*

Raquel Mejía has been tried for the alleged commission of the crime of terrorism under the provisions of Decree-Law No. 25.475 that establishes the penalty for the crimes of terrorism and the procedures for preliminary and full investigation and trial proceedings in respect of such crimes:

Article 13 of this Decree-Law, insofar as it concerns us, reads as follows:

The following rules shall be observed for the preliminary investigation and proceedings in respect of the crimes of terrorism to which this Decree-Law refers:

a. Once the charge has been filed by the Government Attorney’s office, the detainees shall be placed at the disposition of the Criminal Judge, who shall issue the order to open the investigation with warrant of arrest, within 24 hours, with adoption of the necessary security measures... Likewise, prior questions, prejudicial issues, exceptions and any other related matters are to be resolved in the judgment

d. Upon completion of the preliminary investigation the dossier shall be forwarded to the President of the respective court, who will forward the findings to the Chief Senior Prosecutor who, in his turn, shall assign the Senior Prosecutor who is to draw up the indictment...

e. Once the documents with the indictment are returned, the President of the Superior Court shall appoint the members of the Special Court to hear the case, who shall include the Judicial District members, on a rotating and secret basis, under liability.

h. In terrorism cases, no challenges will be permitted against the judges assigned or other justice officials.

On the basis of the above-cited article, once a petition has been filed the judge must order opening of proceedings and the arrest of the accused individual. In this way, a person is obligatorily brought before the court and even placed under arrest without establishing whether there is sufficient evidence of the existence of a crime and of the individual's guilt in the commission of it. The individual is further prevented from introducing a prior question, for example questioning the actual existence of the crime or asserting the absence of criminal liability on the part of the accused. According to Article 13, these exceptions will be resolved in the final judgment, i.e. after the hearing of the case has been completed. Upon completion of the preliminary investigation, the judge must forward the dossier to the Superior Court, even when there is no evidence of the accused's guilt; once the Senior Prosecutor has been appointed, he must draw up an indictment, without needing to establish whether there are grounds for proceeding with the case. As a result, application of this Decree-Law in practice can mean that an individual can be deprived of liberty or made subject to criminal proceedings even if at any stage in such proceedings it is established that there is not evidence of his guilt.

Article 8 of the American Convention sets the requirements to be met in the various stages of proceedings to be able to speak of true and appropriate judicial guarantees. The Inter-American Court of Human Rights has observed that:

[Article 8] recognizes the so-called "due legal process", which encompasses the conditions to be met in order to ensure adequate defense of those whose rights and obligations are under judicial consideration.

This Article includes different rights and guarantees flowing from a common juridical asset or good and which considered as a whole constitute a single right not specifically defined but whose unequivocal purpose is definitely to ensure the right of everyone to a fair trial.

In this connection, paragraphs 1 and 2 of Article 8 specify that . . . .

Impartiality presumes that the court or judge do not have preconceived opinions about the case sub judice and, in particular, do not presume the accused to be guilty. For the European Court, the impartiality of the judge is made up of subjective and objective elements. His subjective impartiality in the specific case is presumed as long as there is no evidence to the contrary. Objective impartiality, on the other hand, requires that the tribunal or judge **offer sufficient guarantees to remove any doubt** as to their impartiality in the case.

The principle of innocence constructs a presumption in favor of a person accused of an offense, according to which he is considered innocent as long as his criminal liability is established by a firm judgment. As a result, in order to establish the criminal liability of an accused person the State has to prove his guilt beyond all reasonable doubt.

The presumption of innocence is related, in the first place, to the spirit and attitude of the judge who has to investigate the criminal charge. He must approach the case without prejudices and

under no circumstances must he presume the accused guilty. On the contrary, his task is to construct an accused's criminal liability on the basis of assessment of the evidence on hand.

In this context, another elementary concept of criminal processal law, the objective of which is to preserve the principle of innocence, is the burden of proof. In criminal proceedings, the onus probandi does not lie with the accused; on the contrary, it is the State that has to demonstrate the accused's guilt. Modern doctrine accordingly maintains that "the accused does not need to prove his innocence, which has already been constructed by the presumption protecting him, but rather the accuser has to fully construct his position, leading to certainty that a punishable act was committed."

The essential thing is therefore that the judge who hears the case is free of any prejudice concerning the accused's guilt and affords him the benefit of the doubt, i.e. does not condemn him until he is certain or convinced of his criminal liability, so that all reasonable doubt that the accused might be innocent is removed.

The Inter-American Court of Human Rights has stated that:

There are many ways in which a State can violate... the Convention. In this latter case, it can do so . . . by enacting provisions that are inconsistent with the requirements of its obligations under the Convention.

Accordingly, when there is a law that is contrary to the Convention, according to the Court:

The Commission is competent, under... Articles 41 and 42 of the Convention, to qualify any domestic legislation of a State Party as in violation of the obligations said State Party has assumed in ratifying or acceding to it...

Therefore:

As a consequence of such qualification, the Commission can recommend to the State that it repeal or amend the legislation in question and for this purpose it is sufficient that said legislation has come to its knowledge by whatever means, whether or not it has been applied in a concrete case. This qualification and recommendation can be made by the Commission directly to the State (Article 41(b)) or in the reports referred to in Articles 49 and 50 of the Convention.

The Commission, based on the power granted it by Articles 41 and 42 of the Convention and in accordance with the interpretation of same by the Court, observes that Article 13 of Decree-Law 25.475 is incompatible with the obligations assumed by the Peruvian State on ratifying the Convention.

The fact is that, pursuant to Article 8 of the Convention, it has recognized the right of everyone accused of an offense to a fair trial. This right includes, inter alia, the right to be heard by an

impartial tribunal and to be presumed innocent until legally proved to be guilty.

For the Commission, Article 13 of Decree-Law 25.475, regardless of its application in a particular case, does not guarantee the right to a fair trial.

In the first place, it [reverses] the burden of proof and creates, in practice, a presumption of guilt that places on the accused the burden of proving his innocence. The decree in fact requires the investigating magistrate to institute criminal proceedings and arrest the accused on the basis of the existence of a petition alone and requires him to forward the case to the Superior Court, without ascertaining in either case whether there is sufficient evidence to warrant proceeding with it; it further prevents the accused from defending himself by recourse to prior questions, even ones that would apparently demonstrate that he is not guilty or that no offense was committed and, finally it generates an obligation for the Senior Prosecutor to indict the accused, even when there is not sufficient evidence for such a step.

Secondly, Article 13 does not guarantee the impartiality of the court. In establishing the legal obligation to open proceedings and indict, the decree places the tribunal in the position of considering the accused guilty, even before assessing the evidence at hand.

The Commission accordingly observes that Article 13 of Decree-Law 25.475, by omitting to guarantee free and full exercise of the right to a fair trial contained in Article 8 of the Convention is incompatible with the obligation set forth in Article 1(1) of same.

In the case of Raquel Mejía, the application of this law in the proceedings constitutes, in the Commission's opinion, a violation of her right to be heard by an impartial tribunal and to be presumed innocent. The fact is that, as is evident from the evidence produced, once she was accused of alleged commission of the crime of terrorism, the examining magistrate opened the case and issued a warrant for her arrest. Once the preliminary investigation was completed, he forwarded the dossier to the Lima Provincial Prosecutor who, despite stating that, Raquel Mejía "...the indications that would warrant formulation of the indictment have not been proven to date, which means that her participation in the events investigated cannot be established for the moment..." forwarded the case to the Superior Court. That Court proceeded to appoint the Supreme Prosecutor who, in compliance with the provisions of Article 13 of Decree-Law 25.475, charged Raquel Mejía with the crime of terrorism and asked for the penalty of 20 years imprisonment, without even considering whether there was any evidence of the criminal liability.

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**Minelli v. Switzerland**

*[The applicant, a Swiss journalist, published an article in January 1972 containing accusations of fraud against a company, Télé-Répertoire S.A., and its director, Mr. Vass. The facts recounted by the applicant had already been the subject of an article by another journalist, Mr. Fust. Télé-Répertoire S.A. and Mr. Vass brought a criminal complaint of defamation against both journalists. Mr. Fust was fined and ordered to pay court costs, together with compensation to each of the private prosecutors for their expenses. On May 12 1976, the Zürich Assize Court decided that it could not hear the complaint against the applicant because the four-year statute of limitations had expired. It directed the applicant to pay two-thirds of the costs of the investigation and trial and compensation in respect of the private prosecutors' expenses. The court had determined that, based on the outcome of the Fust case, the applicant would probably have been convicted of defamation if the proceedings had not been terminated on account of the statute of limitation. In his application to the Commission, Mr. Minelli alleged that the decision of the Zürich Assize Court amounted to "a punishment on suspicion" and thus violated Article 6(2) of the Convention.]*

## II. COMPLIANCE WITH ARTICLE 6 § 2 (art. 6-2)

### A. Limits of the Court's task

34. The applicant and the Government agreed that the case raised a question of principle: is it consonant with the presumption of innocence to direct that a person shall pay court costs and compensation in respect of expenses where he has been acquitted or where the case has been discontinued, discharged or, as here, terminated on account of limitation?

As the Government emphasised by way of alternative plea, the system which permits the adoption of such a solution in certain cases is deeply rooted in Swiss legal tradition: it is enshrined in Federal legislation and in that of most Cantons, including the Canton of Zürich, and has been developed by case-law and practice. According to Mr. Minelli, on the other hand, it is the State which should bear all the risks of criminal proceedings, not only as regards evidence but also as regards costs.

In the Commission's view, the system in question could not of itself run counter to Article 6 § 2 (art. 6-2) of the Convention; however, a problem arose if the reasons for the court's decision or some other precise and conclusive evidence showed that the apportionment of costs resulted from an appraisal of the guilt of the accused.

35. The Court in principle concurs with the Commission. However, it would point out, in conformity with its established jurisprudence, that in proceedings originating in an individual

application, it has to confine itself, as far as possible, to an examination of the concrete case before it (see, inter alia, the above-mentioned Adolf judgment, Series A no. 49, p. 17, § 36). Accordingly, it has to give a ruling not on the Zürich legislation and practice in abstracto but solely on the manner in which they were applied to the applicant.

*B. The decision of the Chamber of the Canton of Zürich Assize Court (12 May 1976)*

36. According to the Government, the decision of 12 May 1976 took account of the applicant's conduct, amongst other factors, only "as a pure hypothesis" for the purpose of apportioning costs: it did no more than endeavour to estimate the prospects of success of the complaint filed by Télé-Répertoire S.A. and Mr. Vass in the event of judgment on the merits. In these circumstances, so the Government submitted, there had been no violation of Article 6 § 2 (art. 6-2).

The Commission, for its part, expressed the contrary opinion: in its view, the Chamber of the Canton of Zürich Assize Court had considered that Mr. Minelli was guilty.

37. In the Court's judgment, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty. The Court has to ascertain whether this was the case on 12 May 1976.

38. The Chamber of the Assize Court based its decision on Article 293 of the Zürich Code of Criminal Procedure, which, in the case of a private prosecution for defamation, permits a departure, in special circumstances, from the rule that the losing party is to bear the court costs and pay compensation to the other party in respect of his expenses (see paragraph 19 above). In the light of Zürich case-law, it found that in the present case "the incidence of the costs and expenses should depend on the judgment that would have been delivered" had the statutory period of limitation not expired. To decide this point, it had regard to four matters (see paragraph 13 above): the fact that the case was virtually identical to that of the journalist Fust, which had resulted on 2 September 1975 in a conviction (see paragraph 10 above); the seriousness of the applicant's accusations against Mr. Vass; the applicant's failure to verify his allegations; and the negative outcome of the 1972 prosecution of Mr. Vass (see paragraph 9 above).

For these reasons, which were set out at length and cannot be dissociated from the operative provisions (see the above-mentioned Adolf judgment, Series A no. 49, p. 18, § 39), the Chamber of the Assize Court concluded that, in the absence of limitation, the "National Zeitung" article complained of would "very probably have led to the conviction" of the applicant. In setting out those reasons, the Chamber treated the conduct denounced by the private prosecutors as having been proved; furthermore, the reasons were based on decisions taken in two other cases to which,

although they concerned the same facts, Mr. Minelli had not been a party and which, in law, were distinct from his case.

In this way the Chamber of the Assize Court showed that it was satisfied of the guilt of Mr. Minelli, an accused who, as the Government acknowledged, had not had the benefit of the guarantees contained in paragraphs 1 and 3 of Article 6 (art. 6-1, art. 6-3). Notwithstanding the absence of a formal finding and despite the use of certain cautious phraseology (“in all probability”, “very probably”), the Chamber proceeded to make appraisals that were incompatible with respect for the presumption of innocence.

*C. The Federal Court's judgment (16 May 1979)*

39. The Government put forward a final argument, which was based on Article 26 (art. 26) of the Convention, to the effect that before the Strasbourg institutions they were answerable solely for the last judicial decision rendered in the present case, namely the Federal Court's judgment of 16 May 1979; they claimed that that judgment had removed any ambiguity that might be contained in the decision of 12 May 1976.

40. The 1976 decision certainly has to be read in the light of the 1979 judgment (see the above-mentioned Adolf judgment, *ibid.*, p. 19, § 40). The Federal Court noted, in the first place, that reasons of equity might necessitate the taking into account, in the decision on costs, of the probable result of the prosecution had there not been limitation; it deduced from this that it was justified to consider, after a provisional examination of the merits of the case, which party would probably have been successful in the absence of this procedural obstacle. It added that the Chamber of the Canton of Zürich Assize Court had taken no measure implicitly amounting to a judicial finding of a criminal offence, equivalent to a conviction; the Chamber had indeed observed that the applicant should probably have been found guilty of defamation, but that was a mere estimation and not a formal finding (see paragraph 16 above).

The judgment of 16 May 1979 thus added certain nuances to the decision of 12 May 1976; however, it was confined to clarifying the reasons for that decision, without altering their meaning or scope. By rejecting Mr. Minelli's appeal, the judgment confirmed the decision in law; at the same time, it approved the substance of the decision on the essential points.

The Federal Court might perhaps have arrived at a different decision had the applicant invoked before that court his right to be heard (see paragraph 16 above), as he subsequently did - without the Government pleading a failure to exhaust domestic remedies - before the Commission and the Court. However, this possibility in no way affects the conclusion that follows from an examination of the decision of 12 May 1976, even if it is seen in conjunction with the judgment of 16 May 1979.

*D. Conclusion*

41. Accordingly, there has been a violation of Article 6 § 2 (art. 6-2).

### **Questions**

1. If you had to formulate a test to determine whether the presumption of innocence, as protected by human rights treaties, has been violated, what elements would you take into account? Assuming that your test includes several elements, could you argue that the right to be presumed innocent was violated if only one of the elements was not respected?

2. Do you consider that the right to an “impartial tribunal” and the right to be presumed innocent are always related in the sense that a violation of the first necessarily implies a violation of the second right?

3. How do you balance the need to scrutinize facts and evidence to determine whether the right to be presumed innocent has been respected in a particular case with the principle according to which international supervisory bodies play a subsidiary role to the findings of domestic courts?

4. Do you find any difference in the approaches followed by the Inter-American Commission and the European Court in the cases that you read in regard to the compatibility of domestic legislation with the American and European Conventions respectively? Is it permissible under international human rights law to rule on the compatibility of domestic laws *in abstracto*?

5. How would you articulate the holding of the European Court in the *Minelli* case? Should this precedent be applicable to every case where the defendant has been acquitted? What about those cases where the defendant has not been acquitted, but the proceedings have been discontinued without a final decision on the guilt of the accused for lack of evidence, statutory limitation, or death of the accused?

In European human rights case law, the right to be presumed innocent has been raised in the context of proceedings for compensation for lawful detention on remand or for reimbursement of costs and expenses when the accused is acquitted or the proceedings are discontinued. Those proceedings have been considered to be a sequel to criminal proceedings and, therefore, the European Court has found that the right to be presumed innocent may be invoked in that context. It is important to note that neither Article 6(2) of the European Convention nor any other provision of that treaty “gives a person ‘charged with a criminal offence’ the right to reimbursement of his costs or a right to compensation for lawful detention on remand” where proceedings against him or her are discontinued or where he or she is acquitted. However, some European countries ensure those rights in their domestic legislation.

In cases where the defendant is acquitted, the Court has consistently ruled that voicing suspicions regarding the accused’s innocence in subsequent proceedings for compensation or reimbursement is incompatible with the right to be presumed innocent. In *Asan Rushiti v.*

*Austria*,<sup>1</sup> the petitioner was detained on remand on charges of attempted murder for which he was ultimately acquitted. He filed a compensation claim relating to his detention on remand on the basis of Austrian domestic law. The Austrian Compensation Act establishes that the right to compensation arises, *inter alia*, where the person accused of a crime has been placed in detention on remand and is subsequently acquitted and the suspicion that he or she committed the offense has been dispelled. Domestic courts rejected his claim alleging that the acquittal had not dispelled the suspicions that the petitioner had committed the crime because the jury had reached its decision for lack of evidence to convict. The European Court found a violation of Article 6(2) stating that “the voicing of suspicions regarding an accused’s innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in the decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final.” With respect to other cases where proceedings are discontinued for reasons other than an acquittal (statutory limitation, death of the defendant), the Court does not necessarily find violations of the presumption of innocence when domestic courts deny compensation or reimbursement of costs and expenses on the basis that suspicions against the defendant have not been dispelled.

In *Nölkenbockhoof v. Germany*,<sup>2</sup> for example, after the defendant’s death without a final conviction, his wife requested indemnification for the time he spent on remand and sought an order that the State should bear the costs and expenses incurred in the criminal proceedings. The defendant had been convicted on several charges of breach of trust, criminal bankruptcy and fraud, and his appeal against that conviction was pending when he died. German legislation provided that the State should bear the costs of the proceedings if the defendant were acquitted, the committal for trial were refused or the proceedings were discontinued. Moreover, it also established that persons who have suffered prejudice for being detained on remand could request indemnification by the State in case of acquittal or discontinuation of proceedings. In both circumstances, the law permitted the courts to decide the matter on an equitable basis and to use a certain margin of discretion. The defendant wife’s requests for compensation and reimbursement were denied by the German courts on the basis that, were it not for his death, the defendant’s conviction would have almost certainly been upheld since he was convicted in first instance, his co-defendants were also convicted, and his appeal did not provide any reasons to support the overturning of the conviction. The European Court stated that the decisions of the domestic courts reflected a “state of suspicion” and not a finding of guilt; therefore, it found no violation of the right to be presumed innocent as protected by Article 6(2) of the European Convention.

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<sup>1</sup> Eur. Ct. H.R., Judgment of March 21, 2000 (2000), <<http://www.echr.coe.int>>.

<sup>2</sup> 123 Eur. Ct. H.R. (ser. A) (1987), <<http://www.echr.coe.int>>.

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**2. THE RIGHT TO HAVE THE FREE ASSISTANCE OF AN INTERPRETER IF THE ACCUSED CANNOT UNDERSTAND OR SPEAK THE LANGUAGE OF THE COURT**

**Luedicke, Belkacem and Knoç v. Germany**

29 Eur. Ct. H.R. (ser. A) (1978)

<<http://www.echr.coe.int>>

*[The applicants, nationals of the UK, Algeria and Turkey, respectively, were residents of West Germany at the time they submitted their petitions to the European System. The three applicants were charged before the German courts with the commission of various criminal offenses. Since they were not sufficiently familiar with the German language, they were assisted by an interpreter in accordance with German law. After conviction, they were ordered, among other things, to pay the costs of the proceedings, including the interpretation costs. They consider that the inclusion of this latter item is contrary to, inter alia, Article 6(3)(e) of the European Convention.]*

*II. On the alleged violation of Article 6 para. 3(e) (art. 6-3-e)*

38. In the applicants' submission, the obligation to pay the interpretation costs, as imposed on them by the Bielefeld and Berlin Regional Courts and Cologne Court of Appeal, is in breach of Article 6 para. 3(e) (art. 6-3-e) of the [European] Convention . . . .

In its report, the Commission expressed the unanimous opinion that the decisions challenged by the applicants were in breach of Article 6 para. 3(e) (art. 6-3-e). The Commission takes this provision to mean that every accused person who "cannot understand or speak the language used in court" must be granted the free assistance of an interpreter and may not have payment of the resulting costs subsequently claimed back from him.

The Government contest the correctness of this opinion. They submit that while Article 6 para. 3(e) (art. 6-3-e) exempts the accused from paying in advance for the expenses incurred by using an interpreter, it does not prevent him from being made to bear such expenses once he has been convicted.

39. For the purposes of interpreting Article 6 para. 3 (e) (art. 6-3-e), the Court will be guided, as also were the Government and the Commission, by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties (see the Golder judgment of 21 February 1975, Series A no. 18, p. 14, para. 29). In order to decide the issue arising in the present proceedings, the Court

will therefore seek to ascertain “the ordinary meaning to be given to the terms” of Article 6 para. 3(e) (art. 6-3-e) “in their context and in the light of its object and purpose” (Article 31 para. 1 of the Vienna Convention).

40. The Court finds, as did the Commission, that the terms “gratuitement”/ “free” in Article 6 para. 3(e) (art. 6-3-e) have in themselves a clear and determinate meaning. In French, “gratuitement” signifies “d’une manière gratuite, qu’on donne pour rien, sans rétribution” (Littré, Dictionnaire de la langue française), “dont on jouit sans payer” (Hatzfeld et Darmesteter, Dictionnaire général de la langue française), “à titre gratuit, sans avoir rien à payer”, the opposite of “à titre onéreux” (Larousse, Dictionnaire de la langue française), “d’une manière gratuite; sans rétribution, sans contrepartie” (Robert, Dictionnaire alphabétique et analogique de la langue française). Similarly, in English, “free” means “without payment, gratuitous” (Shorter Oxford Dictionary), “not costing or charging anything, given or furnished without cost or payment” (Webster’s Third New International Dictionary).

Consequently, the Court cannot but attribute to the terms “gratuitement” and “free” the unqualified meaning they ordinarily have in both of the Court’s official languages: these terms denote neither a conditional remission, nor a temporary exemption, nor a suspension, but a once and for all exemption or exoneration. It nevertheless remains to be determined whether, as the Government contend, the context as well as the object and purpose of the provision in issue negate the literal interpretation.

41. According to the Government, all the rights enumerated in Article 6 para. 3 (art. 6-3) are concerned with criminal proceedings and become devoid of substance once those proceedings, the fair conduct of which they are to guarantee, have been terminated by a final and binding judgment. The Government submitted that what are involved are certain minimum rights which - in specifying the content of the right to a fair trial as enshrined in Article 6 para. 1 (art. 6-1) - are granted only to an accused (“everyone charged with a criminal offence”, “tout accusé”). The Government likewise place reliance on the presumption of innocence, which is enunciated in Article 6 para. 2 (art. 6-2) and which is rebutted on the final and binding conviction of the accused. Their reasoning is that the various guarantees of a fair trial, because they are intended to enable the accused to preserve the presumption of innocence, lapse at the same time as that presumption. In the Government’s submission, the costs of the proceedings constitute a consequence of the conviction and accordingly fall entirely outside the ambit of Article 6 (art. 6).

42. The Court notes that, for the purpose of ensuring a fair trial, paragraph 3 of Article 6 (art. 6-3) enumerates certain rights (“minimum rights”/ “notamment”) accorded to the accused (a person “charged with a criminal offence”). Nonetheless, it does not thereby follow, as far as sub-paragraph (e) is concerned, that the accused person may be required to pay the interpretation costs once he has been convicted. To read Article 6 para. 3(e) (art. 6-3-e) as allowing the domestic courts to make a convicted person bear these costs would amount to limiting in time the benefit of the Article and in practice, as was rightly emphasised by the Delegates of the Commission, to denying that benefit to any accused person who is eventually convicted. Such an

interpretation would deprive Article 6 para. 3(e) (art. 6-3-e) of much of its effect, for it would leave in existence the disadvantages that an accused who does not understand or speak the language used in court suffers as compared with an accused who is familiar with that language - these being the disadvantages that Article 6 para. 3(e) (art. 6-3-e) is specifically designed to attenuate.

Furthermore, it cannot be excluded that the obligation for a convicted person to pay interpretation costs may have repercussions on the exercise of his right to a fair trial as safeguarded by Article 6 (art. 6) (see the Golder judgment of 21 February 1975, Series A no. 18, p 18, para. 36), even if, as in the Federal Republic of Germany, an interpreter is appointed as a matter of course to assist every accused person who is not conversant with the language of the court. Making such an appointment admittedly eliminates in principle the serious drawbacks that would arise were an accused to defend himself in person in a language he did not master or fully master rather than incurring additional costs. Nevertheless, as was pointed out by the Delegates of the Commission, the risk remains that in some borderline cases the appointment or not of an interpreter might depend on the attitude taken by the accused, which might in turn be influenced by the fear of financial consequences.

Hence, it would run counter not only to the ordinary meaning of the terms “free”/ “gratuitement” but also to the object and purpose of Article 6 (art. 6), and in particular of paragraph 3(e) (art. 6-3-e) thereof, 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 (art. 6) seeks to safeguard would itself be adversely affected.

43. The Government derive from other sub-paragraphs of Article 6 para. 3 (art. 6-3) certain further arguments which, they contend, support their case.

They rely on sub-paragraph (c) (art. 6-3-c) which grants to everyone charged with a criminal offence the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”. The Government likewise invoke sub-paragraph (d) (art. 6-3-d), according to which every accused has the right “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”.

The Government maintain that the words “free”/ “gratuitement” employed in the two sub-paragraphs (c) and (e) (art. 6-3-c, art. 6-3-e) must have the same meaning in both provisions. In their submission, there is nothing to justify saying that in sub-paragraph (c) (art. 6-3-c) these words permanently exempt the accused, subsequent to his conviction, from having to pay for legal assistance given in the circumstances specified in that sub-paragraph.

Furthermore, for the Government, the three sub-paragraphs (c), (d) and (e) of Article 6 para. 3

(art. 6-3-c, art. 6-3-d, art. 6-3-e) are distinguishable from the two preceding sub-paragraphs by reason of the fact that financial consequences are entailed in the exercise of the rights they set forth; it would be wrong to suppose, the Government argue, that the Convention should have established an arbitrary difference between the financial implications of each of the said rights by granting the accused once and for all exemption from payment of interpretation costs.

44. The Court does not accept this argument. The Court is not called on in the current proceedings to interpret sub-paragraphs (c) and (d) of Article 6 para. 3 (art. 6-3-c, art. 6-3-d), which are not concerned with the same situation as sub-paragraph (e) (art. 6-3-e). Accordingly, the Court does not intend to establish whether and for which reasons and under what conditions the expenses associated with these provisions may be awarded against or left to be borne by the accused after his conviction.

The Court restricts itself to the following remark: whatever the doubts that might be prompted by the interpretation of sub-paragraphs (c) and (d) (art. 6-3-c, art. 6-3-d), such doubts cannot be relied on in opposition to the clear meaning of the adjective “free” in sub-paragraph (e) (art. 6-3-e).

45. The Government assert in the last place that it would not be logical to exempt a convicted person from payment of the interpretation costs incurred during the trial and not from payment of any costs necessitated by the interpretation of the information referred to in sub-paragraph (a) (art. 6-3-a), according to which “everyone charged with a criminal offence has the (right) ... to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”.

This argument really rests on the supposition that the right to the free assistance of an interpreter, as guaranteed by sub-paragraph (e) of paragraph 3 (art. 6-3-e), covers only the costs resulting from the interpretation at the trial hearing. However, it does not at first sight appear excluded that Article 6 para. 3(e) (art. 6-3-e) applies also to the costs incurred by the interpretation of the accusation mentioned in sub-paragraph (a) (art. 6-3-a), as well as to the costs incurred by the interpretation of the reasons for arrest and of any charge brought - matters of which everyone who is arrested must, under Article 5 para. 2 (art. 5-2), be informed “in a language which he understands”. The Court will return to this issue (at paragraphs 48 and 49 below) when determining whether the right stated in Article 6 para. 3(e) (art. 6-3-e) extends to the costs that the German courts awarded against the applicants.

46. The Court thus finds that the ordinary meaning of the terms “gratuitement” and “free” in Article 6 para. 3(e) (art. 6-3-e) is not contradicted by the context of the sub-paragraph and is confirmed by the object and purpose of Article 6 (art. 6). The Court concludes that the right protected by Article 6 para. 3(e) (art. 6-3-e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred.

47. It remains to be determined if and to what extent the contested decisions of the German courts are compatible with Article 6 para. 3(e) (art. 6-3-e) so interpreted.

48. Before the Court a difference of opinion emerged between the Government and the Commission as to which costs come within the scope of Article 6 para. 3(e) (art. 6-3-e). In the Government's submission, Article 6 para. 3(e) (art. 6-3-e) "unambiguously and expressly settles the assistance of an interpreter at the oral hearing (audience)" but does not apply to other interpretation costs.

The Government's contention, the correctness of which is contested by the Delegates, cannot be accepted by the Court. Article 6 para. 3(e) (art. 6-3-e) does not state that every accused person has the right to receive the free assistance of an interpreter at the oral hearing (à l'audience); it states that this right is accorded to him "if he cannot understand or speak the language used in court" ("s'il ne comprend pas ou ne parle pas la langue employée à l'audience"). As was pointed out by the Delegates, the latter words do no more than indicate the conditions for the granting of the free assistance of an interpreter. Furthermore, the English text "used in court", being wider than the French expression "employée à l'audience" (literally translated as "used at the hearing"), furnishes an additional argument in this respect.

Construed in the context of the right to a fair trial guaranteed by Article 6, paragraph 3(e) (art. 6-3-e) 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.

49. In this connection, certain differences exist between the three cases.

Mr. Luedicke had to pay DM 225.40 by way of interpretation costs, including DM 154.60 in respect of the oral hearing (see paragraph 16 above). The representatives appearing before the Court did not provide any details as to the nature of the remaining balance; accordingly, the Court cannot conclude that this balance falls outside the scope of the guarantee in Article 6 para. 3(e) (art. 6-3-e).

As regards Mr. Koç, the interpretation costs are exclusively attributed to three hearings before the Assize Court attached to the Aachen Regional Court and amount respectively to DM 311.50 and DM 510.50 and DM 112.50 (see paragraph 27 above). Therefore, these costs indisputably come within the ambit of Article 6 para. 3(e) (art. 6-3-e).

The interpretation costs awarded against Mr. Belkacem result from four distinct procedural steps, namely, the accused's appearance before the judge (DM 33.25), the review of his detention on remand (DM 67.60), the translation of the indictment (DM 90.20) and the trial hearing (DM 130.90) (see paragraph 22 above). In the Court's opinion, Article 6 para. 3(e) (art. 6-3-e) covers all these costs.

50. Accordingly, the Court concludes that the contested decisions of the German courts were in breach of Article 6 para. 3(e) (art. 6-3-e) of the Convention.

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**Herve Barzhig v. France**

*Communication 327/1988, A/46/40, April 11, 1991 (1991)*

*<<http://sim.law.uu.nl>>*

*[The applicant, a French citizen and resident of Rennes, Bretagne, France, appeared before the Tribunal Correctionnel of Rennes on charges of having defaced 21 road signs on August 7, 1987. He requested permission to express himself in Breton, his mother tongue, and asked for an interpreter. The Court rejected the request, and the applicant appealed. The appeal was dismissed and the case was considered on its merits; the applicant was heard in French. He was given a suspended sentence of four months imprisonment and fined 5,000 French francs. The Department of Criminal Prosecutions appealed the decision. The Court of Appeal of Rennes confirmed the judgment of the lower court. On appeal, the applicant was again heard in French. He claims that as a matter of principle, French courts refuse to provide the services of interpreters to Breton-speaking defendants on the ground that they are deemed to be proficient in French. Nevertheless, the applicant considers the refusal of the services of an interpreter to be a violation of Article 14(3)(f) of the International Covenant on Civil and Political Rights.]*

5.5 The Committee has noted the author's claim that the denial of an interpreter for himself and for a witness willing to testify on his behalf constituted a violation of article 14 of the Covenant. The Committee observes, as it has done on previous occasions, [Footnote: See communication No. 273/1988 (B.d.B. v. The Netherlands) inadmissibility decision of 30 March 1989, para. 6.4] that article 14 is concerned with procedural equality; it enshrines, inter alia, the principle of equality of arms in criminal proceedings. The provision for the use of one official court language by States parties to the Covenant does not violate article 14 of the Covenant. Nor does the requirement of a fair hearing obligate States parties to make available to a person whose mother tongue differs from the official court language, the services of an interpreter, if that person is capable of understanding and expressing himself or herself adequately in the official language. Only if the accused or the witnesses have difficulties in understanding, or in expressing themselves in the court language, is it obligatory that the services of an interpreter be made available.

5.6 On the basis of the information before it, the Committee considers that the French courts complied with their obligations under article 14. The author has failed to show that he and the witness called on his behalf were unable to understand and to express themselves adequately in French before the tribunal. In this context, the Committee notes that the notion of a fair trial in

article 14, paragraph 1, juncto paragraph 3(f), does not imply that the accused be afforded the opportunity to express himself or herself in the language that he or she normally speaks or speaks with a maximum of ease. If the court is certain, as it follows from the decision of the Tribunal Correctionnel of Rennes, that the accused is sufficiently proficient in the court language, it need not take into account whether it would be preferable for the accused to express himself in a language other than the court language.

5.7 French law does not, as such, give everyone a right to speak his or her own language in court. Those unable to understand or speak French are provided with the services of an interpreter, pursuant to article 407 of the Code of Penal Procedure. This service would have been available to the author, had the facts required it; as the facts did not, he suffered no discrimination under article 26 on the ground of language.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as submitted do not disclose a violation of any of the provisions of the Covenant.

....

### **Questions**

1. Do you consider that the duty to provide free interpretation is applicable in every case where the accused does not understand the language of the court, or only when the defendant does not have the means to pay for those services?
2. Does the right to free interpretation extend only to the oral hearings in a trial? How does it relate to the right “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him,” protected by Articles 8(2)(b) of the American Convention, 14(3)(a) of the ICCPR, and 6(3)(a) of the European Convention?
3. Is the duty of the State to provide free interpretation met when the authorities appoint an interpreter, or does it also encompass the obligation to provide “free effective and adequate interpretation?”

The European Court of Human Rights addressed the issues mentioned in questions 2 and 3 in the *Kamasinski v. Austria* case.<sup>3</sup> The petitioner, a U.S. citizen, was charged in Austria on suspicion of fraud and misappropriation and was remanded in custody. He was convicted and sentenced to eighteen months in prison, after which he was deported to the U.S. In his petition before the

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<sup>3</sup> 168 Eur. Ct. H.R. (ser. A) (1989), <<http://www.echr.coe.int>>.

European System, he argued, *inter alia*, a violation of his right protected in Article 6(3)(e) of the European Convention on the basis that: (1) Austrian law providing for court certification of interpreters was excessively vague and did not prescribe a reasonable standard of proficiency ensuring effective assistance of an interpreter; (2) there was a lack of written translation of official documents at the different stages of the procedure; and (3) several bills for interpretation charges had been served on him. The European Court, reaffirming the ruling in *Luedicke et al.*, stated:

[P]aragraph 3(e) (art. 6-3-e) does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.

In view of the need for the right guaranteed by paragraph 3(e) (art. 6-3-e) to be practical and effective, the obligation of the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided  
....

4. Who decides whether the defendant needs to have an interpreter appointed because he or she does not understand, or speak sufficiently well, the language of the court? The court itself? The defendant's lawyer?
5. Do you believe that the right to free interpretation is protected if a court only appoints a public defender who understands the language of the accused and can translate or interpret for him or her? If in principle your answer is negative, analyze whether or not the right to free interpretation is absolute.
6. In the three conventions under analysis, the right to free interpretation is ensured in the context of criminal proceedings. Do you consider that this right should also be ensured in civil or administrative proceedings? Provide the legal arguments to support your position.

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3. **THE RIGHT TO HAVE ADEQUATE TIME AND MEANS FOR THE PREPARATION OF THE DEFENSE**

**Castillo Petruzzi v. Peru**  
*Inter-Am. Ct. H.R., Judgment of May 30, 1999 (ser. C) No. 52 (1999)*  
*[For the facts of the case, see chapter IV; footnotes omitted]*

135. Article 8(2)(b) and 8(2)(c) of the Convention provide that:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]

b) prior notification in detail to the accused of the charges against him;

c) adequate time and means for the preparation of his defense;

[...]

136. Arguments of the Commission:

.....

c) under Decree-Law No. 25,659, the time limits given for fulfillment of procedural requirements in treason cases are two thirds shorter than they are in terrorism cases. Also, for treason cases Decree-Law No. 25,708 requires the summary proceeding “established under the Code of Military Justice for trials in the ‘theater of operations’.” It also stipulates that the finding of the judge of inquiry must be issued “within a maximum of 10 days, and the Military Superior Court’s review within five days.” The proceeding “in the theater of operations” is “the [...] most summary proceeding provided for under the Code of Military Justice.” During such proceedings, the accused has no means of challenging the reports and evidence;

d) with legislation of this type, “the court’s inquiry is meaningless, since decisions are based on the findings contained in the police investigation reports.” Judgements in the military courts are not the result of “evidence taken at trial, but rather expanded police investigation reports that the accused has not seen.” The proceedings conducted in the case against the alleged victims were based entirely on the police investigation report produced by DINCOTE, an organ answerable to the executive branch and “not the typical investigative police force.” That document had to serve as the charge, because “it is not proof but rather facts that have to be proven.” In order for police investigation work to constitute evidence, “the police must be intervening in the inquiry strictly for precautionary reasons, in cases of urgency or necessity, on orders of the judicial authority.” This does not appear to have happened in the instant case, except in the case of the medical tests done on the alleged victims;

e) it is a principle of procedural law that “any evidence used to argue the guilt of the accused in a case must be tendered by an organ other than the court” and the latter must exhibit the evidence so that the defense has an opportunity to state its position.

Moreover, the investigative work of the preliminary phase is quite apart from the evidence-gathering and fact-finding done during the second phase [trial].” The verdict is to be based entirely on evidence produced at trial;

f) Mr. Astorga Valdéz’ conviction was based on testimony introduced during proceedings conducted by the court of third and final instance. The introduction of new evidence at this late stage dealt a lethal blow to his case and was a “gross infringement of his guarantees that left him with no means of self-defense.” Moreover, under Article 8 of the Convention, a higher court must review a verdict of conviction;

g) the defense attorneys were unable to confer with their clients until after the latter had made their preliminary statements. Even then, military were present, rattling their weapons, close enough to listen in on the attorney/client conversations;

h) from the situations described here it is obvious that the defense was denied the minimum guarantees and ended up becoming “a mere spectator to the proceedings.”

### 137. Arguments of the State:

a) the defense lawyers had the opportunity to put on whatever defense they deemed appropriate; the alleged victims “were tried in proceedings that scrupulously complied with the procedural guarantees established under Peruvian law, especially those relating to due process and the right of defense.” The attorneys participated “actively in all the proceedings conducted throughout the process, advising their clients when they made their statements to the police and in the presence of the officers of the court. They filed briefs to support their arguments and presented oral arguments before the competent courts;”

....

138. The Court observes that Article 717 of the Code of Military Justice, which is the applicable law in treason cases, provides that once the criminal indictment has been produced, the case files will be made available to the defense for a period of twelve hours. In the instant case, the criminal indictment was presented on January 2, 1994, and the attorneys were allowed to view the file on January 6, for a very brief time. The judgment was delivered the following day. As the applicable law dictated, the defense was never allowed to cross-examine the DINCOTE agents who participated in the investigation.

139. In the Basic Principles on the Role of Lawyers, number 8 -under the heading of “Special safeguards in criminal justice matters”- sets out the proper standards for an adequate defense in criminal cases. It reads as follows:

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such

consultations may be within sight, but not within the hearing, of law enforcement officials.

140. Mr. Astorga Valdéz' conviction illustrates even more vividly what little chance the accused had of putting on an effective defense. In his case, the accused was convicted in the court of last instance, based on new evidence that his defense attorney had not seen and consequently could not rebut.

141. This particular case illustrates how the work of the defense attorneys was shackled and what little opportunity they had to introduce any evidence for the defense. In effect, the accused did not have sufficient advance notification, in detail, of the charges against them; the conditions under which the defense attorneys had to operate were wholly inadequate for a proper defense, as they did not have access to the case file until the day before the ruling of first instance was delivered. The effect was that the presence and participation of the defense attorneys were mere formalities. Hence, it can hardly be argued that the victims had adequate means of defense.

142. The Court therefore finds that the State violated Article 8(2)(b) and 8(2)(c) of the Convention.

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**The Right to Information on Consular Assistance  
in the Framework of the Guarantees of the Due Process of Law**  
*Inter-Am. Ct. H.R., Advisory Opinion OC-16/99 of October 1, 1999*  
*(ser. A) No. 16 (1999)*

110. In a number of the questions in its request, Mexico put specific issues to the Court concerning the nature of the nexus between the right to information on consular assistance and the inherent rights of the individual as recognized in the International Covenant on Civil and Political Rights and the American Declaration and, through the latter, in the Charter of the OAS.

....

111. In these questions, the requesting State is seeking from the Court its opinion on whether nonobservance of the right to information constitutes a violation of the rights recognized in Article 14 of the International Covenant on Civil and Political Rights, Article 3 of the Charter of the OAS and Article II of the American Declaration, mindful of the nature of those rights.

112. Examination of these questions necessarily begins with consideration of the rules governing interpretation of the articles in question. The International Covenant on Civil and Political Rights

and the OAS Charter, which are treaties in the meaning given to the term in the Vienna Convention on the Law of Treaties, must be interpreted in accordance with the latter's Article 31 (*supra* 58).

113. Under that article, the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty (paragraph 2 of Article 31), but also the system of which it is part (paragraph 3 of Article 31). As the International Court of Justice has held:

[...] the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law [...] Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years [...] have brought important developments. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.

114. This guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection. That evolutive interpretation is consistent with the general rules of treaty interpretation established in the 1969 Vienna Convention. Both this Court, in the Advisory Opinion on the Interpretation of the American Declaration of the Rights and Duties of Man (1989), and the European Court of Human Rights, in *Tyrer v. United Kingdom* (1978), *Marckx v. Belgium* (1979), *Loizidou v. Turkey* (1995), among others, have held that human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.

115. The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.

116. The International Covenant on Civil and Political Rights recognizes the right to the due process of law (Article 14) as a right that "derives[s] from the inherent dignity of the human person." That article enumerates a number of guarantees that apply to "everyone charged with a criminal offence," and in that respect is consistent with the principal international human rights instruments.

117. In the opinion of this Court, for "the due process of law" a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other

defendants. It is important to recall that the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end. To protect the individual and see justice done, the historical development of the judicial process has introduced new procedural rights. An example of the evolutive nature of judicial process are the rights not to incriminate oneself and to have an attorney present when one speaks. These two rights are already part of the laws and jurisprudence of the more advanced legal systems. And so, the body of judicial guarantees given in Article 14 of the International Covenant on Civil and Political Rights has evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added.

118. In this regard the Court has held that the procedural requirements that must be met to have effective and appropriate judicial guarantees “are designed to protect, to ensure, or to assert the entitlement to a right or the exercise thereof” and are “the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination.”

119. To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one’s interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages.

120. This is why an interpreter is provided when someone does not speak the language of the court, and why the foreign national is accorded the right to be promptly advised that he may have consular assistance. These measures enable the accused to fully exercise other rights that everyone enjoys under the law. Those rights and these, which are inextricably inter-linked, form the body of procedural guarantees that ensures the due process of law.

121. In the case to which this Advisory Opinion refers, the real situation of the foreign nationals facing criminal proceedings must be considered. Their most precious juridical rights, perhaps even their lives, hang in the balance. In such circumstances, it is obvious that notification of one’s right to contact the consular agent of one’s country will considerably enhance one’s chances of defending oneself and the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for the dignity of the human person.

122. The Court therefore believes that the individual right under analysis in this Advisory Opinion must be recognized and counted among the minimum guarantees essential to providing

foreign nationals the opportunity to adequately prepare their defense and receive a fair trial.

123. The inclusion of this right in the Vienna Convention on Consular Relations —and the discussions that took place as it was being drafted- are evidence of a shared understanding that the right to information on consular assistance is a means for the defense of the accused that has repercussions —sometimes decisive repercussions- on enforcement of the accused’ other procedural rights.

124. In other words, the individual’s right to information, conferred in Article 36(1)(b) of the Vienna Convention on Consular Relations, makes it possible for the right to the due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights, to have practical effects in tangible cases; the minimum guarantees established in Article 14 of the International Covenant can be amplified in the light of other international instruments like the Vienna Convention on Consular Relations, which broadens the scope of the protection afforded to those accused.

....

### **Questions**

1. How would you articulate the test to determine whether the “right to have adequate time and means to prepare one’s defense” has been ensured in a particular case? Is this right applicable in preliminary proceedings? What is the legal value of the “*Basic Principles on the Role of Lawyers*”<sup>4</sup> referred to by the Inter-American Court in *Castillo Petruzzi*? Can an international tribunal apply those principles to a case?

In European human rights case law, there is no clear determination of the scope of this right; in general, European institutions assess compliance with this due process guarantee in light of the circumstances of each case. The case law of the European Court has established that Article 6(3)(b) is closely connected to the right to be fully informed enshrined in Article 6(3)(a). In *Pelissier and Sassi v. France*,<sup>5</sup> the petitioners were convicted of an offense different from the one charged; therefore, they alleged a violation of Articles 6(1) and 3(a) and (b) of the Convention. In regard to the scope of those provisions the European Court stated that

51. The Court observes that the provisions of paragraph 3(a) of Article 6 point to the need for special attention to be paid to the notification of the “accusation” to the

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<sup>4</sup> Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>5</sup> Judgment of March 25, 1999, Reports 1999 II (1999), <<http://www.echr.coe.int>>.

defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on written notice of the factual and legal basis of the charges against him. . . . Article 6 § 3(a) of the Convention affords the defendant the right to be informed not only of the “cause” of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should, as the Commission rightly stated, be detailed.

52. The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention . . . The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.

53. Article 6 § 3(a) does not impose any special formal requirement as to the manner in which the accused is to be informed of the nature and cause of the accusation against him . . . .

54. Lastly, as regards the complaint under Article 6 § 3(b) of the Convention, the Court considers that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused’s right to prepare his defence.

In this area, see also the Court’s recent decision in the *Dallos v. Hungary* case.<sup>6</sup> In addition, the European Court has found on several occasions that the “right to have adequate time and means to prepare one’s defense” is related to the right to counsel guaranteed in Article 6(3)(c). See for example the *Vacher v. France* case.<sup>7</sup>

2. Explain the reasoning of the Inter-American Court in Advisory Opinion No. 16 regarding the impact that failing to notify the accused of the right to contact the consular agent of his or her country may have on the right to adequately prepare his or her defense. Do you consider that the shortcomings identified by the Court could be overcome by the appointment of free counsel and an interpreter, if needed? If not, why?

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<sup>6</sup> Judgment of March 1, 2001 (2001), <<http://www.echr.coe.int>>.

<sup>7</sup> Judgment of December 17, 1996, Reports 1996 VI (1996), <<http://www.echr.coe.int>>.

#### 4. THE RIGHT TO COUNSEL

##### **Artico v. Italy**

31 Eur. Ct. H.R. (ser. A) (1980)

<<http://www.echr.coe.int>>

*[The applicant, an accountant and an Italian citizen, was sentenced in January 1965 by the Verona District Judge to eighteen months imprisonment and a fine for simple fraud. A further sentence of eleven months' imprisonment and a fine for repeated fraud, impersonation and issuing worthless checks was imposed on him by the same judge in October 1970. These various offenses had been committed in May and June of 1964. The applicant filed numerous appeals alleging procedural irregularities and the expiration of statutory limitations. In March 1972, he petitioned the Court of Cassation asserting that the offenses covered by the decisions of the District Judge should be declared to have been extinguished as a result of statutory limitation in November and December of 1971, since by that date the statutory period had elapsed. The applicant had requested and received free legal counsel, but due to the illness of his attorney and the failure of the authorities to appoint a replacement despite his repeated requests, he was not assisted by counsel in these proceedings. By two orders of November 12 1973, the Court declared the applications inadmissible on the ground that there had been no procedural irregularity; however, it did not address the question of statutory limitation. The applicant claimed that he would have been released from prison more than a year earlier if the Court of Cassation had decided in 1973 that proceedings were barred as a result of statutory limitation. He maintained that his chances of obtaining such a ruling would have been greatly improved if he had had the benefit of effective legal counsel. Accordingly, in his application to the Commission, Mr. Artico alleged, inter alia, a violation of Article 6(3)(c) by reason of the fact that he was not assisted by counsel before the Court of Cassation.]*

31. The applicant alleged a violation of Article 6 par. 3(c) (art. 6-3-c) of the [European] Convention . . . .

32. Paragraph 3 of Article 6 (art. 6-3) contains an enumeration of specific applications of the general principle stated in paragraph 1 of the Article (art. 6-1). The various rights of which a non-exhaustive list appears in paragraph 3 reflect certain of the aspects of the notion of a fair trial in criminal proceedings (see paragraph 87 of the Commission's report; Dewee judgment of 27 February 1980, Series A no. 35, p. 30, par. 56). When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots.

33. As the Commission observed in paragraphs 87 to 89 of its report, sub-paragraph (c) (art. 6-3-c) guarantees the right to an adequate defence either in person or through a lawyer, this right being reinforced by an obligation on the part of the State to provide free legal assistance in certain cases.

Mr. Artico claimed to be the victim of a breach of this obligation. The Government, on the other hand, regarded the obligation as satisfied by the nomination of a lawyer for legal aid purposes, contending that what occurred thereafter was in no way the concern of the Italian Republic. According to them, although Mr. Della Rocca declined to undertake the task entrusted to him on 8 August 1972 by the President of the Second Criminal Section of the Court of Cassation, he continued to the very end and “for all purposes” to be the applicant’s lawyer. In the Government’s view, Mr. Artico was, in short, complaining of the failure to appoint a substitute but this amounted to claiming a right which was not guaranteed.

The Court recalls that 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 rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive (see the Airey judgment of 9 October 1979, Series A no. 32, pp. 12-13, par. 24, and paragraph 32 above). As the Commission’s Delegates correctly emphasised, Article 6 par. 3(c) (art. 6-3-c) speaks of “assistance” and not of “nomination”. Again, mere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations. Adoption of the Government’s restrictive interpretation would lead to results that are unreasonable and incompatible with both the wording of sub-paragraph (c) (art. 6-3-c) and the structure of Article 6 (art. 6) taken as a whole; in many instances free legal assistance might prove to be worthless.

In the present case, Mr. Artico did not have the benefit of Mr. Della Rocca’s services at any point of time. From the very outset, the lawyer stated that he was unable to act. He invoked firstly the existence of other commitments and subsequently his state of health . . . The Court is not called upon to enquire into the relevance of these explanations. It finds, as did the Commission (see paragraph 98 of the report), that the applicant did not receive effective assistance before the Court of Cassation; as far as he was concerned, the above-mentioned decision of 8 August 1972 remained a dead letter.

34. Sub-paragraph (c) of Article 6 par. 3 (art. 6-3-c) does, nevertheless, make entitlement to the right it sets forth dependent on two conditions. Whilst here there was no argument over the first condition - that the person charged with a criminal offence does not have sufficient means -, the Government denied that the second condition was satisfied: on their view, the “interests of justice” did not require that Mr. Artico be provided with free legal aid. The subject-matter of the Court of Cassation proceedings was, so the Government claimed, crystallized by the grounds adduced in support of the applications to quash, grounds that were filed by the applicant in December 1971 with the assistance of a lawyer of his own choice, Mr. Ferri. However, the Government continued, the grounds related to an issue - the regularity of the summons to appear in court - that was of the utmost simplicity, so much so that the public prosecutor pleaded in July 1973 that the applications were manifestly ill-founded . . . ; hence, a lawyer would have played but a “modest” rôle, limited to receiving notification to the effect that the Court of Cassation

would take its decision in chambers. . .

According to the Commission's Delegates, this opinion contrasted with that of the President of the Second Criminal Section of the Court of Cassation. By 8 August 1972, when this judge granted the legal aid that had been requested on 10 March, several months had elapsed since the filing of the applications to quash and the supporting grounds; moreover, Mr. Artico had sent to the registry, on 10 and 14/15 March, declarations which he had drafted himself and which set out his further arguments. . . Nevertheless, the President came to the conclusion that there was a genuine need for a lawyer to be nominated for legal aid purposes. The Delegates doubted whether it was open to the Government to argue the contrary at the present time. The Court recalls that, subject to certain exceptions not pertinent to the present case, anyone who is in a state of poverty is entitled under Italian law to free legal aid in criminal matters (Article 15 of Royal Decree no. 3282 of 30 December 1923; see also Article 125 of the Code of Criminal Procedure).

In any event, here the interests of justice did require the provision of effective assistance. This would, according to Mr. Della Rocca, have been a very demanding and onerous task. At any rate, the written procedure, which is of prime importance before the Italian Court of Cassation, had not been concluded by 8 August 1972. A qualified lawyer would have been able to clarify the grounds adduced by Mr. Artico and, in particular, to give the requisite emphasis to the crucial issue of statutory limitation which had hardly been touched on in the "voluminous and verbose" declarations of the 14/15 March 1972 . . . In addition, only a lawyer could have countered the pleadings of the public prosecutor's department by causing the Court of Cassation to hold a public hearing devoted, amongst other things, to a thorough discussion of this issue. . . .

35. The Government objected that this was pure conjecture. In their view, for there to be a violation of Article 6 par. 3(c) (art. 6-3-c), the lack of assistance must have actually prejudiced the person charged with a criminal offence.

The Court points out . . . that here the Government are asking for the impossible since it cannot be proved beyond all doubt that a substitute for Mr. Della Rocca would have pleaded statutory limitation and would have convinced the Court of Cassation when the applicant did not succeed in doing so. Nevertheless, it appears plausible in the particular circumstances that this would have happened. Above all, there is nothing in Article 6 par. 3(c) (art. 6-3-c) indicating that such proof is necessary; an interpretation that introduced this requirement into the sub-paragraph would deprive it in large measure of its substance. More generally, the existence of a violation is conceivable even in the absence of prejudice (see the *Marckx* judgment of 13 June 1979, Series A no. 31, p. 13, par. 27); prejudice is relevant only in the context of Article 50 (art. 50).

36. The Government criticised Mr. Artico for not having recourse to the services of the colleague of whom Mr. Della Rocca spoke highly . . . and for failing to induce the Court of Cassation to take notice of the issue of statutory limitation, allegedly because he did not plead it either soon enough, that is as from December 1971, or with sufficient emphasis and persistence. The second

criticism is tantamount to saying that the interests of justice did not necessitate the presence of a lawyer, a matter on which the Court has already ruled . . . ; in fact it confirms if anything that his presence was indispensable. The first criticism also does not bear examination since the applicant would have lost the benefit of free legal aid had he followed Mr. Della Rocca's advice. . . .

In reality, Mr. Artico doggedly attempted to rectify the position: he multiplied his complaints and representations both to his official lawyer . . . and to the Court of Cassation . . . Admittedly, a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes but, in the particular circumstances, it was for the competent Italian authorities to take steps to ensure that the applicant enjoyed effectively the right to which they had recognised he was entitled. Two courses were open to the authorities: either to replace Mr. Della Rocca or, if appropriate, to cause him to fulfil his obligations . . . They chose a third course - remaining passive -, whereas compliance with the Convention called for positive action on their part (see the above-mentioned Airey judgment, p. 14, par. 25 in fine)..

37 The Court thus concludes that there has been a breach of the requirements of Article 6 par. 3(c) (art. 6-3-c).

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### **S. v. Switzerland**

200 Eur. Ct. H.R. (ser. A) (1991)

<<http://www.echr.coe.int>>

*[The applicant, a Swiss national, was arrested in March 1985 in connection with a series of protests which had occurred in 1983 and 1984. The applicant was eventually convicted of manufacturing explosives, and of arson, theft and criminal damage, and was sentenced to seven years' imprisonment. During his initial detention, the applicant's visits and correspondence with his attorney were subject to surveillance by police officials. Three of the applicant's letters to his lawyer were intercepted and were later used for the purpose of graphological reports. On several occasions, he was not able to confer with his attorney privately; on one occasion, the meeting took place in the presence of a police officer who took notes. The applicant further alleged that he did not have access to the case file, and that his attorney was unable to make a copy of it. The applicant filed a series of unsuccessful petitions and appeals against the surveillance measures. He complained to the Commission that the restrictions on his ability to communicate freely with his attorney violated Article 6(3)(b) and (c) of the Convention, as well as his right to bring proceedings before a court within the meaning of Article 5(4). For its part, the government maintained that the restrictions were justified, given the applicant's dangerous character and the risk of collusion between the applicant's lawyer and the co-accused.]*

I. *ALLEGED VIOLATION OF ARTICLE 6 PARA. 3 (c) (art. 6-3-c)*

46. S. claimed that there had been a violation of Article 6 para. 3(c) (art. 6-3-c), which reads as follows:

“Everyone charged with a criminal offence has the following minimum rights:

(...)

(c) to defend himself in person or through legal assistance of his own choosing ...”

He criticized the Swiss authorities for having exercised surveillance of his meetings with Mr Garbade and for having authorised Mr Garbade to consult only a minute fraction of the case-file, with the alleged effect that it had been difficult for him to challenge the decisions by which his detention on remand was extended. The Government apparently failed to recognize the purpose of the guarantees provided in the Convention and confused the protected rights’ efficacy with their successful exercise. Now these rights - in particular the right to legal assistance - were not exclusive to those who knew how to benefit from them or enjoyed the services of a good lawyer; they were intended to ensure equality of arms. Free communication between a lawyer and his detained client was a fundamental right which was essential in a democratic society, above all in the most serious cases. There was thus a contradiction between naming a court-appointed defence counsel at the start of an investigation because of the seriousness of the alleged offences and preventing him from carrying out his task freely.

47. The Government, praying in aid the Commission’s report, pointed out that an accused’s right to communicate with his counsel without hindrance, insofar as it was implicitly guaranteed by Article 6 para. 3(c) (art. 6-3-c), might call for such regulation as to restrict the exercise of the right in certain cases.

The “particularly drastic” restriction imposed in this case was justified, according to the Government, by the exceptional circumstances of the case. The grounds for the decisions of the Swiss courts, which were best in a position to assess the situation, provided two decisive arguments in support of the “very unusual” length of the surveillance: firstly, the “extraordinarily dangerous” character of the accused, whose methods had features in common with those of terrorists, and the existence of systematic offences against public and social order, and secondly the risk of collusion between Mr Garbade and the co-accused. As the Indictments Division of the Zürich Court of Appeal stated on 27 June 1985, such a risk was increased when a defendant exercised his right to silence, as the applicant did. Finally, S. had not in any way shown that the surveillance complained of by him had adversely affected his defence.

48. The Court notes that, unlike some national laws and unlike Article 8 para. 2(d) of the American Convention on Human Rights, the European Convention does not expressly guarantee the right of a person charged with a criminal offence to communicate with defence counsel without hindrance. That right is set forth, however, within the Council of Europe, in Article 93 of the Standard Minimum Rules for the Treatment of Prisoners (annexed to Resolution (73) 5 of the

Committee of Ministers), which states that:

“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.”

In another context, the European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights, which is binding on no less than twenty member States, including Switzerland from 1974, provides in Article 3 para. 2:

“As regards persons under detention, the exercise of this right [the right ‘to correspond freely with the Commission and the Court’ - see paragraph 1 of the Article] shall in particular imply that:

...

c. such persons shall have the right to correspond, and consult out of hearing of other persons, with a lawyer qualified to appear before the courts of the country where they are detained in regard to an application to the Commission, or any proceedings resulting therefrom.”

The Court 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 para. 3(c) (art. 6-3-c) of 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 (see *inter alia* the Artico judgment of 13 May 1980, series A no. 37, p. 16, para. 33).

49. The risk of “collusion” relied on by the Government does, however, merit consideration.

Accordingly to the Swiss courts there were “indications pointing to” such a risk “in the person of defence counsel”; there was reason to fear that Mr Garbade would collaborate with W.’s counsel Mr Rambert, who had informed the Winterthur District Attorney’s Office that all the lawyers proposed to co-ordinate their defence strategy (see paragraph 24 above).

Such a possibility, however, notwithstanding the seriousness of the charges against the applicant, cannot in the Court’s opinion justify the restriction in issue and no other reason has been adduced cogent enough to do so. There is nothing extraordinary in a number of defence counsel

collaborating with a view to co-ordinating their defence strategy. Moreover, neither the professional ethics of Mr Garbade, who had been designated as court-appointed defence counsel by the President of the Indictments Division of the Zürich Court of Appeal (see paragraph 14 above), nor the lawfulness of his conduct were at any time called into question in this case. Furthermore, the restriction in issue lasted for over seven months (31 May 1985 to 10 January 1986).

50. The argument that the applicant was not prejudiced by the measures in question as he was in fact able to make several applications for provisional release must also be dismissed. A violation of the Convention does not necessarily imply the existence of damage (see, among many other authorities, the Alimena judgment of 19 February 1991, series A no. 195-D, p. 56, para. 20).

51. There has therefore been a violation of Article 6 para. 3(c) (art. 6-3-c).

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### **Exceptions to the Exhaustion of Domestic Remedies**

*Inter-Am. Ct. H.R., Exceptions to the Exhaustion of Domestic Remedies  
(Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights),  
Advisory Opinion OC-11/90 of August 10, 1990, (ser. A) No. 11 (1990)*

23. [P]rotection of the law consists, fundamentally, of the remedies the law provides for the protection of the rights guaranteed by the Convention. The obligation to respect and guarantee such rights, which Article 1(1) imposes on the States Parties, implies, as the Court has already stated, 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 (Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C No. 4, para. 166; Godínez Cruz Case, Judgment of January 20, 1989. Series C No. 5, para. 175).

24. Insofar as the right to legal counsel is concerned, this duty to organize the governmental apparatus and to create the structures necessary to guarantee human rights is related to the provisions of Article 8 of the Convention. That article distinguishes between accusation[s] of a criminal nature and procedures of a civil, labor, fiscal, or any other nature. Although it provides that [e]very person has the right to a hearing, with due guarantees ...by a... tribunal in both types of proceedings, it spells out in addition certain minimum guarantees for those accused of a criminal offense. Thus, the concept of a fair hearing in criminal proceedings also embraces, at the very least, those minimum guarantees. By labeling these guarantees as minimum guarantees, the Convention assumes that other, additional guarantees may be necessary in specific circumstances to ensure a fair hearing.

25. Sub-paragraphs (d) and (e) of Article 8(2) indicate that the accused has a right to defend himself personally or to be assisted by legal counsel of his own choosing and that, if he should choose not to do so, he has the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides... Thus, a defendant may defend himself personally, but it is important to bear in mind that this would only be possible where permitted under domestic law. If a person refuses or is unable to defend himself personally, he has the right to be assisted by counsel of his own choosing. In cases where the accused neither defends himself nor engages his own counsel within the time period established by law, he has the right to be assisted by counsel provided by the state, paid or not as the domestic law provides. To that extent the Convention guarantees the right to counsel in criminal proceedings. But since it does not stipulate that legal counsel be provided free of charge when required, an indigent would suffer discrimination for reason of his economic status if, when in need of legal counsel, the state were not to provide it to him free of charge.

26. Article 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing. Any state that does not provide indigents with such counsel free of charge cannot, therefore, later assert that appropriate remedies existed but were not exhausted.

27. Even in those cases in which the accused is forced to defend himself because he cannot afford legal counsel, a violation of Article 8 of the Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing to which he is entitled under that Article.

28. For cases which concern the determination of a person's rights and obligations of a civil, labor, fiscal, or any other nature, Article 8 does not specify any minimum guarantees similar to those provided in Article 8(2) for criminal proceedings. It does, however, provide for due guarantees; consequently, the individual here also has the right to the fair hearing provided for in criminal cases. It is important to note here that the circumstances of a particular case or proceeding -its significance, its legal character, and its context in a particular legal system- are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing.

29. Lack of legal counsel is not, of course, the only factor that could prevent an indigent from exhausting domestic remedies. It could even happen that the state might provide legal counsel free of charge but neglect to cover the costs that might be required to ensure the fair hearing that Article 8 prescribes. In such cases, the exceptions to Article 46(1) would apply. Here again, the circumstances of each case and each particular legal system must be kept in mind.

30. In its advisory opinion request, the Commission states that it has received certain petitions in which the victim alleges that he has not been able to comply with the requirement of the exhaustion of remedies set forth in the domestic legislation because he cannot afford legal assistance or, in some cases, the obligatory filing fees.

Upon applying the foregoing analysis to the examples set forth by the Commission, it must be concluded that if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies. The same would be true of cases requiring the payment of a filing fee. That is to say, if it is impossible for an indigent to deposit such a fee, he cannot be required to exhaust domestic remedies unless the state provides some alternative mechanism.

31. Thus, the first question presented to the Court by the Commission is not whether the Convention guarantees the right to legal counsel as such or as a result of the prohibition of discrimination for reason of economic status (Art. 1(1)). Rather, the question is whether an indigent may appeal directly to the Commission to protect a right guaranteed in the Convention without first exhausting the applicable domestic remedies. The answer to this question given what has been said above, is that if it can be shown that an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigency prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies. That is the meaning of the language of Article 46(2) read in conjunction with Articles 1(1), 24 and 8.

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**McKenzie *et al.* v. Jamaica**

*Cases 12.023, 12.044, 12.107, 12.126, and 12.146, Inter-Am. C.H.R. 918,*

*Annual Report 1999, OEA/Ser.L/V/II.106, doc. 3 rev. (2000)*

*[For the facts of the case, see Section I of this chapter; footnotes omitted]*

6. *Articles 8, 24 and 25 unavailability of legal aid for Constitutional Motions*

307. The petitioners in the five cases that are the subject of this Report argue that legal aid is not effectively available for Constitutional Motions before the courts in Jamaica, thus constituting a violation of the right to due process under Article 8, the right to equal protection under Article 24 and the right to judicial protection under Article 25 of the Convention.

308. More particularly, in Part III.A.3.e of this Report, the victims have claimed that Constitutional Motions before the domestic courts in Jamaica often involve sophisticated and complex questions of law which require the assistance of counsel. The victims also claim that they are indigent, and the State does not provide legal aid to pursue Constitutional Motions in Jamaica. The victims state further that it is extremely difficult to find Jamaican lawyers who will pursue Constitutional Motions on a pro bono basis. As a consequence, the Petitioners allege that the State's failure to provide legal aid in order to present Constitutional Motions constitutes a denial of access to the court and to effective remedies, in fact as well as in law.

309. In this connection, the Petitioners assert that a Constitutional Motion in the context of the victims' cases constitutes a criminal proceeding for which Article 8(2)(e) of the Convention requires the State to provide legal assistance. They argue that a Constitutional Motion should be considered a criminal proceeding because a decision on such a motion could influence and change a ruling on a previous criminal proceeding. They also argue that the fact that some attorneys take pro bono cases does not relieve Jamaica of the obligation to provide legal aid with regard to Constitutional Motions.

310. In response to these contentions, the State has argued in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), and 12.126 (Dwight Fletcher), that it is not required to grant legal aid for Constitutional Motions because under Article 8(2)(e) of the Convention, the State only has a duty to give legal aid in respect of criminal proceedings, and a Constitutional Motion is not a criminal proceeding. The State argues further that in any event, the absence of legal aid for Constitutional Motions is not an absolute bar to presenting Constitutional Motions, because condemned prisoners have in the past been able to seek Constitutional Motions without legal aid. The State cites, *inter alia* the case of *Pratt and Morgan v. A.G. for Jamaica* in support of its position.

311. Based upon the material before it, the Commission is satisfied that Constitutional Motions dealing with legal issues of the nature raised by the victims in their proceedings before the Commission, such as the right to due process and the adequacy of the victims' conditions of detention, are procedurally and substantively complex and cannot be effectively raised or presented by a victim in the absence of legal representation. The Commission also finds that the State does not provide legal aid to individuals in Jamaica to bring Constitutional Motions, and that the victims in the cases at issue are indigent and are therefore not otherwise able to secure legal representation for Constitutional Motions.

312. While the State has indicated that condemned prisoners have in the past brought Constitutional Motions with the assistance of pro bono counsel, there is no evidence that such assistance is effectively available to these victims. There is also no evidence of any other avenues through which condemned prisoners are able to effectively raise alleged violations of their rights under the Jamaican Constitution or under the American Convention before the courts in Jamaica. In any event, the Commission considers that in capital cases, where Constitutional Motions relate to the procedures and conditions through which the death penalty has been imposed, the high standards of procedural fairness applicable in capital cases do not properly permit the effective protection of those rights to be left to the random prospect of whether an attorney may be willing or available to take the defendant's case without charge. Judicial protection of the right to life and other fundamental rights of condemned prisoners must be guaranteed through the effective provision of legal aid for Constitutional Motions. The State cannot be said to have afforded such protection to the victims in the cases noted above.

313. The Commission considers that in the circumstances of the present cases, the State's

obligations in respect of legal assistance for Constitutional Motions flow from both Article 8 and Article 25 of the Convention. In particular, the determination of rights through a Constitutional Motion in the Supreme Court of Jamaica must conform with the requirements of a fair hearing in accordance with Article 8(1) of the Convention. In the circumstances of the cases before the Commission, the Court would be called upon to determine whether the victims' criminal convictions violated their rights under the Constitution of Jamaica. In such cases, the application of a requirement of a fair hearing in the Supreme Court should be consistent with the principles in Article 8(2) of the Convention. Accordingly, when a convicted person seeking constitutional review of the irregularities in a criminal trial lacks the means to retain legal assistance to pursue a Constitutional Motion and where the interests of justice so require, legal assistance should be provided by the State. In the present cases, the effective unavailability of legal aid has denied the victims the opportunity to challenge the circumstances of their convictions under the Constitution of Jamaica in a fair hearing, and therefore has contravened Article 8(1) in respect of those victims.

314. Moreover, Article 25 of the Convention provides individuals with the right to simple and prompt recourse to a competent court or tribunal for protection against acts that violate his or her fundamental rights recognized by the constitution or laws of the State concerned or by the Convention. The Commission has stated that the right to recourse under Article 25, when read together with the obligation under Article 1(1) and the provisions of Article 8(1), must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the constitution, or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation. In addition, the Inter-American Court has held that if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized, and a person is unable to obtain such services because of his indigence, then that person is exempted from the requirement under the Convention to exhaust domestic remedies. While the Court rendered this finding in the context of the admissibility provisions of the Convention, the Commission considers that the Court's comments are also illuminating in the context of Article 25 of the Convention in the circumstances of the present cases.

315. By failing to make legal aid available to the victims to pursue Constitutional Motions in relation to their criminal proceedings, the State has effectively barred recourse for the victims to a competent court or tribunal in Jamaica for protection against acts that potentially violate their fundamental rights under the Constitution of Jamaica and under the Convention. As a consequence, the State has failed to fulfil its obligations under Article 25 of the Convention as regards the victims in these cases.

316. Accordingly, the Commission concludes that the State has failed to respect the rights of the victims in Case Nos. 12.023 (Desmond McKenzie), 12.044 (Andrew Downer and Alphonso Tracey), 12.107 (Carl Baker), 12.126 (Dwight Fletcher) and 12.146 (Anthony Rose) under

Article 8(1) of the Convention by denying the victims an opportunity to challenge the circumstances of their convictions under the Constitution of Jamaica in a fair hearing. The Commission also concludes that the State has failed to provide the victims with simple and prompt recourse to a competent court or tribunal for protection against acts that violate their fundamental rights recognized by the constitution or laws of the state concerned or by the Convention, and has therefore violated the rights of these victims to judicial protection under Article 25 of the Convention.

317. In light of the above conclusions, the Commission does not consider it necessary to determine whether the failure of the State to provide legal aid for Constitutional Motions violates Article 24 of the Convention.

### **Questions**

1. The European Court in *Artico* stated that the right to counsel under Article 6(3)(c) “guarantees the right to an adequate defence either in person or through a lawyer, this right being reinforced by an obligation on the part of the State to provide free legal assistance in certain cases.” Do you consider that the scope of this right is similar under Articles 8(2)(c) and (d) of the American Convention and 14(3)(d) of the ICCPR?

2. Are the conditions established in Article 6 of the European Convention to provide free legal aid applicable in the context of the other international treaties? Compare the language of the provisions and review the case law reproduced above. In regard to the determination of whether the “interests of justice” are at stake, the European case law has developed criteria according to which the following grounds should be given consideration: (1) seriousness of the offense of which he or she is accused and the severity of the sentence which he or she risks; and (2) complexity of the case.<sup>8</sup>

3. Assuming that the State has a duty to ensure “adequate counsel,” is the State responsible for any shortcomings on the part of the lawyer appointed for legal aid purposes? If not, in which case can the State be held responsible for a violation of the right to counsel? Read para. 301 of the *Mc Kenzie et al. case*, reproduced in Section I of this Chapter, and compare it to the *Artico* case and the following excerpt of the *Imbroschia*<sup>9</sup> case, in which the European Court stated that:

... a State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes . . . or chosen by the accused. Owing to the legal profession’s independence, the conduct of the defence is essentially a matter between the defendant and his representative; under Article 6 para. 3(c) (art. 6-3-c) the Contracting

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<sup>8</sup> *Quarantas v. Switzerland*, 205 Eur. Ct. H.R. (ser. A) (1991), <<http://www.echr.coe.int>>.

<sup>9</sup> *Imbroschia v. Switzerland*, 275 Eur. Ct. H.R. (ser. A) (1993), <<http://www.echr.coe.int>>.

States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention . . . .

4. Is the right to have access to free counsel if the accused does not have the means to afford the services of a lawyer an absolute right? If not, what would you consider permissible grounds for restriction? What about lack of funds on the part of the State?

5. After reading the provisions of the international human rights conventions and the case law reproduced above, could you determine at which stage of the proceedings this right can be claimed? Does the duty of the State to provide legal aid extend to special appeal procedures, such as constitutional motions? Consider very carefully the holding of the Inter-American Commission in *McKenzie et al.*

6. How did the European Court sustain its finding of a violation of the right to communicate with counsel without hindrance when this right is not expressly protected under Article 6 of the European Convention? Do you agree with the Court that this right may be restricted in particular cases? Suggest and explain grounds that you consider to justify limiting the exercise of this right. In addition, compare your conclusions with the language of the American Convention and the ICCPR that expressly recognizes the right to communicate with counsel, and determine whether there is any difference in the scope of this right as protected by those treaties and the European Convention.

7. Does the right to counsel apply in the context of the determination of civil rights and obligations or only in criminal proceedings? What about the right to “free legal aid?” In *Airey v. Ireland*,<sup>10</sup> petitioner was seeking a decree of judicial separation but did not have the means to pay for the services of a lawyer. The European Court found that, given the complexity of the legal issues at stake, lack of free legal aid in the context of this case infringed upon the petitioner’s right to access to court as protected in Article 6(1) of the European Convention. Which provision of the American Convention would you use to advocate the finding of a similar violation? Re-read paragraphs 313-315 of the *McKenzie et al.* case.

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## 5. THE RIGHT OF THE DEFENSE TO EXAMINE WITNESSES

### **Doorson v. The Netherlands**

*Eur. Ct. H.R., Judgment of March 26, 1996, Reports 1996 II (1996)*

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<sup>10</sup> 32 Eur. Ct. H.R. (ser. A) (1979), <<http://www.echr.coe.int>>.

*[The applicant was convicted of drug-trafficking, based on evidence given by eight witnesses, six of whom remained anonymous. The conviction was based largely on the evidence of witnesses who had not been heard in the presence of the applicant. Two of the anonymous witnesses, however, were questioned by the Investigating Judge in the presence of his counsel. The Court of Appeal had also refused to hear an expert brought forward by the defense but had agreed to hear an expert brought forward by the prosecution. In his application to the Commission, Mr. Doorson alleged, inter alia, violations of Articles 6(1) and 3(d) of the Convention.]*

B. *The Court's assessment*

1. *The Court's general approach*

66. As the requirements of Article 6 para. 3 (art. 6-3) are to be seen as particular aspects of the right to a fair trial guaranteed by Article 6 para. 1 (art. 6-1), the Court will examine the complaints under Article 6 paras. 1 and 3(d) (art. 6-1+art. 6-3-d) taken together (see, among many other authorities, the *Delta v. France* judgment of 19 December 1990, Series A no. 191-A, p. 15, para. 34).

67. The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see, among other authorities, the above-mentioned *Kostovski* judgment, p. 19, para. 39).

2. *The anonymous witnesses Y.15 and Y.16*

68. The Court agrees with the Commission's Delegate that no issue arises in relation to the fact that Investigating Judge M. heard Y.15 and Y.16 in the absence of the applicant's counsel in the course of the preliminary judicial investigation, since in the course of the subsequent appeal proceedings these two witnesses were heard in counsel's presence (see paragraph 25 above).

69. As the Court has held on previous occasions, the Convention does not preclude reliance, at the investigation stage, on sources such as anonymous informants. The subsequent use of their statements by the trial court to found a conviction is however capable of raising issues under the Convention (see the above-mentioned *Kostovski* judgment, p. 21, para. 44, and the *Windisch v. Austria* judgment of 27 September 1990, Series A no. 186, p. 11, para. 30). As was already implicit in paragraphs 42 and 43 of the above-mentioned *Kostovski* judgment (loc. cit., pp. 20-21), such use is not under all circumstances incompatible with the Convention.

70. It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 8) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.

71. As the Amsterdam Court of Appeal made clear, its decision not to disclose the identity of Y.15 and Y.16 to the defence was inspired by the need, as assessed by it, to obtain evidence from them while at the same time protecting them against the possibility of reprisals by the applicant (see paragraph 28 above). This is certainly a relevant reason to allow them anonymity. It remains to be seen whether it was sufficient.

Although, as the applicant has stated, there has been no suggestion that Y.15 and Y.16 were ever threatened by the applicant himself, the decision to maintain their anonymity cannot be regarded as unreasonable per se. Regard must be had to the fact, as established by the domestic courts and not contested by the applicant, that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them (see paragraph 28 above). Furthermore, the statements made by the witnesses concerned to the investigating judge show that one of them had apparently on a previous occasion suffered violence at the hands of a drug dealer against whom he had testified, while the other had been threatened (see paragraph 25 above).

In sum, there was sufficient reason for maintaining the anonymity of Y.15 and Y.16.

72. The maintenance of the anonymity of the witnesses Y.15 and Y.16 presented the defence with difficulties which criminal proceedings should not normally involve. Nevertheless, no violation of Article 6 para. 1 taken together with Article 6 para. 3(d) (art. 6-1+art. 6-3-d) of the Convention can be found if it is established that the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities (see, *mutatis mutandis*, the above-mentioned Kostovski judgment, p. 21, para. 43).

73. In the instant case the anonymous witnesses were questioned at the appeals stage in the presence of counsel by an investigating judge who was aware of their identity (see paragraph 25 above), even if the defence was not. She noted, in the official record of her findings dated 19 November 1990, circumstances on the basis of which the Court of Appeal was able to draw conclusions as to the reliability of their evidence (see paragraphs 32 and 34 above). In this respect the present case is to be distinguished from that of Kostovski (*loc. cit.*, p. 21, para. 43). Counsel was not only present, but he was put in a position to ask the witnesses whatever questions he considered to be in the interests of the defence except in so far as they might lead to the disclosure of their identity, and these questions were all answered (see paragraph 25 above).

In this respect also the present case differs from that of Kostovski (loc. cit., p. 20, para. 42).

74. While it would clearly have been preferable for the applicant to have attended the questioning of the witnesses, the Court considers, on balance, that the Amsterdam Court of Appeal was entitled to consider that the interests of the applicant were in this respect outweighed by the need to ensure the safety of the witnesses. More generally, the Convention does not preclude identification - for the purposes of Article 6 para. 3(d) (art. 6-3-d) - of an accused with his counsel (see, mutatis mutandis, the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, p. 40, para. 91).

75. In addition, although it is normally desirable that witnesses should identify a person suspected of serious crimes in person if there is any doubt about his identity, it should be noted in the present case that Y.15 and Y.16 identified the applicant from a photograph which he himself had acknowledged to be of himself (see paragraph 12 above); moreover, both gave descriptions of his appearance and dress (see paragraph 25 above).

It follows from the above considerations that in the circumstances the “counterbalancing” procedure followed by the judicial authorities in obtaining the evidence of witnesses Y.15 and Y.16 must be considered sufficient to have enabled the defence to challenge the evidence of the anonymous witnesses and attempt to cast doubt on the reliability of their statements, which it did in open court by, amongst other things, drawing attention to the fact that both were drug addicts (see paragraph 33 above).

76. Finally, it should be recalled that even when “counterbalancing” procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements. That, however, is not the case here: it is sufficiently clear that the national court did not base its finding of guilt solely or to a decisive extent on the evidence of Y.15 and Y.16 (see paragraph 34 above).

Furthermore, evidence obtained from witnesses under conditions in which the rights of the defence cannot be secured to the extent normally required by the Convention should be treated with extreme care. The Court is satisfied that this was done in the criminal proceedings leading to the applicant’s conviction, as is reflected in the express declaration by the Court of Appeal that it had treated the statements of Y.15 and Y.16 “with the necessary caution and circumspection” (see paragraph 34 above).

....

5. *The defence expert K. and the prosecution witness I*

81. The Court of Appeal refused to hear the expert K. while agreeing to hear the police officer I. Both had been brought to the hearing, K. by the defence and I. by the prosecution (see paragraphs 31 and 33 above).

The Court of Appeal refused to hear K. for the reason that as an expert rather than a witness he would not be able to contribute to the elucidation of the facts of the case. According to the defence, K. would have been able to testify generally to the effect that statements made to the police by drug addicts were often unreliable.

The evidence of the police officer I., on the other hand, concerned the way in which the police went about obtaining statements from drug addicts and ensuring that these were as reliable as possible.

82. As was pointed out earlier (at paragraphs 67 and 78 above), decisions whether to allow evidence and what reliance to place on admitted evidence are primarily the responsibility of the domestic courts. The Court of Appeal could consider that the evidence offered by K. would not have contributed to the assessment which it was required to make, especially since in any case a similar statement had already been made by the expert L., and it was open to the Court of Appeal to draw from I.'s evidence the inferences which it did.

The Court therefore does not find that the fairness of the criminal proceedings against the applicant was adversely affected by the Court of Appeal's decision to hear I. but not K.

### *C. Conclusion*

83. None of the alleged shortcomings considered on their own lead the Court to conclude that the applicant did not receive a fair trial. Moreover, it cannot find, even if the alleged shortcomings are considered together, that the proceedings as a whole were unfair.

In arriving at this conclusion the Court has taken into account the fact that the domestic courts were entitled to consider the various items of evidence before them as corroborative of each other.

Accordingly, there has been no violation of Article 6 para. 1 taken together with Article 6 para. 3(d) (art. 6-1+art. 6-3-d) of the Convention.

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### **Molero Coca et al. v. Peru**

*Case 11.182, Inter-Am. C.H.R. 1226,  
Annual Report 1999, OEA/Ser.L/V/II.106, doc. 3 rev. (2000)  
[Footnotes omitted]*

*[The four petitioners in this case, all students, were detained on April 30, 1992 on a street in the Lima neighborhood of Villa El Salvador by agents of the Peruvian anti-terrorist police]*

*(DINCOTE). The police had launched an operation in that district after having arrested a student named Gladys Helen Ramos Vargas, who was allegedly in possession of explosive devices. At the DINCOTE headquarters, the petitioners were beaten and tortured in an attempt to force them to admit that they were associates of Ms. Ramos. Two days after the petitioners were arrested, the mother of Ms. Ramos was threatened by police officials and forced to sign a statement which alleged, falsely, that the four petitioners were arrested at her home while waiting for her daughter. With no evidence whatsoever, the petitioners were charged with being members of the Shining Path, and were tried in a “faceless” court composed of anonymous judges. The process involved numerous limitations of the right of defense, and resulted in convictions with sentences ranging from ten to twelve years’ imprisonment. In their petition to the Commission, the victims alleged that the State had violated their right to personal liberty, right to humane treatment, and right to a fair trial, as set forth in Articles 7, 5 and 8 of the American Convention.]*

114. . . . In accordance with the terms of Article 15 of Decree Law No. 25475:

The identities of magistrates and members of the Office of the Attorney General, as well as of judicial auxiliaries involved in trying terrorism cases shall be secret, to which end the necessary arrangements shall be made. Court decisions shall not bear the signatures or initials of the magistrates involved, nor of the judicial auxiliaries. Codes will be used for that purpose, which shall also be kept in secret.

115. Such a system of secret justice constituted a flagrant violation *per se* of the right — that is an integral part of due process — to be tried by an independent and impartial judge or tribunal, enshrined in Article 8(1) of the American Convention, and of the guarantee providing for the public nature of criminal proceedings, enshrined in Article 8(2)(5). In connection with this, in its 1993 Report on the Situation of Human Rights in Peru, the Commission stated that: If no one knows the identity of the presiding judges, then nothing can be said about their impartiality and independence. . . . Furthermore, Article 13(h) of Decree Law 25475 provided that in terrorism proceedings, challenges to judges or judicial auxiliaries were inadmissible. To some extent, this last provision was certainly redundant, since the secret identities of the aforesaid officials prevented defendants and their attorneys from learning of the existence of any grounds for challenges.

116. . . . Evidently, the right of the accused in any proceedings to know who is judging him and to be able to determine that judge’s subjective competence — that is, whether there are any grounds for challenging or removing the judge — is a basic guarantee. The anonymity of judges deprives de accused of this basic guarantee and violates his right to be tried by an impartial court, since he is unable to object to a judge when there are grounds for a challenge.

. . . .

119. In the case at hand and in accordance with the facts that the Commission has established, it can be seen that this system of secret justice was applied in full in convicting the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca: their trial was conducted by faceless prosecutors and decided on by the Special Chamber of the Superior Court, composed of faceless judges, in a ruling handed down on October 24, 1992. In addition, the members of the Supreme Court of Justice who heard the annulment motion filed against that ruling were also faceless judges. Thus, as explained above, the Peruvian State violated the victims' right to due process, as set forth in Article 8 of the American Convention.

120. Continuing with its analysis of Decree No. 25474 and its ancillary provisions, the Commission notes that under Article 16, terrorism trials are held in the respective penitentiary centers, in rooms equipped so as to prevent judges, prosecutors, and judicial auxiliaries from being visually or aurally identified by the defendants and their defense counsel. Regarding these trials, the UN's Special Rapporteur on the independence of judges and lawyers offered the following comments:

The main characteristic of the proceedings before faceless courts, both civilian and military is secrecy. Judges and prosecutors are identified by codes. When handling treason cases, Supreme Court judges also identify themselves by secret codes. The judges are at all times invisible to the defendants and their counsel, and trial proceedings are conducted in private. Hearings take place in specially equipped courtrooms inside high-security prisons or, in treason cases, at military bases. The courtrooms are small, with a single room on the other side of the mirror, the judges, prosecutor and court secretaries have their seats. They communicate with the accused persons and their counsel through voice-distorting microphones. Since the sound system does not always function properly, it is sometimes impossible for the defendant or his or her counsel to understand what is being said, which has in many cases seriously obstructed the proceedings or affected the defence.

121. In turn, Article 13(c) of Decree Law No. 25.475 and Article 2.b of Decree Law 25.744 prohibit the officers involved in preparing the police affidavit and the members of the armed forces who captured or arrested the accused from appearing as witnesses at trials dealing with the crimes of terrorism and treason against the fatherland.

122. The Commission finds that the aforementioned legal denial of the right of defendants to cross-examine the persons who arrested them or who otherwise played a major part in gathering — an even fabricating — the evidence later used to convict them constitutes another violation *per se* of the guarantee of due process enshrined in Article 8(2)(f) of the American Convention, under which the defense has the right to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts and other persons who may throw light on the facts.

123. In the case at hand and in accordance with the facts that the Commission has established, it can be seen that pursuant to the aforesaid provisions, the Asencios Lindo brothers and Messrs. Ambrosio Concha and Molero Coca were unable to cross-examine the police officers who had

arrested them. This was of particular relevance since the victims never accepted that they had been detained at the home of Mrs. Gladys Vargas Vergaray, as the police claimed; it was thus vitally important that the victims defense lawyers were allowed to question the arresting officers. By denying them that, the Peruvian State violated, with respect to the victims, the right set forth in Article 8(2)(f) of the American Convention, according to which the defense is entitled 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.

....

### **Questions**

1. As stated in *Doorson*, the right to summon witnesses is not absolute and courts enjoy a certain margin of discretion to admit evidence such as the testimony of witnesses and to assess the weight of those testimonies in reaching a final decision. In which cases do you think an international adjudicatory body could scrutinize more closely the actions of domestic courts in assessing evidence and find a violation of the right to summon witnesses?
2. Do you agree with the decision of the Commission in *Molero Coca* according to which the prohibition against hearing certain witnesses constitutes *per se* a violation of the right to summon witnesses? The decision also refers to the “faceless tribunals” established in Peru to try persons accused of terrorism and treason and establishes that this system violates *per se* the right to be tried by an impartial and independent court. Do you agree with this holding? Compare and distinguish, if necessary, the situation in which certain witnesses are never allowed to be cross-examined by the defense.
3. Anonymous or “faceless” witnesses create a particular problem for international adjudicatory bodies, particularly in the case of crimes such as rape, terrorism, or narcotrafficking. How would you articulate the test to determine, in a case where anonymous witnesses are allowed, whether the right to summon witnesses is still respected? Or do you consider that allowing anonymous witnesses constitutes in itself a violation of this right?

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## **6. THE RIGHT NOT TO BE COMPELLED TO TESTIFY AGAINST ONESELF OR TO PLEAD GUILTY**

**Manríquez v. Mexico**  
*Case 11.509, Inter-Am. C.H.R. 664,*

*[On June 2, 1990, while the petitioner was performing his work as a mariachi in the Plaza Garibaldi, in Mexico City, several persons solicited the services of his group. The applicant later learned that these individuals were in fact agents of the Judicial Police for the Federal District. The applicant and his companions were detained and taken, blindfolded, to the offices of the Public Ministry. No arrest warrant was issued, nor was it argued that the applicant had committed a crime in flagrante delicto. In the Public Ministry, the police officers proceeded to torture the applicant severely, to get him to confess to two murders. He signed a confession as a result of the torture. The applicant was not brought before a judge until seven days after his detention. Even though he revoked his confession before the respective judges, the applicant was found guilty of homicide and sentenced to 27 years in prison. Later motions brought against the decision were all rejected. In his complaint before the Commission, the applicant alleged, inter alia, a violation of Article 8 of the American Convention.]*

*i. The confession under torture of Manuel Manríquez*

62. Article 8 of the American Convention provides:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

...

g. the right not to be compelled to be a witness against himself or to plead guilty.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

63. The Convention Against Torture, at Article 10,<sup>11</sup> provides:

No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means.

64. The IACHR shall now analyze the judicial proceeding held with respect to the facts of this

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<sup>11</sup> Note that the Commission refers to Article 10 of the Inter-American Convention to Prevent and Punish Torture, adopted and opened to signature on December 9, 1995.

matter, focusing on the decisions of the judicial organs in this case. Those decisions are the judgment of the court of first instance, or trial court, of July 12, 1991, in criminal case 112/90, by the Thirty-Sixth Criminal Court (hereinafter “judgment in the first instance”), and primarily the judgment on appeal (*de segunda instancia*) handed down on January 29, 1992, by the Eleventh Criminal Chamber of the Superior Tribunal of Justice for the Federal District (hereinafter “judgment on appeal”), as this is the final and firm decision that exhausted the regular jurisdiction, and against which no special remedy prevailed.

65. For these purposes, it is observed that those decisions were issued within a criminal proceeding with respect to one person, whose confession was obtained by torture. It should be noted that while the parties agree that Manuel Manríquez was tortured, they disagree on the evidentiary value given to that confession. The petitioners argued that the confession obtained through torture was practically the only evidence that provided a basis for his conviction, while the State argues that the confession was dismissed by the judges, at their own initiative, and that the conviction was based on all the other evidence in the record, especially the testimony of Valeriano Guzmán Mendoza.

66. After the detailed study of those judgments, the Commission considers that in effect the confession of Manuel Manríquez, obtained under torture, was the only part of the evidence that led the judges to determine that he was the direct perpetrator of the homicide of which he was accused. In effect, the judgment of first instance, on analyzing that confession, establishes as follows:

Although he says that they were done to force him to state what was set forth at the Judicial Police and before the Public Ministry in its investigative capacity, in that preparatory statement he accepts that he did state what was set forth in those statements and that he was not advised by nor did he receive suggestions from any police agent; therefore, pursuant to the principle of procedural immediacy, the first statements are the ones taken into account to consider the participation of the accused in the events proven....

67. In the judgment on appeal, on analyzing the confession, it was considered not proven that any violence had been involved in Manríquez’s original confession.

68. Moreover, according to the claimed confession by Manuel Manríquez, he had reached a place where a fight was concluding among several persons, in which Armando and Juventino López Velasco had participated; and when Manríquez arrived, one of them was already on the ground, apparently dead, while Manríquez had helped to kill the other. That confession was decisive in his conviction, as Manríquez was found guilty of only one of the homicides, considering that according to his confession the other person was already apparently dead when Manuel Manríquez arrived on the scene.

69. According to the foregoing, and based on the information that appears in the files, the

Commission considers inaccurate the State's affirmation to the effect that:

The Judge, in effect, dismissed the confession *sua sponte* as provided for in Article 20(II) of the Constitution of Mexico, Article 8(3) of the American Convention on Human Rights, and Article 10 of the Inter-American Convention to Prevent and Punish Torture.

70. The State notes that even eliminating all evidentiary value from the confession obtained under torture, the judges had other evidence that Manríquez had killed Armando and Juventino López Velasco (especially the testimony of Valeriano Guzmán Mendoza). The petitioner notes the contrary. To this end, the Commission notes that on May 30, 1990, two cardboard boxes appeared in a trashcan containing the corpses of Armando and Juventino López Velasco, whereupon it was determined that they had been murdered. On the occasion of that finding, that same day inquiry N° 19/1286/990-05 was initiated into these two homicides.

71. On June 2, 1990, witness Guzmán Mendoza came forth voluntarily to give testimony to the Judicial Police; he said that in previous days Manríquez, together with other persons, had hired his services as a driver; and that on that occasion he had transported two cardboard boxes whose contents were unknown to Guzmán, and that after he heard about the boxes with the corpses on the news he presumed they were the same ones he had transported earlier. Immediately upon the conclusion of his statement, the police went with him to the public plaza where Manuel Manríquez usually offered his services as a mariachi. The witness identified Manuel Manríquez as one of the persons who hired him to transport the cardboard boxes, after which the police proceeded to detain and torture Manuel Manríquez to get him to confess to the homicide of Messrs. Armando and Juventino López Velasco.

72. In the brief seeking "recognition of innocence," Manríquez denied having participated in the homicide of those persons, he denied that he had hidden the boxes containing the corpses, and he admitted that he had hired the services of Guzmán with his pick-up truck, and that he had helped him load the boxes on the truck, but he alleged that at that moment he was inebriated, and that he thought the boxes contained crafts, as that was what he had been told by those who sought his help for the purposes of hiring the pick-up truck and of helping to load the boxes onto it.

73. Consequently, the statement by witness Valeriano Guzmán Mendoza could be evidence, at the most, that Manuel Manríquez participated in the transportation and hiding of the corpses of Messrs. Armando and Juventino López Velasco. Nonetheless, the same evidence is not sufficient, much less determinant, in and of itself, to establish the responsibility of Manuel Manríquez as the direct perpetrator of those homicides.

74. Nor do the rest of the elements weighed in both the judgment of the court of first instance and the judgment on appeal provide any evidence that Manuel Manríquez was the direct perpetrator of the homicides of Messrs. Armando and Juventino López Velasco. That evidence consists of:

- a. Statement by the preventive police officer Catalino Ayala Sánchez, who found the

- corpses in the cardboard boxes;
- b. Certificate of eyewitness inspection of the corpses;
- c. Certification and transfer of the corpses;
- d. Statement by identification witnesses Ignacia Tolentino San Juan and Catalina Velasco Tolentino;
- e. Identification of and report on the corpses;
- f. Reports on lesions and filiation;
- g. Medical report;
- h. Autopsy report;
- i. Criminalistic and photographic report;
- j. Chemical forensic report;
- k. Weapon's report;
- l. Report on boxes and clothes;
- m. Vehicle report;
- n. Presence of traces of blood on the rubber of the lower part of the pick-up truck.

75. The above-noted evidence could turn out to be suitable or relevant to a showing that two corpses were found; that their identity was determined; that the cause of death was established; and that the vehicle in which those corpses were transported was found. Nonetheless, and in the absence of other admissible and relevant evidence, there is no showing that Manuel Manríquez murdered those persons.

76. The Commission observes that the practice of torture as a method of police investigation is compounded by the legal force that the Mexican legal system attributes to the first statement by the accused, which is not taken by a judge, but by the Public Ministry. On this point, the Supreme Court of Justice of Mexico has even established that where there are two contrary statements by an accused, the first in time should prevail:

Confessions. First statements by the detainee. Based on the principle of procedural immediacy, and unless the confession be lawfully retracted, the first statements by the accused, uttered without sufficient time for preparation or defensive reflections, should prevail over the later ones.

77. This thesis has been erroneously characterized in Mexico as the thesis of immediacy (*inmediatez or inmediatez*). The Commission considers it timely to clarify that *inmediatez* only occurs, legally, when the judge himself or herself is present at the procedural acts.

78. Historical experience has clearly shown that giving evidentiary effect to extrajudicial statements, or statements made during the investigative stage of the proceedings, is an incentive to use torture when the police prefer to save on investigative effort, extracting a confession from the accused.

79. The comparative analysis of the various judicial guarantees in the hemisphere clearly shows that the process must be conducted directly and immediately by the judge, placing special

emphasis on the direct relationship between him or her and the person of the accused. Both the International Covenant on Civil and Political Rights and the American Convention provide that the accused must be brought "... promptly before a judge ...."

80. The logic of the criminal procedure guarantees is based on the personal involvement of the judge, conceived of as the adequate organ for safeguarding them. The objective of the principle of procedural immediacy is to try to avoid a distancing of the judge from the elements of the process, especially the accused. In addition,

The principle of immediacy seeks to ensure citizens that the most serious matters, including criminal matters, will be examined by an organ vested with a series of safeguards that guarantee, above all, its independence and impartiality.

81. On criminal matters, the principle of procedural immediacy is fundamental, since the problems to be resolved by the court affect the basic faculties of the human person, in the face of possible conviction and sentencing by the criminal justice powers of the State. Therefore, in any event, "procedural immediacy" should be considered to operate solely between the judge and the accused; consequently, one should dismiss the improper and mistaken interpretations that include under this concept statements made to the police or before the Public Ministry, as neither of these is before a judge.

82. The principle of procedural immediacy as conceived of by the Mexican State, instead of serving as a procedural guarantee for persons accused of crimes, is becoming its antithesis, a source of abuses of the accused. In effect, these persons, instead of being accused without delay before the impartial organ adequate to safeguard their rights, as is the judge with jurisdiction in each specific case, are held for 48 or 96 hours by the judicial police, with no judicial supervision whatsoever, who often use coercion and torture to extract self-incriminating testimony from the accused.

83. In this regard, the IACHR notes that it has not received any information alleging torture during the period that persons accused of crimes have been brought before a judge with jurisdiction. In contrast, the Commission has learned of several cases of torture that occurred while the accused were in the custody of the judicial police, both federal and state.

84. Based on the foregoing on the principle of procedural immediacy and the guarantees of due process, the IACHR notes that the statements that should prevail as fully admissible evidence are the judicial statements, i.e. those made before a judge with jurisdiction, not those made during a pre-judicial stage.

85. Pursuant to the foregoing, the Commission receives the complaint insofar as the confession obtained through torture was in effect the only evidence relied upon in the judgment of the court of first instance to convict Manuel Manríquez as direct perpetrator of the homicide of which he was accused. The Commission also concludes that the right to the presumption of innocence set

forth at Article 8(2) of the Convention was violated, as Manuel Manríquez was forced to give testimony against himself under torture, to declare his guilt, and for having accepted his confession obtained by coercion as valid. In addition, the Commission concludes that on assigning evidentiary value to that confession, the State also violated the provision of Article 10 of the Convention Against Torture.

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**Funke v. France**

256-A Eur. Ct. H.R. (ser. A) (1993)

<<http://www.echr.coe.int>>

*[The applicant, a German national and resident of France, died in 1987. In January 1980, Strasbourg customs officers and a police officer went to the house of the applicant and his wife to obtain "particulars of their assets abroad," acting on information received from the tax authorities. The customs officers searched the premises and seized statements and check books from foreign banks. The search and seizure did not lead to criminal proceedings for offenses against the regulations governing financial dealings with foreign countries. They did, however, give rise to parallel proceedings for failure to disclose documents and for interim orders, as authorized by the Customs Code. The applicant was sentenced to a fine and a further penalty for each day he delayed in complying with subsequent orders to produce documents regarding his financial dealings in foreign countries. In January 1985, customs officials served a garnishee notice on the applicant's bank requiring it to pay the amount of the penalties owed by the applicant. The order was ultimately reversed by the Court of Cassation. In April 1982, the customs authorities applied for an order for attachment of the applicant's property to secure the payment of customs debts in case he was convicted in criminal or civil proceedings. This order was finally discharged in July 1990 by customs officials. The applicant invoked Article 6 of the Convention, complaining that, inter alia, his criminal conviction for refusal to produce the documents requested by the customs officials had violated his right to a fair trial and disregarded the principle of presumption of innocence.]*

(a) Article 6 para. 1 (art. 6-1)

41. In the applicant's submission, his conviction for refusing to disclose the documents asked for by the customs (see paragraphs 9-14 above) had infringed his right to a fair trial as secured in Article 6 para. 1 (art. 6-1). He claimed that the authorities had violated the right not to give evidence against oneself, a general principle enshrined both in the legal orders of the Contracting States and in the European Convention and the International Covenant on Civil and Political Rights, as although they had not lodged a complaint alleging an offence against the regulations governing financial dealings with foreign countries, they had brought criminal proceedings

calculated to compel Mr Funke to co-operate in a prosecution mounted against him. Such a method of proceeding was, he said, all the more unacceptable as nothing prevented the French authorities from seeking international assistance and themselves obtaining the necessary evidence from the foreign States.

42. The Government emphasised the declaratory nature of the French customs and exchange-control regime, which saved taxpayers having their affairs systematically investigated but imposed duties in return, such as the duty to keep papers concerning their income and property for a certain length of time and to make them available to the authorities on request. This right of the State to inspect certain documents, which was strictly supervised by the Court of Cassation, did not mean that those concerned were obliged to incriminate themselves, a requirement that was prohibited by the United Nations Covenant (Article 14) and had been condemned by the Court of Justice of the European Communities (Orkem judgment of 18 October 1989, European Court Reports, 1989-9, pp. 3343-3354); it was not contrary to the guidelines laid down in the Convention institutions' case-law on what constituted a fair trial.

In the instant case the customs had not required Mr Funke to confess to an offence or to provide evidence of one himself; they had merely asked him to give particulars of evidence found by their officers and which he had admitted, namely the bank statements and cheque-books discovered during the house search. As to the courts, they had assessed, after adversarial proceedings, whether the customs' application was justified in law and in fact.

43. The Commission reached the same conclusion, mainly on the basis of the special features of investigation procedures in business and financial matters. It considered that neither the obligation to produce bank statements nor the imposition of pecuniary penalties offended the principle of a fair trial; the former was a reflection of the State's confidence in all its citizens in that no use was made of stricter supervisory measures, while responsibility for the detriment caused by the latter lay entirely with the person affected where he refused to co-operate with the authorities.

44. The Court notes that the customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed. The special features of customs law (see paragraphs 30-31 above) cannot justify such an infringement of the right of anyone "charged with a criminal offence", within the autonomous meaning of this expression in Article 6 (art. 6), to remain silent and not to contribute to incriminating himself.

There has accordingly been a breach of Article 6 para. 1 (art. 6-1).

**John Murray v. United Kingdom**

*Eur. Ct. H.R., Judgment of February 8, 1996, Reports 1996 I (1996)*

*<<http://www.echr.coe.int>>*

*[The applicant was convicted of the offense of aiding and abetting the unlawful imprisonment of a member of the IRA who had acted as an informant to the Royal Ulster Constabulary. According to Articles 3, 4, and 6 of the Criminal Evidence Order (Northern Ireland), a tribunal of fact was entitled to draw an adverse inference against an accused if he failed to give evidence on his own behalf at trial, or to account for his presence at a particular place or to mention particular facts when questioned by the police. Domestic case law interpreting the Order established that the fact that an accused person does not give evidence does not mean that the court can conclude that he or she is guilty. The prosecutor must establish a prima facie case, that is, a case that calls for an explanation that the accused ought to be in a position to give. A failure to provide that information, then, may as a matter of common sense permit a court to draw inferences that there is no explanation and that the accused is guilty. The trial judge and the appeal court considered that there was enough evidence in the case to call for an explanation from the accused; therefore, his failure to provide any information when detained and questioned by the police, and to testify in trial, permitted domestic courts to draw adverse inferences against him in deciding that he was guilty.]*

**I. ALLEGED VIOLATION OF ARTICLE 6 (art. 6) OF THE CONVENTION**

41. In the submission of the applicant, the drawing of incriminating inferences against him under the Criminal Evidence (Northern Ireland) Order 1988 (“the Order”) violated Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention. It amounted to an infringement of the right to silence, the right not to incriminate oneself and the principle that the prosecution bear the burden of proving the case without assistance from the accused.

He contended that a first, and most obvious element of the right to silence is the right to remain silent in the face of police questioning and not to have to testify against oneself at trial. In his submission, these have always been essential and fundamental elements of the British criminal justice system. Moreover the Commission in *Saunders v. the United Kingdom* (report of the Commission of 10 May 1994, paras. 71-73) and the Court in *Funke v. France* (judgment of 25 February 1993, Series A no. 256-A, p. 22, para. 44) have accepted that they are an inherent part of the right to a fair hearing under Article 6 (art. 6). In his view these are absolute rights which an accused is entitled to enjoy without restriction.

A second, equally essential element of the right to silence was that the exercise of the right by an accused would not be used as evidence against him in his trial. However, the trial judge drew very strong inferences, under Articles 4 and 6 of the Order, from his decision to remain silent under police questioning and during the trial. Indeed, it was clear from the trial judge’s remarks and from the judgment of the Court of Appeal in his case that the inferences were an integral part

of his decision to find him guilty.

Accordingly, he was severely and doubly penalised for choosing to remain silent: once for his silence under police interrogation and once for his failure to testify during the trial. To use against him silence under police questioning and his refusal to testify during trial amounted to subverting the presumption of innocence and the onus of proof resulting from that presumption: it is for the prosecution to prove the accused's guilt without any assistance from the latter being required.

....

43. The Government contended that what is at issue is not whether the Order as such is compatible with the right to silence but rather whether, on the facts of the case, the drawing of inferences under Articles 4 and 6 of the Order rendered the criminal proceedings against the applicant unfair contrary to Article 6 (art. 6) of the Convention.

They maintained, however, that the first question should be answered in the negative. They emphasised that the Order did not detract from the right to remain silent in the face of police questioning and explicitly confirmed the right not to have to testify at trial. They further noted that the Order in no way changed either the burden or the standard of proof: it remained for the prosecution to prove an accused's guilt beyond reasonable doubt. What the Order did was to confer a discretionary power to draw inferences from the silence of an accused in carefully defined circumstances. They maintained that this did not, of itself, violate the right to silence.

In this respect, they emphasised the safeguards governing the drawing of inferences under the Order which had been highlighted in national judicial decisions (see paragraphs 24 and 29 above). In particular, it had been consistently stressed by the courts that the Order merely allows the trier of fact to draw such inferences as common sense dictates. The question in each case is whether the evidence adduced by the prosecution is sufficiently strong to call for an answer.

....

As to the question whether, on the facts of the case, the drawing of inferences under Articles 4 and 6 of the Order rendered the criminal proceedings against the applicant unfair, the Government comprehensively analysed the trial court's assessment of the evidence against the applicant. On the basis of this analysis they submitted that on the evidence adduced against the applicant by the Crown, the Court of Appeal was right to conclude that a formidable case had been made out against him which deeply implicated him in the false imprisonment of Mr L. and that this case "called for an answer". The drawing of inferences therefore had been quite natural and in accordance with common sense.

44. The Court must, confining its attention to the facts of the case, consider whether the drawing of inferences against the applicant under Articles 4 and 6 of the Order rendered the criminal

proceedings against him - and especially his conviction - unfair within the meaning of Article 6 (art. 6) of the Convention. It is recalled in this context that no inference was drawn under Article 3 of the Order. It is not the Court's role to examine whether, in general, the drawing of inferences under the scheme contained in the Order is compatible with the notion of a fair hearing under Article 6 (art. 6) (see, amongst many examples, the Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, p. 29, para. 53).

45. Although not specifically mentioned in Article 6 (art. 6) of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 (art. 6) (see the Funke judgment cited above, loc. cit.). 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 (art. 6).

46. The Court does not consider that it is called upon to give an abstract analysis of the scope of these immunities and, in particular, of what constitutes in this context "improper compulsion" What is at stake in the present case is 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"

47. On the one hand, it is self-evident 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. On the other hand, the Court deems it 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.

Wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative.

It cannot be said therefore 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. In particular, as the Government have pointed out, established international standards in this area, while providing for the right to silence and the privilege against self-incrimination, are silent on this point.

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 (art. 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.

48. As regards the degree of compulsion involved in the present case, it is recalled that the applicant was in fact able to remain silent. Notwithstanding the repeated warnings as to the possibility that inferences might be drawn from his silence, he did not make any statements to the police and did not give evidence during his trial. Moreover under Article 4(5) of the Order he remained a non-compellable witness (see paragraph 27 above). Thus his insistence in maintaining silence throughout the proceedings did not amount to a criminal offence or contempt of court. Furthermore, as has been stressed in national court decisions, silence, in itself, cannot be regarded as an indication of guilt (see paragraphs 24 and 29 above).

....

51. In this context, it is recalled that these were proceedings without a jury, the trier of fact being an experienced judge. Furthermore, the drawing of inferences under the Order is subject to an important series of safeguards designed to respect the rights of the defence and to limit the extent to which reliance can be placed on inferences.

In the first place, before inferences can be drawn under Article 4 and 6 of the Order appropriate warnings must have been given to the accused as to the legal effects of maintaining silence. Moreover, as indicated by the judgment of the House of Lords in *R. v. Kevin Sean Murray* the prosecutor must first establish a *prima facie* case against the accused, i.e. a case consisting of direct evidence which, if believed and combined with legitimate inferences based upon it, could lead a properly directed jury to be satisfied beyond reasonable doubt that each of the essential elements of the offence is proved (see paragraph 30 above).

The question in each particular case is whether the evidence adduced by the prosecution is sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused “calls” for an explanation which the accused ought to be in a position to give that a failure to give any explanation “may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty”. Conversely if the case presented by the prosecution had so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt (*ibid.*). In sum, it is only common-sense inferences which the judge considers proper, in the light of the evidence against the accused, that can be drawn under the Order.

In addition, the trial judge has a discretion whether, on the facts of the particular case, an inference should be drawn. As indicated by the Court of Appeal in the present case, if a judge accepted that an accused did not understand the warning given or if he had doubts about it, “we are confident that he would not activate Article 6 against him” (see paragraph 31 above). Furthermore in Northern Ireland, where trial judges sit without a jury, the judge must explain the reasons for the decision to draw inferences and the weight attached to them. The exercise of

discretion in this regard is subject to review by the appellate courts.

....

53. The trial judge drew strong inferences against the applicant under Article 6 of the Order by reason of his failure to give an account of his presence in the house when arrested and interrogated by the police. He also drew strong inferences under Article 4 of the Order by reason of the applicant's refusal to give evidence in his own defence when asked by the court to do so (see paragraph 25 above).

54. In the Court's view, having regard to the weight of the evidence against the applicant, as outlined above, the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances. As pointed out by the Delegate of the Commission, the courts in a considerable number of countries where evidence is freely assessed may have regard to all relevant circumstances, including the manner in which the accused has behaved or has conducted his defence, when evaluating the evidence in the case. It considers that, what distinguishes the drawing of inferences under the Order is that, in addition to the existence of the specific safeguards mentioned above, it constitutes, as described by the Commission, "a formalised system which aims at allowing common-sense implications to play an open role in the assessment of evidence".

Nor can it be said, against this background, 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.

....

58. Accordingly, there has been no violation of Article 6 paras. 1 and 2 (art. 6-1, art. 6-2) of the Convention.

### *Questions*

The right not to be compelled to testify against oneself or to plead guilty is closely related to other rights protected by international human rights treaties, especially the right to be presumed innocent (Articles 8(2) of the American Convention, 14(2) of the ICCPR, and 6(2) of the European Convention) and the right not to be tortured or subjected to other cruel, inhuman, or degrading treatment (Articles 5 of the American Convention, 7 of the ICCPR, and 3 of the European Convention). Moreover, Article 8(3) of the American Convention provides that confessions obtained under coercion of any kind shall not be valid to assess the guilt of an accused person. Finally, Articles 10 of the Inter-American Convention to Prevent and Punish Torture and 15 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment provide that statements verified as having been obtained through torture shall be inadmissible as evidence in a legal proceeding.

1. What is the scope of the prohibition against self-incrimination? Is it an absolute right? The Human Rights Committee established in *Errol Johnson v. Jamaica*<sup>12</sup> that:

[U]nder the wording of Article 14, paragraph 3(g), namely 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.

Review also the corresponding paragraphs of *Murray v. United Kingdom*, which refer to the permissible restrictions to this right.

2. If the right to remain silent is not expressly established in the European Convention, how did the European Court decide that this right was violated in *Funke*? How could you distinguish the holding of the European Court in *Murray* from its previous holding in *Funke*? What is your opinion on *Murray*? Is it true that ultimately courts generally draw inferences from the silence of the accused, particularly in legal systems that permit the free assessment of the evidence by a tribunal?

3. How did the Inter-American Commission come to the conclusion that the right not to be compelled to testify against oneself had been violated in the *Manríquez* case? Do you consider that the Court acted as a trier of fact and law when deciding this case? Is there any approach that you consider an international adjudicatory body should follow to assess whether the accused has been convicted on the basis of evidence obtained under any kind of coercion? In *Peter Grant v. Jamaica*,<sup>13</sup> the Human Rights Committee concluded that domestic courts had examined the applicant’s allegations and found that the statements made by him had not been procured through duress. Therefore, it decided that “[i]n the absence of a clear showing of bias or misconduct by the judge, the Committee cannot re-evaluate the facts and evidence underlying the judge’s finding.”

4. Article 8(3) of the American Convention applies to confessions obtained under any kind of coercion, while Article 10 of the Inter-American Convention to Prevent and Punish Torture refers to the evidentiary exclusion of statements obtained through torture. What about statements that are not confessions but are obtained under cruel treatment that does not rise to the level of torture?

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<sup>12</sup> Communication No. 588/1994, U.N. Doc. CCPR/C/56/D/588/1994, August 5, 1996(1996), <<http://sim.law.uu.nl>; <http://www.unhchr.ch>>.

<sup>13</sup> Communication No. 597/1994, U.N. Doc. CCPR/C/56/D/597/1994, April 10, 1996(1996), <<http://sim.law.uu.nl>; <http://www.unhchr.ch>>.

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## 7. THE RIGHT TO APPEAL TO A HIGHER COURT

### **Abella v. Argentina**

*Case 11.137, Inter-Am C.H.R. 271,*

*Annual Report 1997, OEA/Ser.L/V/II.98, doc. 7 rev. (1998)*

*[For the facts of the case, see Chapter III; footnotes omitted]*

#### C. THE TRIAL

248. In this case, the petitioners have alleged several violations of the right to due process, invoking Articles 8 and 25 of the American Convention. The complaints have been summarized at the outset of this report, and refer to the totality of the *Abella* case, from the beginning of the investigation, primarily in respect of the following aspects: the legal classification of the facts, the competent judge, the petitioners' characterization of the trial as "political and repressive", the taking of the evidence, the lack of any investigation into the complaints of human rights violations made by the accused due to the ineffectiveness of what are called "parallel proceedings", the right to be presumed innocent, the right to defense, and the right to appeal to a higher court.

249. The Commission considers that the complaints with respect to the alleged violations of the American Convention's due process provisions (Articles 8 and 25) are closely related to the alleged violation of the right to appeal the ruling to a higher judge or court. In effect, had petitioners been able as a matter of right to appeal their convictions to a higher court, that court could have been able to establish the existence of the due process violations alleged by petitioners and ordered appropriate relief. Accordingly, the Commission will limit its examination of petitioners' due process claims to a specific issue that affected all the defendants in the *Abella* case: whether they were afforded the right to appeal their convictions to a higher court as required by Article 8(2)(h) of the American Convention.

#### *The right to appeal the judgment to a higher court (Article 8(2)(h))*

250. Article 8 of the American Convention establishes the requirements that should be observed during the various procedural stages to be able to speak of authentic and appropriate judicial guarantees. According to the jurisprudence of the Inter-American Court, Article 8

...recognizes the concept of "due process of law", which includes the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial

determination.

251. The inter-American system, like the European system, has a provision that develops the procedural guarantees for the accused because of the conviction of states that the effective protection of human rights requires procedural guarantees, in addition to the observance of substantive rights.

252. One essential aspect of due process is the right to have a higher court examine or re-examine the legality of all judicial decisions that result in an irreparable harm or when that harm affects fundamental rights and liberties, such as personal liberty. Due process of law would lack efficacy without the right of defense in a trial and the opportunity to defend oneself against an adverse decision.

253. Article 8(2)(h) of the American Convention provides that . . . .

254. The Commission will proceed to examine whether remedies under Argentine law available to the defendants in the *Abella* case effectively permitted them to seek review of their convictions by a higher court. In so doing, the Commission must focus on and ultimately define the scope and content of this right enshrined in Article 8(2)(h) of the American Convention. In this regard, the Commission had the opportunity to consider the same issue in Case 11,086, with respect to Guillermo Maqueda, who was convicted and given a 10-year prison sentence for his alleged involvement in the attack on the RIM 3 barracks at La Tablada. Because the issue concerning the alleged violation of Article 8(2)(h) in this case is virtually identical to that in the Maqueda case, the Commission in its analysis of this issue will draw heavily from its decision in Maqueda.

255. Guillermo Maqueda was a member of the MTP, and was in the immediate area around the La Tablada barracks on January 23, 1989. He was arrested four months after the attack, tried under Law 23,077, and convicted on June 11, 1990. Maqueda filed a special appeal (“recurso extraordinario”), which was denied by the Federal Court of Appeals of San Martín on October 25, 1990. Consequently, he filed an appeal directly before the Supreme Court (“recurso de queja”), which dismissed it on March 17, 1992.

256. In the processing of Case 11,086, the Commission adopted Report 17/94 at its Session 1,222 on February 9, 1994. In that report, the Commission determined that the Argentine State had violated, among other rights, the right to appeal to a higher court, set forth at Article 8(2)(h), together with the judicial guarantees provided for in Article 25. The Commission submitted the case to the Inter-American Court of Human Rights once the period set in the report had elapsed without the recommendations having been carried out. Finally, the case was settled under the friendly settlement procedure: Mr. Maqueda had his sentence commuted by the State of Argentina, and was thereby released from prison. The Commission filed to voluntarily dismiss the case before the Inter-American Court; that motion was granted by resolution of January 17, 1995.

257. It must be noted that the Argentine Constitution in force during the *Abella* case did not provide for access to either split-level or multiple-level courts (i.e. some sort of review), nor did it determine the jurisdiction of the federal courts. Therefore, in principle, the cases in the federal courts could be governed by Congressional statute with or without review. The result of this situation was that the constitutional guarantee of due process and the right of defense at trial did not require the right of review. While the right of review was not, in and of itself, a constitutional requirement at the time of the *Abella* trial, it should be noted that the American Convention, when approved by Law 23,054 and ratified by the Argentine State on September 5, 1984, became the supreme law of the nation, pursuant to Article 31 of the Constitution then in force.

258. In the instant case, the petitioners had only one opportunity to be heard and to present their case. They were tried under the procedural provisions of Law 23,077, which creates a special criminal procedure that does not include an appeal or a broad remedy before any appellate court. Nonetheless, it does allow for the special appeal (*recurso extraordinario*) provided for in Article 14 of Law 48.

259. The Commission now sets forth its views concerning the purpose and characteristics of the right enshrined in Article 8(2)(h). The American Convention, in contrast to the European Convention on Human Rights and the Universal Declaration of Human Rights, provides ample protection of the right to appeal. The Commission views this remedy as a means of benefitting the accused, so as to protect his rights by providing a new opportunity to exercise his defense. The remedy against the definitive judgment is aimed at offering the opportunity to one who has been affected by an unfavorable decision to seek to overturn the judgment and have the matter reviewed. The purpose of the review is to ensure the decision is a rational outcome of a fair trial, pursuant to the law and guarantees, and of the proper application of the criminal law.

260. The State tried to justify the nature of Law 23,077 by citing the basic principles of the draft legislation that was submitted to the Congress, and by referring to the improvements in the justice system. Notwithstanding the broader guarantees provided by the oral hearing procedure, insofar as it constitutes an opportunity for the issues to be debated and confronted, the right of the accused to appeal to a second instance in the criminal procedure strengthens the protection against judicial error.

261. The Commission observes that Article 8(2)(h) refers to the minimum characteristics of a remedy that serves as a check to ensure a proper ruling in both substantive and formal terms. From the formal standpoint the right to appeal the judgment to a higher court to which the American Convention refers should, in the first place, apply to every first instance judgment with the purpose of examining the unlawful application, the lack of application, or the erroneous interpretation of rules of law based on the operative part of the judgment. The Commission also considers that to guarantee the full right of defense, this remedy should include a material review of the interpretation of procedural rules that may have influenced the decision in the case when there has been an incurable nullity or where the right to defense was rendered ineffective, and also with respect to the interpretation of the rules on the weighing of evidence, whenever they

have led to an erroneous application or non-application of those rules.

262. Based on the foregoing, the right provided for in Article 8(2)(h) requires the availability of a remedy that would at least allow for review by a higher court of questions of law and of all the major procedural rulings. Such review is especially relevant with respect to those rulings that may result in defenselessness or cause irreparable damage in the final judgment, including the legality of the evidence. The remedy should also allow the higher court a relatively simple means to examine the validity of the judgment appealed in general, as well as to monitor the respect for fundamental rights of the accused, especially the right of defense and the right to due process.

263. Accordingly, the Commission must examine the nature of the special appeal provided for in Law 48, the only one available under Law 23,077, in order to determine whether that appeal constitutes an effective tool for putting in practice the right recognized by article 8(2)(h) of the American Convention.

264. In the Argentine legal order, the special appeal is exceptional, and is limited to the federal jurisdiction. As such, it is not a procedural level that is added on to every trial, but rather it operates as a new but reduced and partial procedural level that is limited to federal subject matter in the case of arbitrary judgments. In the final instance, the special appeal exists to ensure constitutional supremacy.

265. In general, the Supreme Court of Justice of Argentina interprets the application of the special appeal as of restricted scope. In its denial of the complaint appeal filed by the defendants in the *Abella* case, the Supreme Court held:

(5) That, under doctrine of this Court, to meet the requirement of autonomous grounds required by Article 15 of Law 48, the special appeal must contain a clear and precise statement of the facts in the case that make it possible to link to them the issues which, such as those federal in nature, are to be submitted to the Court....

(7) That the requirement of sufficient foundation is aimed at examining the concrete federal harms that may justify the intervention of the Court to review a judgment that has put an end to the process, and that can only be reviewed in the specific cases stated in the law....

266. The special appeal in the *Abella* case was founded on the alleged nullity of the proceedings due to the irregularities of the proceedings, the interpretation of Article 21 of the Constitution, the legal analysis of the facts, and finally, the weighing of the evidence, which the defense considered arbitrary. In this regard, it should be mentioned that in its judgment in the *Maqueda* case, handed down the same day as the previous case, the Supreme Court explained:

As to the rest, the matters relating to the weighing of the evidence and the existence of *mens rea* in *Maqueda's* conduct, are questions of fact, civil code law, and procedural law which have been resolved by the court below with sufficient reasoning such that it is not up to the Court to analyze

these discrepancies, given the limited nature of the appeal.

267. In the Argentine legal system the arbitrariness of a judgment is considered a federal question, and thus susceptible to review only by special appeal. It should be noted, as has already been said, that this remedy is interpreted narrowly, and consequently the arbitrariness of a judgment will not be considered solely on the ground the judgment is in error, or because its grounds may be called into question.

268. The Federal Court of Appeals explained as follows in its denial of the special appeal brought by Mr. Maqueda:

... the doctrine of arbitrariness is exceptional in nature, and imposes a particularly narrow criterion for analyzing its origin. Were it otherwise it would mean creating a third regular procedural level in cases in which the parties find the trial judge's decision in error or not well-founded, which is foreign to the nature of the remedy, or in situations involving the selection and interpretation of the evidence and the application of the law that would have been appealed, ... consequently this rule only applies in those situations where the decision, lacking grounds, merits disqualification as a judicial act.

269. Based on the foregoing, it is clear that the special appeal does not have the purpose of remedying decisions supposedly in error, but only extremely serious omissions or blunders. Bearing in mind that the jurisprudence of the Supreme Court holds that the special appeal does not encompass a review of the procedure, and that the doctrine of arbitrariness imposes a particularly narrow criterion for analyzing its applicability, in practice the special remedy does not allow for legal review by a higher court of the decision or of all important procedural rulings, including the sufficiency and legality of the evidence, nor does it allow for examining the validity of the judgment appealed in a relatively simple fashion. It is a remedy of limited scope, available only on an exceptional basis, whose application is narrow, and therefore it does not satisfy the guarantee whereby the accused may challenge the judgment.

....

272. In the particular circumstances of this case, the special appeal was not an effective instrument to guarantee the right to appeal a judgment before a higher court to challenge the decision of the Federal Court of Appeals of San Martín.

273. Based on its analysis, the Commission considers that the special appeal, the only remedy available against judgments issued pursuant to the procedure established in Law 23,077, does not satisfy the requirements set forth in Article 8(2)(h) of the American Convention. Consequently, the application of the special criminal procedure provided for by Law 23,077, in this case, was a violation of the petitioners' right to appeal the judgment to a higher court as required by the Convention. The effect of that circumstance was that the petitioners tried in the *Abella* case did not have access to an effective remedy that protected them from acts violative of their

fundamental rights; accordingly, the Commission concludes that the Argentine State is also responsible for violating Article 25(1) of the American Convention with respect to those persons.

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**Case of Horacio David Giroidi and Others**  
*Supreme Court of Justice of Argentina, Judgment of April 7, 1995 (1995)*

Whereas:

1<sup>o</sup>) The Oral Criminal Court N<sup>o</sup> 6<sup>14</sup> of Buenos Aires sentenced Horacio David Giroidi to the punishment of one month, suspended sentence, for the crime of attempting to commit a theft. Against said judgment, the state-appointed defense filed a writ of cassation [*recurso de casación*]<sup>15</sup> to the National Criminal Court of Cassation [*Cámara Nacional de Casación Penal*].

The defense argued, as to the merit of the lawsuit, that the Oral Court's judgment violated the guarantee of a defense in trial. Furthermore, the defense based the action on the unconstitutionality of the limit set forth by article 459, inc. 2<sup>o</sup> of the National Code of Criminal Procedure as contravening article 8<sup>o</sup>, inc. 2<sup>o</sup>, ap. h) of the American Convention of Human Rights, which grants to all persons accused of committing a crime the right "to appeal the judgment to a higher court."

2<sup>o</sup>) The National Criminal Court of Cassation rejected the constitutional argument raised by the defense and, as a result, declared the action inadmissible. In arriving at this result, the tribunal cited the Jáuregui case (Fallos: 311:274), where this Supreme Court resolved that the requirement of judicial appeal in the criminal field was satisfied by the possibility of bringing the extraordinary appeal [*recurso extraordinario*]<sup>16</sup> envisaged in article 14 of the law 48. In challenging the Court of Appeals, the defense filed an extraordinary appeal before that tribunal,

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<sup>14</sup> *Editor's note:* An "Oral Criminal Court" is a Trial Court.

<sup>15</sup> *Editor's note:* Under Argentinian law, *casación* is a remedy to challenge a judgment on the ground that the trial court failed to observe or misapplied the law.

<sup>16</sup> *Editor's note:* The *recurso extraordinario* is a special appeal to the Supreme Court, basically aimed at challenging the validity of a decision or law under the Constitution.

the denial of which gives rise to the present request for review [*recurso de queja*]<sup>17</sup>.

....

5°) The constitutional reform of 1994 has conferred equal constitutional status to various international agreements (Article 75, Clause 22, Paragraph 2), among them, the American Convention of Human Rights, which, pursuant to its Article 8°, paragraph 2, clause h, provides that every person accused of a criminal offense has the right “to appeal the judgment to a higher court.”

6°) Therefore, it should be determined whether, within the Argentinian laws of criminal procedure, there exists the institution and the procedures necessary to give adequate satisfaction to the aforementioned constitutional guarantee. In this sense, the non-existence of appeals in the procedural law has driven the Court of Cassation to assert that the Oral Court’s judgment could be appealed through the extraordinary appeal [*recurso extraordinario*] before this Supreme Court on the ground of the “Jáuregui” precedent.

7°) That in the above mentioned case, the Court considered the requirement provided for in the aforesaid Article 8, paragraph 2, subsection h of the Convention was satisfied by the existence of the extraordinary appeal [*recurso extraordinario*] before this Court....

Nevertheless, the rules and exceptions that by that time determined the appealed jurisdiction of the Supreme Court underwent modifications as a result of the amendment introduced in 1990 by the law 23.774. This law granted the Court the authority to deny, by the mere application of article 280 of the National Code of Commercial and Civil Procedure, the extraordinary appeal [*recurso extraordinario*] for the lack of sufficient injury under federal law or when the issues raised lack substantiality or relevancy.

8°) Such circumstances are able to support the new grounds that in a case like the one at hand, the extraordinary appeal [*recurso extraordinario*] does not constitute an effective remedy for the protection of the guarantee of an appeal to a higher court that should be respected within the framework of criminal procedure as the “minimum guarantees” for “every person accused of a criminal offense” (Article 8, Paragraph 2, subsection h of the Convention)

9°) That likewise, the changes introduced by the laws 23.984 and 24.050 in respect to the different judicial organs which constitute the lower courts of the Federal Judiciary (article 75, subsection 20 of the Constitution) included the creation of the National Criminal Court of

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<sup>17</sup> *Editor’s note:* The *recurso extraordinario* is initially filed with the court that adopted the decision, to be challenged before the Supreme Court. If that appeal is allowed, the case is referred to the Supreme Court; if the appeal is denied, the appellant may file a request for review directly with that Court. The direct appeal is named *recurso de queja*.

Cassation.

This circumstance modified the organization of the Nation's Judicial Branch, that did not provide an intermediate court between the Supreme Court and the National and Federal Courts of Appeals, in place at the time of the decision in the "Jáuregui" case. The National Criminal Court of Cassation has been precisely created to consider the appeals, through the remedies of cassation [*casación*] and unconstitutionality, - and even *revisión*<sup>18</sup>- against the judgments that the Oral Criminal Courts as well as the Correctional Courts,<sup>19</sup> entered on issues under their jurisdiction.

10º) That the aforesaid determines that the most appropriate method in securing the guarantee of an appeal to a higher court in criminal matters provided for in the American Convention on Human Rights (article 8, subsection 2, ap. h) is to declare the unconstitutionality of the limitation established in article 459, subsection 2 of the National Code of Criminal Procedure, inasmuch as it precludes the appeals [*recurso de casación*] against lower criminal court's sentences on the ground of the amount of the punishment.

11º) That the already mentioned "constitutional hierarchy" of the American Convention of Human Rights (considering 5º) has been established by the express desire of the framers of the Constitution, "in the full force of their provisions" (article 75, subsection 22, 2º paragraph) in other words, just like that Convention effectively is applied in the international sphere with particular consideration to the jurisprudence developed by the international courts competent for the interpretation and application of that treaty.

It follows that the said jurisprudence should serve as a guide for the interpretation of the treaty provisions to the extent that the State of Argentina acknowledged the jurisdiction of the Inter-American Court in order to entertain all cases concerning the interpretation and application of the provisions of the American Convention (pursuant to arts 75 of the National Constitution, 62 and 64 American Convention and article 2 law 23.054).

12º) That, consequently, this Court, as the supreme authority of one of the branches of the Federal Government, is vested - to the extent of its jurisdiction- with the power to apply the international treaties to which this country is bound to in the aforementioned terms, since otherwise the State's responsibility for violating international law could be at issue within the international community. In this regard, the Inter-American Court determined the scope of article 1 of the Convention, as stating that the States Parties should not only "respect the rights and freedoms recognized therein," but also "ensure to all persons subject to their jurisdiction the

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<sup>18</sup> *Editor's note:* *Revisión* is a remedy by which a final judgment can be reviewed on the basis of facts or evidence unknown at the time the decision was adopted.

<sup>19</sup> *Editor's note:* "Correctional Courts" are courts with jurisdiction to try misdemeanors.

free and full exercise of those rights and freedoms.” Pursuant to the said Court, “to ensure” includes the State’s duty to take all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees. Consequently, the State’s tolerance of circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights is a violation of Article 1(1) of the Convention. (Advisory Opinion No. 11/90 of August 10, 1990-Exceptions to the exhaustion of domestic remedies -paragraph 34). To guarantee includes, likewise, “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.” (id., paragraph 23).

13°) Then, it follows that the solution herein adopted allows, from the point of view of the due process guarantees, compliance with the human rights commitments assumed by the State while safeguarding the institutional insertion of the National Criminal Court of Cassation in the sphere of the federal judiciary and respecting the aim of establishing “intermediate” judicial authorities in that sphere. These intermediate judicial authorities were created in order to lay the necessary foundations for the Court to satisfy the primary mission with which it has been entrusted, either because before those “intermediate courts” the parties are able to find the relief for damages caused by lower court judgments without necessity of appealing to the Supreme Court, or because the object for the Court to revise would certainly be a more elaborate product. . . .

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**Case of Jorge Daniel Arce**

*Supreme Court of Argentina, Judgment of October 14, 1997 (1997)*

Whereas:

1°) That against the judgment of the Oral Criminal Tribunal N° 15 which sentenced Jorge Daniel Arce and Pablo Armando Miranda or José Antonio Gramajo to incarceration of five and six years, respectively, the prosecutor filed a writ of cassation [*recurso de casación*] contesting the application of Article 458 of the National Code of Criminal Procedure insofar as it prevents the Public Prosecutor’s Office from filing this appeal when, as in this case, one of the situations anticipated in clauses 1 or 2 of this norm occurs.

2°) That the National Criminal Court of Cassation declared that the writ of cassation [*recurso de casación*] was erroneously granted, and resolved, supported by the precedent of this Court, that the limit established in Article 458 of the National Code of Criminal Procedure was properly applied. Likewise, it stipulated that the American Convention on Human Rights—which recognizes the right to appeal—does not apply to prosecutors acting as an organ of the State (pp.

639/641), in that its principal goal is to ensure fundamental rights of human beings. The representative of the Public Prosecutor's Office filed an extraordinary appeal [*recurso extraordinario*] against this decision, based on the arguments that the American Convention does not exclude the Public Prosecutor's Office from the scope of its protection, and that the decision violated the guarantees of due process and equality before the law (arts. 18 and 16 of the National Constitution).

....

4°) That this Court understood in the *Girolodi* case –Judgments 318:514– that the most appropriate way to ensure the constitutional guarantee of the right to appeal to a higher tribunal was to declare Article 459(2) of the National Code of Criminal Procedure unconstitutional, insofar as it disallowed the admissibility of a writ of cassation [*recurso de casación*] filed on behalf of the accused against the judgments of criminal courts with regard to the length of a sentence. It remains to be analyzed now whether the previously invoked guarantee enshrined in the American Convention is applicable to the Public Prosecutor's Office.

5°) That art. 75(22), second paragraph, of the 1994 Constitution grants constitutional status to the American Convention on Human Rights, which stipulates that, “Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ... the right to appeal the judgment to a higher court” (Art. 8(2)(h)).

6°) That the first analysis turns on the meaning of the term “person” in Article 8, paragraph 2 of the American Convention on Human Rights. The Preamble and Article 1 of the Convention establish that “person” means every human being. Thus, it is fitting to apply the hermeneutic principle that when a law is clear and does not demand greater interpretive effort, its direct application is the only possible option (Judgments: 218:56). On the other hand, the guarantees emanating from human rights treaties must be understood in terms of the protection of the essential rights of human beings, not for the benefit of the Contracting States. The jurisprudence of the Inter-American Court of Human Rights serves as a guide for the interpretation of the Convention; and given the Argentine State's recognition of the Court's competence to hear all of the cases relative to the interpretation and application of the Convention (see Articles 41, 62 and 64 of the Convention and Article 2 of law 23,054), the Court's assertion that: “the States...assume various obligations, not in relation to other States, but to the individuals under their jurisdiction” (OC-2/82, September 24, 1982, para. 29) is relevant to this case.

7°) That, likewise, it is appropriate to examine the scope of Article 8(2)(h) of the American Convention. Among the international agreements enumerated in Article 75(22), second paragraph, of the 1994 Constitution is the International Covenant on Civil and Political Rights (ICCPR). That treaty sheds light on the question posed from two perspectives. First, the treaties with constitutional status must be understood as forming a single piece of law, the aim of which

is the protection of the fundamental rights of human beings. Second, the ICCPR was used as a model in the preparation of the American Convention, which allows for its use as a means of interpretation according to that Convention (see Article 29(d)) and the Vienna Convention on the Law of Treaties (see Article 32). The ICCPR establishes that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law” (art. 14(5)). Thus, both norms taken together demonstrate that the guarantee of the right of appeal has been recognized only for the benefit of the accused. We thus conclude that, insofar as the Public Prosecutor’s Office is an organ of the State and is not the subject of this benefit, it is not covered by the norm of constitutional scope; nevertheless, the legislature is not precluded from granting the same right to the Public Prosecutor’s Office if considered necessary.

8°) That the appellant challenges the constitutionality of Article 458 of the National Code of Criminal Procedure inasmuch as does not grant the Public Prosecutor’s Office the right of appeal via writ of cassation [*recurso de casación*]. In analyzing this argument, it is essential to point out that the right to appeal does not attain constitutional status. Along these lines, repeated jurisprudence of this Court affirms that the adequate respect for the right to due process of the law demands only that the litigant be heard with legal formalities, and does not depend upon the number of instances that the procedural laws regulating this constitutional guarantee establish according to the nature of the cases...This rule has been limited by the 1994 constitutional reform, which expressly recognizes the right of the accused to “appeal the judgment to a higher judge or court” (see also Article 8(2)(h) of the American Convention on Human Rights). Accordingly, the intent of the framers of the constitution was to surround this individual with greater guarantees without it being possible to conclude that this difference violates the Constitution, since it is a norm with constitutional status which provides for such treatment.

9°) That on the other hand it is worth noting that the State—the party bringing the criminal suit—may limit its own *ius persequendi*<sup>20</sup> in the cases it considers lacking in sufficient relevance to justify its proceeding. In such conditions, the prosecutor must exercise his or her right within the limits granted by the procedural law. Thus, the limitation of the Public Prosecutor’s Office’s ability to appeal cannot be considered unconstitutional when an assumption like the one provided in Article 458 of the National Code of Criminal Procedure is verified, insofar as, under the particular circumstances of the case under analysis, it has not been demonstrated that the validity of other constitutional norms has been affected.

10°) That it is proper to dismiss the appellant’s claim that the situation created upon the declaration of unconstitutionality of Article 459 of the National Code of Criminal Procedure in the *Girolodi* case violates the right of equality before the law (art. 16 of the National Constitution). This is because the parties to a criminal proceeding do not pursue the same interests. In effect, criminal procedure is characterized by the absence of the permanent antagonism typical of civil proceedings. This derives from the public character of the claim that the Public Prosecutor’s Offices pursues, which often can coincide with the private interest of the

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<sup>20</sup> *Editor’s note*: “*ius persequendi*” means “power to prosecute.”

accused, since its function is the reconstruction of the altered judicial order. It was so understood by the representative of the Republic of Argentina, Dr. José María Ruda, in the discussion of the International Covenant on Civil and Political Rights (ICCPR): “the law must concede identical guarantees to all persons similarly situated before the courts in criminal matters, [but] the rights of the prosecutor are not the same as those of the accused. All individuals must be the object of equal protection, but they are not equal before the courts, since the circumstances vary in each case” (see *travaux préparatoires* of the International Covenant on Civil and Political Rights, United Nations General Assembly, Third Commission, fourteenth period of sessions, draft art. 14, November 24, 1959).

11°) That by virtue of the above, it may be concluded that in the present case the right of equality before the law enshrined in our Constitution has been respected within the scope that this Court has long granted it, in that “the principle of the equality of all persons before the law, according to the letter and spirit of our Constitution, is nothing but the right that no exceptions or privileges be established which deny some individuals that which is conceded to others in like circumstances. From this it follows forcefully that true equality consists of the application of the law according to the differences that constitute the cases arising. . .”

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**E.M. v. Norway**

*App. No. 20087/92, Eur. Comm'n. H.R.,  
Decision on Admissibility of October 25, 1995  
<<http://www.echr.coe.int>>*

*[The applicant and others were accused of defrauding the National Bank of Norway through the use of documents issued under false pretenses. The applicant was found guilty of some of the charges brought against him, and acquitted of others. He was sentenced to two-and-a-half years' imprisonment, and ordered to pay damages jointly with three co-defendants. Subsequently, the applicant applied to the Appeals Selection Committee of the Supreme Court for a new trial in the High Court or, in the alternative, leave to appeal to the Supreme Court. In support of his request for a new trial he maintained his innocence and claimed that the City Court had failed to make a correct evaluation of the evidence. In support of the alternative request, he directed his appeal against alleged procedural errors, claiming that the reasons for the Court's findings were incomplete, against an alleged wrongful application of the law, and against the sentence imposed, which he found disproportionate when compared to that of a co-defendant. Both requests were rejected, as were two subsequent petitions to reconsider and to reopen the case. The applicant alleged, inter alia, the violation of Article 2 of Protocol 7 to the European Convention.]*

## *THE LAW*

1. Relying on Article 2 of Protocol No. 7 (P7-2) to the Convention the applicant complains that the examination by the Appeals Selection Committee of the Supreme Court of his application for a new trial or leave to appeal, did not comply with the requirements of this provision.

Article 2 of Protocol No. 7 (P7-2) reads as follows:

“1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right 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 the first instance by the highest tribunal or was convicted following an appeal against acquittal.”

Having regard to the fact that a conviction and sentence may involve severe punishment as well as an obligation to pay enormous sums in damages the applicant maintains that the above provision should be interpreted as securing a right of an accused to have a “complete review” of the entire case before a higher tribunal without a need first to obtain leave to appeal. Furthermore, he maintains that the “review” performed by the Appeals Selection Committee of the Supreme Court cannot be considered as satisfying the review required by Article 2 of Protocol No. 7 (P7-2).

The Government submit that under Norwegian law there are no limitations as to what aspects of a case an appeal court may consider. As Article 2 of Protocol No. 7 (P7-2) refers on the other hand to a review of the conviction or the sentence the Government maintain that the applicant enjoyed procedural rights which were more extensive than those prescribed by this provision.

Furthermore, the Government maintain that where leave is refused the review is carried out by the Appeals Selection Committee of the Supreme Court which under sections 349 and 370 of the Criminal Procedure Act shall consider, depending on the type of appeal requested, whether or not the appeal, which may concern all aspects of a case, is unfounded or whether there is reason to doubt the assessment of the evidence made by the first instance court. Having regard to this and to the fact that Article 2 of Protocol No. 7 (P7-2) explicitly leaves it to the national legislator to decide how the right of review shall be exercised, the Government contend that the “leave to appeal proceedings” as applied in the present case satisfied the requirements of this provision.

The Commission notes that different rules govern review by a higher tribunal in the member States of the Council of Europe. In some countries such review is in certain cases limited to questions of law such as the “recours en cassation” (in French law) or “Revision” (in German law). In other countries there is a right to appeal against findings of fact as well as on questions

of law; and in some States a person wishing to appeal to a higher tribunal must in certain cases apply for leave to appeal.

As regards Norway the Commission recalls that judgments of the City Court are subject to two kinds of review in criminal cases in the form of an examination by the Supreme Court or a new trial in the High Court. The choice between these remedies rests with the appellant and depends on the aspects of the judgment which are contested. Whereas a party may petition for a new trial in the High Court when the question of evidence in relation to the issue of guilt is alleged to have been wrongly decided by the City Court, an “appeal” to the Supreme Court may be based on alleged defects covering the application of the law, the application of the rules of procedure and the determination of the sanction.

Having regard to this the Commission considers that in principle the possibility exists in Norway for a person convicted of a criminal offence to have his conviction or sentence reviewed by a higher tribunal within the meaning of Article 2 of Protocol No. 7 (P7-2) to the Convention.

However, the possibility of such a “review” depends on leave from the Appeals Selection Committee of the Supreme Court. The question accordingly arises whether the Norwegian system of “leave to appeal”, as applied in the present case, was such that the applicant was denied a review of his conviction or sentence as required by Article 2 of Protocol No. 7 (P7-2) to the Convention.

The second sentence of this provision requires that the exercise of the right to a review by a higher tribunal shall be governed by law but it does not otherwise specify its scope or actual implementation. However, as the reference to the grounds for the review being governed by law clearly shows the Contracting States have a discretion as to the modalities for the exercise of the right of review. Consequently, the Article gives the States the possibility to regulate the review in several ways.

The Commission recalls, as a matter of comparison, that the right of access to the courts secured by Article 6 para. 1 (Art. 6-1) of the Convention may also be subject to limitations in the form of regulation by the State. The State enjoys a certain margin of appreciation but in addition to pursuing a legitimate aim the limitations applied shall not restrict or reduce the access left to the individual in such a way that the very essence of the right is impaired (cf. for example Eur. Court H.R., *Tolstoy Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 323, para. 59).

Although it is not the Commission’s task to substitute itself for the competent Norwegian authorities in determining the most appropriate policy for regulating the exercise of the right of review, the Commission finds that similar considerations should be kept in mind when examining whether the limitations on the right to a review as guaranteed by Article 2 of Protocol No. 7 (P7-2) are compatible with the very essence of this right.

In the present case the Commission recalls that the Appeals Selection Committee of the Supreme Court may decide that an “appeal” may not be allowed to proceed when it unanimously finds it clear that it will not succeed (cf. section 349 of the Criminal Procedure Act). Furthermore, the Committee may refuse leave to obtain a new trial in the High Court if there is no reason to doubt that the assessment of evidence was correct or there are no other special reasons for granting such leave (cf. section 370).

The Commission considers that these provisions of the Criminal Procedure Act pursue a legitimate aim, i.e. the fair administration of justice. Furthermore, the Commission has found no evidence which could lead to the conclusion that the Appeals Selection Committee pursued any other aims. Before the Committee the applicant had not only the opportunity to present any submissions he considered to be of relevance to his case, but also to comment on the observations submitted by the prosecuting authority. Although it is not the Commission’s role to assess the facts which led the Committee to adopt one decision rather than another the Commission is satisfied that the decision taken was based on a full evaluation of all relevant factors.

In these circumstances the Commission does not find that the Appeals Selection Committee overstepped its margin of appreciation when refusing the applicant leave to appeal having found that the conditions therefor were not fulfilled. These conditions, as set out in the Criminal Procedure Act, cannot be said to impair disproportionately the essence of the applicant’s right to a review by a higher tribunal within the meaning of Article 2 of Protocol No. 7 (P7-2) to the Convention.

It follows that this part of the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

### **Questions**

1. Compare the language of Articles 8(2)(h) of the American Convention, 14(5) of the ICCPR, and 2 of Protocol VII to the European Convention and identify the differences in the scope of protection afforded by those provisions.
2. Article 2 of Protocol VII establishes three express exceptions to the right of review, while Articles 8 of the American Convention and 14 of the ICCPR do not set specific limitations. Assuming that the scope of the right of review under the American Convention and the ICCPR is broader than that afforded by Protocol VII, do you consider that, under those international treaties, this right is not subject to any restrictions? Explain.

In relation to “offenses of a minor character,” the decision of the Supreme Court of Argentina in *Giroldi* suggests that Article 8(2)(h) of the American Convention is not limited by that restriction. In fact, the Supreme Court in that case declared unconstitutional, on the basis of the

American Convention, a provision of the Criminal Procedural Code that restricted the right of appeal based on the amount of the punishment. Moreover, the Human Rights Committee established in *Salgar de Montejo v. Colombia*<sup>21</sup> that the one year punishment imposed upon the applicant was serious enough to require a review by a higher tribunal as provided by Article 14 (5) of the ICCPR.

3. Assuming that the three provisions cited above ensure the right of a convicted person to have his conviction and sentence reviewed, how would you articulate the scope of that right after reading the case law reproduced above? Is it similar under the three conventions? Do you think States should have a margin of discretion to determine the modalities of the exercise of the right of review as provided by the European Court in *E.M. v. Norway*? If so, what would be the test to determine that the discretion has been abused?

Like Protocol VII, Article 14(5) of the ICCPR ensures the right of review as governed by domestic law. In *Salgar de Montejo*,<sup>22</sup> the Human Rights Committee stated that “. . . the expression ‘according to law’ in article 14(5) of the Covenant is not intended to leave the very existence of the right of review to the discretion of the States parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law. Rather, what is to be determined ‘according to law’ is the modalities by which the review by a higher tribunal is to be carried out.”

4. Both *Abella* and *E.M.* refer to restricted forms of review. Why do you think the cases were decided differently?

5. The decision of the Argentine Supreme Court in *Giroldi* came out after the *Abella* case was decided by the Inter-American Commission. What was the impact of *Abella* on that Court’s interpretation, if any?

6. In *Arce*, the Supreme Court of Argentina decided that the American Convention and the ICCPR only protect the right of review of a convicted person and not that of a public prosecutor. Do you consider that this holding could be used to argue that international human rights treaties prohibit prosecutors from appealing the acquittal of an accused person?

### Note

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<sup>21</sup> Communication No. 64/1979, U.N. Doc. Supp. No. 40 (A/37/40) (1982), <<http://www1.umn.edu>>

<sup>22</sup> *Id.*

In its recent decision in *Krombach v. France*,<sup>23</sup> the European Court found a violation of Article 2 of Protocol VII because the applicant was unable to appeal his conviction to a higher court based on a provision of the French Code of Criminal Procedure establishing that a defendant tried *in absentia* has no right to have that judgment reviewed by the Court of Cassation.

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## 8. THE NON BIS IN IDEM PRINCIPLE (PROHIBITION OF DOUBLE JEOPARDY)

### Loayza Tamayo v. Peru

*Inter-Am.Ct.H.R., Judgment of September 17, 1997, (ser. A) No. 34 (1997)*

*[For the facts of this case, see Chapter IV]*

66. With regard to the Commission's complaint of the violation of the judicial guarantee that prohibits double jeopardy, to the detriment of Ms. María Elena Loayza-Tamayo, the Court observes that the principle of *non bis in idem* is established in Article 8(4) of the Convention in the following terms:

....

4. An accused person acquitted by a nonappealable judgment shall nor be subjected to a new trial for the same cause.

This principle 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. Unlike the formula used by other international human rights protection instruments (for example, the United Nations International Covenant on Civil and Political Rights, Article 14(7), which refers to the same "*crime*"), the American Convention uses the expression "*the same cause*," which is a much broader term in the victim's favor.

67. In the instant case, the Court observes that Ms. María Elena Loayza-Tamayo was tried in the military criminal courts for the crime of treason, which is closely linked to the crime of terrorism, as may be seen from a comparative reading of Article 2(a), (b) and (c) of Decree-Law No. 25.659 (crime of treason) and Articles 2 and 4 of Decree-Law No. 25.475 (crime of terrorism.)

68. Both Decree-Laws refer to actions not strictly defined, so that they may be interpreted similarly within both crimes, in the view of the Ministry of the Interior and the corresponding

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<sup>23</sup> Judgment of February 13, 2001 (2001), <<http://www.echr.coe.int>>.

judges and, as in the case under consideration, of the “*Police (DINCOTE) itself.*” Consequently, the aforementioned Decree-Laws are contrary to Article 8(4) of the American Convention in this regard.

69. The Special Naval Court, in its judgment of March 5, 1993, which remained in force after all the available appeals had been exhausted, acquitted Ms. María Elena Loayza-Tamayo of the crime of treason, specifying that since

“there is evidence and signs in the records that suggest liability ... for the crime of terrorism, an unlawful activity codified in Decree Law Number twenty-five thousand four hundred and seventy-five it is appropriate that a certified copy of all the police and judicial files be remitted to the Provincial Prosecutor ... so that the appropriate authority may take cognizance of them and act in accordance with their legal powers....”

70. The Court does not accept the State’s argument that the judgment of March 5, 1993, “*merely finds that the acts attributed to Ms. María Elena Loayza-Tamayo do not constitute the crime of treason, but that of terrorism, [since] the term acquittal used by the Military Justice ... is not used with its usual meaning ...*”. In the aforementioned judgment, which concluded a case in which others were also involved, the Tribunal, in referring to some of them, used the phrase “*relinquished jurisdiction to consider the case in regard to ....*” If the judicial intention had been to restrict its ruling to a matter of no jurisdiction, it would have used the same term when referring to Ms. María Elena Loayza-Tamayo. It did not do so, but used the term “*acquittal*” instead.

71. The Commission submitted copies of several judgments rendered by the military tribunals to demonstrate that, when that jurisdiction deems itself to lack jurisdiction to hear a similar case, it uses the juridical concept of “*relinquishment.*” In one such case, the Special Naval Court Martial decided “[its r]*elinquishment ... in favor of the civil courts, and that the proceedings should be remitted to the District Attorney in charge, inasmuch as they constitute facts relating to the crime of Terrorism, so that it may rule according to its jurisdiction; and they returned them.*”

72. The Court observes that the Special Naval Examining Magistrate, in acquitting Ms. María Elena Loayza-Tamayo and other defendants, handed down a judgment using the usual procedure, when he said

Administering Justice on behalf of the Nation, weighing objectively evidence for and against, in exercise of the authority conferred in Article One of Decree-Law twenty-five thousand seven hundred and eight, and Article One of Decree-Law twenty-five thousand seven hundred and twenty-five, in accordance with the Constitutional Law of the sixth of January nineteen hundred and ninety-three.

He also ruled the request concerning “*the payment of civil reparation inadmissible,*” such reparation being proper only when a person is acquitted, and not when the court deems itself to lack jurisdiction.

73. Accordingly, in the firm judgments rendered by the military and civil tribunals in relation to Ms. María Elena Loayza-Tamayo, the grounds for her acquittal and her subsequent conviction were not specified, and can only be determined from the police files and the corresponding charges.

74. Before the military courts, the aforementioned facts were imprecisely stated in Expanded Police Report No. 049-DIVICOTE 3-DINCOTE of February 25, 1993; more specifically, in the part relating to the charge brought by the Military Prosecutor in the Special Naval Court on March 4 of that year, Ms. María Elena Loayza-Tamayo was accused of

[being a member] of the *Departamento de Socorro Popular* [People's Assistance Department] of the Peruvian Communist Party Shining Path, and a member of the 'Leadership Cell,' and was in charge of elaborating the plans for each campaign or given period, and plan, supervise, control and provide logistical support to the detachments and troops that carry out the various terrorist acts.

....

It was also decided that María Elena Loayza-Tamayo, alias 'Rita' [is an author] of the crime of Treason and is covered under Decree-Law No. 25.659 for the following reasons:

- For having carried out activities for the Communist Party of Peru-Shining Path terrorist organization, using firearms and explosive devices.
- For being a member of the leadership of the PCP-SL terrorist organization: "Communist," "Political Command," "Military Command," "Activist," "Combatants," all designations corroborated in her statements, acts of recognition, and documents seized.
- For belonging to a group dedicated to "annihilating" various persons and as such responsible for selecting targets and planning and executing those actions . . .
- For having consistency demonstrated that she has been ideologically schooled and occupies an important position within the terrorist organization by steadfastly denying her association with it or admitting to as little as possible in order to pretend to be what she is not and prove her alibi in order to avoid being held criminally accountable, which is typical of the members of that organization and reveals their cynicism and fanaticism about preserving their "golden rule" (secrecy and not informing); thus adhering to the tenets of their doctrine.
- It has been established that the properties on which meetings were held to plan, coordinate, pass along instructions from above, evaluate actions, render accounts, and for political ideological indoctrination are the following:
  - The building owned by María Elena Loayza-Tamayo, alias 'Rita,' where Nataly Mercedes Salas-Morales, alias 'Cristina,' and Vilma Ulda-Antaurco, alias 'Mónica' lived clandestinely...

75. The accused was bound over for trial by the Forty-third Criminal Court of Lima on October 8, 1993, on the basis of the same Expanded Police Report. The pertinent part of that order maintained that

there being evidence of the commission of the crime of terrorism by the aforementioned defendants; accused of being members of the Peruvian Communist Party -Shining Path- who use terrorist methods for attaining their objectives ...

The same order required DINCOTE to remit the documents, police statements, and attachments to the aforementioned police report, including the statements by Ms. María Elena Loayza-Tamayo, the notification of her arrest, her civil record, the official documentation concerning her domicile, and the documents seized there.

76. The Court deems that in the instant case, Ms. María Elena Loayza-Tamayo was acquitted of the crime of treason in the military jurisdiction, not only because of the technical acceptance of the word “acquittal,” but also because the military court, instead of declaring itself to lack jurisdiction, took cognizance of the facts, circumstances and evidence relating to the alleged acts, evaluated them, and ruled to acquit her.

77. In the light of the foregoing, the Court finds that the Peruvian State violated Article 8(4) of the American Convention with Ms. María Elena Loayza-Tamayo’s trial in the civil jurisdiction for the same facts of which she had been acquitted in the military jurisdiction.

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**García v. Perú**

*Case 11.006, Inter-Am. C. H.R. 72,  
Annual Report 1994, OEA/Ser.L/V/II.88, doc. 9 rev. 1 (1995)  
[For the facts of this case, see Chapter IV]*

Subparagraph 4 of Article 8 of the American Convention upholds the guarantee of non bis in idem by providing that “an accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.”

Analyzing that subparagraph shows that the underlying elements of the principle, for the Convention, are as follows:

1. the accused must have been acquitted;
2. the acquittal must be a final judgment; and

3. the new trial must be based on the same cause that prompted the original trial.

To apply this principle to the instant case, one must first analyze the meaning of the concepts “accused person acquitted” and “nonappealable judgment” under the human rights protection system established by the American Convention.

The language used by the Convention, i.e., “accused person acquitted” implies that someone who, having been charged with a crime, has been exonerated from all criminal responsibility, since he has been acquitted because his innocence has been demonstrated, because his guilt has not been proven, or because it has been determined that the acts of which he is accused are not defined as crimes.

The Commission considers that the expression “nonappealable judgment” in subparagraph 4 of Article 8 of the Convention should not be interpreted restrictively, that is, limited to the meaning given to it by the domestic law of the States. In this context, “judgment” should be interpreted as any procedural act that is fundamentally jurisdictional in nature, and “non-appealable judgment” as expressing the exercise of jurisdiction that acquires the immutability and incontestability of *res judicata*.

Within the framework of the interpretation given to the text of subparagraph 4, article 8 of the American Convention, it is to be determined in this instance whether in this case there was a firm pronouncement exonerating former-president Alan García from guilt.

Article 77 of the Peruvian Code of Criminal Procedure reads:

Once he receives the complaint, the Examining Judge shall open the preliminary hearing only if he deems that the act reported constitutes a crime, that the accused has been pin-pointed as the alleged perpetrator of the act, and that criminal proceedings have not been barred by a statute of limitations... If the judge concludes that no action is to be taken, he shall dismiss the case.

Accordingly, the text of the rule quoted shows that in the event that one of the required elements is not present, the court shall declare that preliminary hearings shall not be initiated because the proceeding is not admissible.

Unlike other bases for dismissing a charge--for procedural reasons, for example--when the order not to open preliminary hearings is based on the fact that the acts charged are not defined as criminal, the ruling establishing that finding may not be overturned. In fact, in a case where a court rules on one occasion that an individual cannot be prosecuted by the State because the acts charged are not defined as a crime, another court, citing the same acts, cannot hold that they constitute a crime.

Having exhausted the remedies provided for under the law, this decision shall also be

uncontestable, that is, it may not be changed during the same proceedings or in later proceedings.

In the Alan García case, as was indicated earlier, the Superior Court Justice -- performing the duties of an examining judge -- ruled that preliminary hearings should not be initiated, and ordered the case to be filed permanently because the acts charged were not defined as a crime. That ruling was contested by the remedies provided for under the law. Once those remedies were denied as inadmissible, the procedural ruling became final because of the principle of *res judicata*.

While the Convention explicitly refers to the prohibition against instituting a new trial based on the same facts, from a literal interpretation of its text, one would have to acknowledge that the violation of the principle of *res judicata* by reopening a proceeding that had already been closed, would not be covered under Article 8, subparagraph 4. Hence, there is the possibility that a State Party to the Convention could file time-barred petitions and thus reinstate the criminal prosecution of an individual previously acquitted.

But in actual fact, the Commission finds that the protection accorded under Article 8, subparagraph 4, implicitly includes those cases in which reopening a case has the effect of reviewing questions of fact and of law that have come to have the authority of *res judicata*.

As the petitioners point out, confirmation of the decision not to reopen the case and to file it permanently took place in January 1992, via a decision of the Supreme Court to dismiss, as unfounded, the complaints filed by the Attorney General's Office and the Office of the State's Attorney to challenge the ruling on the petition to have the earlier decisions declared null and void. On July 15, 1992, in other words six months later, the Attorney General filed a new petition seeking nullification, which the Supreme Court declared admissible on November 23, 1992. The Court decided to nullify all rulings as of and including the one that ordered that no inquiry be instituted and that the case be definitively filed.

Article 295 of the Code of Criminal Procedure of Peru provides that the petition for nullification must be filed within one day of the ruling or of notification of the decision being challenged. In the event that petition is denied, Article 297 of the Procedural Code provides that a complaint may be filed with the Supreme Court within 24 hours.

Once both challenges have been filed, the Supreme Court's final decision will put an end to the proceedings and become *res judicata*. Any procedural measure taken on a finalized case will in practice imply a reopening of that case, save for the remedy of review, where allowed.

The arguments lead the Commission to conclude that in the case in question, the time-barred filing of the petition for nullification and the decision of the Supreme Court to grant that petition have reopened a closed case, thereby violating the principle of *res judicata*.

In the final analysis, it is for the Commission to determine whether the second trial instituted for

the crime of illegal enrichment is based on the same facts that were the grounds for the first criminal prosecution.

The impeachment that found grounds for prosecution of Alan García was based on four facts alleged to constitute the crime of unlawful enrichment. When the articles of impeachment were presented to the Attorney General of the Nation, the latter instituted a criminal case against the former President based on just one of those articles and eliminated the others on the grounds that they were suspected of not constituting the crime of unlawful enrichment and did not prove liability.

The Commission considers the Attorney General's decision to dismiss criminal proceedings on the grounds that the incidents brought before it did not objectively constitute a crime since they are not so defined in any criminal law, as an act that is essentially jurisdictional in nature and --like all actions taken by the Attorney General's Office in the proceedings-- once final, cannot be repeated and is uncontestable, having the effect of *res judicata*. Thus, the judicial decision is final, and accordingly it has the effect of banning future actions being brought based on the same material facts of the judgment.

In the case under review, as was indicated earlier, the prosecutor, in his decision, on the one hand dismissed three of the acts included in the impeachment, and on the other hand, brought criminal proceedings for the remaining act. During the proceedings, neither the petitioner nor the government have indicated whether the prosecutor's decision to dismiss the case was appealed to a higher court. For that reason, the Commission must assume that, since the prosecutor's decision was not appealed, it was consented to, and accordingly became final.

Therefore, based on the foregoing, the Commission concludes that the prosecutor's decision, which dismissed three of the initial charges because they do not constitute crimes, became final and concluded the State's criminal proceedings for the acts that were set forth in the judgment. Initiation of a new criminal prosecution based on the same charges brought previously violates the principle prohibiting multiple criminal prosecutions, and accordingly, subparagraph 4, article 8 of the American Convention.

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**M. L.-O. v. Switzerland**

*App. No. 25711/94, Eur. Comm'n H. R. (1997)*

*<<http://www.echr.coe.int>>*

*[On December 15, 1990, the applicant was driving her car in Zürich. The road was covered with ice and snow; her car went onto the other side of the road where she touched one car and then collided with a second car. The driver of the latter was seriously injured. On August 13, 1991,*

*the Zürich Police Judge convicted the applicant of a breach of the Federal Road Act, namely of not controlling her vehicle as she had not adapted her speed to the road conditions, and sentenced her to a fine. On January 25, 1993, the District Attorney's Office issued a penal order, whereby the applicant was convicted under the Swiss Penal Code of the offense of negligently inflicting bodily injury, and was sentenced to an additional fine. The applicant objected, whereupon criminal proceedings were instituted before the Zürich District Court. The Court annulled the fine issued by the Zürich Police Judge, but affirmed the conviction of negligently inflicting bodily injury and the fine. The applicant's subsequent appeal was dismissed, and the Appeals Court confirmed the deduction of the first fine from the second one, considering that the applicant should not be punished more severely than if both offenses had been dealt with together in one set of proceedings. The applicant filed a plea of nullity and a public law appeal, both of which were dismissed. In her petition to the European System, the applicant alleged a violation of Article 4 of Protocol N° 7, in that she had been punished twice for the same offense.]*

*B. Point at issue*

32. The only point at issue is whether there has been a violation of Article 4 of Protocol No. 7 (P7-4).

*C. Article 4 of Protocol No. 7 (P7-4) to the Convention*

33. The applicant submits that on 13 August 1991 she was convicted for not mastering her vehicle. Subsequently, further criminal proceedings were instituted against her for the same incident. The resulting penal order issued on 25 January 1993 therefore breached the principle of *ne bis in idem*. The applicant relies on Article 4 para. 1 of Protocol No. 7 (P7-4-1).

34. Article 4 paras. 1 and 2 of Protocol No. 7 (P7-4-1, P7-4-2) to the Convention state:

“1. 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.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, 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.”

35. The applicant contends that the text of Article 4 para. 1 of Protocol No. 7 (P7-4-1) leaves no room for interpretation: it prohibits trial or punishment for a criminal offence for which the applicant has already been finally convicted. Thus, the principle *ne bis in idem* is violated if the same facts are examined in the course of two separate proceedings. In the applicant's opinion, her rights are also protected if the judge in question issues a court order by mistake. The District

Court judge was competent to issue the decision, and it cannot be said that there was a fundamental defect in the proceedings, as stated for instance in para. 2 of Article 4 of Protocol No. 7 (P7-4-2).

36. The applicant considers in the light of *ne bis in idem* that the fact that a fine has been imposed on a motorist for contravening traffic regulations will render it impossible for a criminal court to convict a motorist of committing bodily injury. M.'s injury was the direct result of the applicant disregarding the traffic regulations. The fact that a party benefits from a procedural error, as submitted by the Government, does not preclude invocation of *ne bis in idem*. The applicant further notes that the Government correctly state that the Zurich Court of Appeal did not formally set aside the fine imposed by the Police Judge's Office. The conviction of 13 August 1991 constitutes a "final conviction" within the meaning of Article 4 para. 1 of Protocol No. 7 (P7-4-1), and therefore stands in the way of a further conviction. In its decision of 17 August 1994 the Federal Court itself confirmed this breach of *ne bis in idem* by referring to "the new fine".

37. Finally, the applicant considers that her interest in her legal rights cannot be called in question. After conviction by the Police Judge's Office she was again involved in a further trial resulting in an additional fine. It cannot therefore be said that the rights invoked were theoretical and illusory.

38. The Government contest that there has been a violation of Article 4 para. 1 of Protocol No. 7 (P7-4-1). The question arises whether this provision is already breached if the same set of facts is examined in two different procedures, or whether it is only breached if a person is punished twice for the same offence. The latter situation would raise no issue in the present case as the applicant was convicted on 13 August 1991 for a breach of traffic rules and on 25 January 1993 for negligently having committed bodily injury.

39. In the Government's opinion, even if Article 4 of Protocol No. 7 (P7-4) required that the same set of facts should not be examined in different proceedings, this provision would not be breached in the circumstances of the present case which were the result of a misunderstanding. Thus, on 19 March 1991 the Zurich Police Judge's Office transmitted the file to the District Attorney's Office as the former was not competent to examine a possible offence of bodily injury. On 3 June 1991, the file was referred back to the Police Judge's Office as the District Attorney considered that no proceedings would be instituted against M. It was probably by mistake, therefore, that the Police Judge's Office not only terminated the proceedings against M., but also against the applicant.

40. The Government recall that on 25 January 1993 a penal order was issued against the applicant since, as the District Court later confirmed, the offence was sufficiently severe to require prosecution despite the previous administrative proceedings. In its judgment of 11 March 1993 the District Court nevertheless annulled the fine of 200 CHF previously imposed by the Police Judge's Office. While it is true that the Zurich Court of Appeal found on 7 October 1993

that the fine of the Police Judge “still stands”, this caused the applicant no prejudice whatsoever. Indeed, the Court of Appeal also confirmed the deduction of the fine of 200 CHF. The Court of Appeal found that in fact the offences committed by the applicant should have been dealt with in one set of proceedings.

41. In the Government’s submission, the fact that the Court of Appeal did not formally annul the fine of the Police Judge cannot in itself breach Article 4 of Protocol No. 7 (P7-4). Thus, the rights enshrined in the Convention are not intended to be theoretical or illusory but rights that are practical and effective (see Eur. Court HR, *Artico v. Italy* judgment of 13 May 1980, Series A no. 37, p. 16, para. 33). The principle *ne bis in idem* should not be interpreted as permitting a person to benefit from a procedural error.

42. The Commission recalls the Convention organs’ case-law according to which the aim of Article 4 of Protocol No. 7 (P7-4) is to prohibit the repetition of criminal proceedings which have been concluded by a final decision (see Eur. Court HR, *Gradinger v. Austria* judgment of 23 October 1995, Series A no. 328-C, p. 65, para. 53).

43. In the present case, on 13 August 1991 the Zurich Police judge convicted the applicant of a breach of traffic rules, namely for not mastering her vehicle as she had not adapted her speed to the road conditions, and sentenced her to a fine of 200 CHF. The decision noted, *inter alia*, that the applicant’s car had got onto the other side of the road and first touched one car and then collided with another (see above, para. 20).

44. On 25 January 1993, the District Attorney’s Office issued a penal order against the applicant. Thus, in view of the collision with another car driven by M., resulting in his injury, the applicant was convicted of having negligently caused the offence of bodily injury and sentenced to a fine of 2,000 CHF (see above, para. 21). Upon the applicant’s objection, the Zurich District Court on 11 March 1993 reduced the fine to 1,500 CHF (see above, para. 22).

45. It is true that the Zurich District Court also “annulled” the original fine and deducted the amount of 200 CHF from the fine of 1,500 CHF (see above, para. 23) which now amounted to 1,300 CHF. However, the Commission notes that the original conviction of the Police Judge’s Office had meanwhile entered into legal force. Indeed, the respondent Government have confirmed a statement of the Court of Appeal of the Canton of Zurich in its decision of 7 October 1993 according to which “(that) decision still stands” (see above, para. 24).

46. The issue arises whether in the second proceedings the applicant was “tried or punished again ... for an offence for which (she had) already been finally acquitted or convicted” within the meaning of Article 4 para. 1 of Protocol No. 7 (P7-4-1). This provision does not refer to “the same offence”, but refers rather to trial and punishment “again ... for an offence” (see *Gradinger v. Austria*, Comm. Report 19.5.94, para. 75, Eur. Court HR, Series A no. 328-C, p. 77). Thus, the Court found in the *Gradinger* case that “the (Austrian) provisions in question differ ... as regards their nature and purpose ... Nevertheless, both impugned decisions were based on the same

conduct.” As a result, it found in that case a breach of Article 4 of Protocol No. 7 (P7-4) (see Eur. Court HR, *ibid.* p. 66, para. 55).

47. In the present case the offences did indeed differ in nature and pursued different aims. Thus, SS. 31 and 32 of the Federal Road Traffic Act aim at regulating traffic, whereas S. 125 of the Penal Code aims at protecting life and limb of other persons. Nevertheless, in the Commission’s opinion the applicant’s two convictions were both based on the same conduct, namely that her car got onto the other side of the road where she touched one car and then collided with a second car whose driver was seriously injured. The injury is not a completely separate element, but part of the whole conduct by which the injury was finally caused.

48. In the Government’s submissions, the second conviction of the applicant resulted from a misunderstanding in that the Police Judge’s Office originally failed to pursue the proceedings on account of a possible offence of bodily injury. In fact, the offences committed by the applicant should have been dealt with in one set of proceedings. In the Government’s opinion, Article 4 of Protocol No. 7 (P7-4) is not breached if the Court of Appeal did not formally annul the first fine of the Police Judge, since the applicant at least did not have to pay the fine. The principle *ne bis in idem* should not, the Government submit, be interpreted as permitting a person to benefit from a procedural error.

49. In the Commission’s opinion, the mere fact that a conviction was based on a procedural error cannot remove the protection against a new trial. According to Article 4, para. 2 of Protocol No. 7 (P7-4-2) a reopening of the case is only possible if the procedural error amounts to “a fundamental defect in the previous proceedings”. The Commission notes in this respect that the Court of Appeal of the Canton of Zurich did not find that the decision of 13 August 1991 had “serious faults which would possibly bring about the complete nullity” (see above, para. 24).

50. In these circumstances, the Commission finds that the applicant was “tried or punished again ... for an offence” of which she had previously been convicted within the meaning of Article 4 of Protocol No. 7 (P7-4) to the Convention.

### *CONCLUSION*

51. The Commission concludes, by 24 votes to 8, that in the present case there has been a violation of Article 4 of Protocol No. 7 (P7-4) to the Convention.

### *Questions*

1. Compare the language of Articles 8(4) of the American Convention, 14(7) of the ICCPR, and 4 of Protocol VII to the European Convention and identify the differences in the scope of protection afforded by those provisions. In general, does the interpretation provided by the Inter-American and European Courts in the cases you read sustain the differences that you identified?

Explain.

2. Do you consider that the language of Article 8(4) should be strictly interpreted to mean that the prohibition of double jeopardy would only be applicable in cases where an accused person is acquitted? How would you argue for a broader interpretation and which other provisions of the American Convention would you use for that purpose?

3. Article 4 of Protocol VII provides that the *non bis in idem* principle applies only in relation to criminal proceedings carried out under the jurisdiction of the same State. Likewise, the Human Rights Committee in *A.P. v. Italy*<sup>24</sup> stated that Article 14(7) of the ICCPR “prohibits double jeopardy only with regard to an offence adjudicated in a given State”. Do you think that this limitation should be read into Article 8(4) of the American Convention?

4. Article 4 of Protocol VII also establishes that reopening a case in accordance with domestic law, on the basis of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, does not violate the prohibition of double jeopardy. Do you consider that this limitation should be read into the corresponding provisions of the American Convention and the ICCPR. If so, did the Inter-American Commission err when deciding the *García* case?

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## 8. PUBLIC PROCEEDINGS

### **Figueredo Planchart v. Venezuela**

*Case 11.298, Inter-Am. C.H.R. 1313,*

*Annual Report 1999, OEA/Ser.L/V/II.106, doc. 3 rev. (2000)*

*[For the facts of this case, see Section I of this Chapter; footnotes omitted]*

#### 132. *Right to a public proceeding [Article 8(5) of the Convention]*

Article 8(5) of the Convention provides that, “Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.” The Inter-American Commission has stated in that regard that:

Having public trials is not only an essential guarantee of due process, but also a general principle of law. Having public proceedings is a “fundamental principle of modern procedure, opposed to inquisitorial secrecy, which establishes, as a supreme guarantee for the litigants, for the finding of the truth, and for

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<sup>24</sup> Communication No. 204/1986, U.N. Doc. CCPR/C/OP/1 (1987), <www1.umn.edu>.

fair judgments, that the investigation of the cases...be known not only to the parties and those who intervene in proceedings, but to everyone in general.”

133. The case law of the European Court of Human Rights is also consistent on this point:

The public nature of proceedings protects litigants from the secret administration of justice not checked by public opinion; it is also one of the measures for preserving confidence before the courts and tribunals, by securing transparent administration of justice. Public procedure helps ensure the aim of the right to a fair trial, whose guarantee is one of the fundamental pillars of any democratic society.

134. The Commission observes that at the time of the events, an ordinary criminal proceeding could be initiated *ex officio*, by petition, or by accusation; however, the initial inquiry, once opened, was secret and of indefinite duration in cases where there was no detainee. In the case *sub lite* it is amply shown that from the start of the investigations in November 1992, until June 22, 1994, -- following the issuance of the arrest warrant - - the accused did not have access to the record containing the charges brought either by the Comptroller General or the prosecutor. As a result of the secrecy of the first stage of the proceeding let us call it the first stage in spite of the almost two years that elapsed-- the accused did not have access to the proceeding and, therefore, could not help to shed light on the facts. Indeed, the fact that Venezuelan criminal law at the time provided for the secrecy of investigations in preliminary proceedings, not only made it impossible for the interested party to know the truth of what occurred in the investigation, but also forbade his cooperation therewith or participation therein. The interest of the accused in seeing justice done in his case can contribute depth to the investigation and to clarification of the facts. Thus, at this crucial stage of the investigation, when the memory of the witnesses is fresh and when it is still possible for experts to perform tests or to carry out judicial inspections that make it possible to gather evidence in defense of the accused, the lack of access to the proceeding instituted by the State has contributed to a lack of transparency in the proceedings in this case.

135. It is pertinent to mention in this context that the Venezuelan Government has corrected this situation by promulgating the new Organic Code of Criminal Procedure, which entered into force on July 1, 1999. Under this new code, the Office of the Attorney General has sole control over investigations in crimes against public order, thereby eliminating *secret preliminary proceedings*. The purposes article of the new Code of Criminal Procedure criticizes *secrecy of preliminary proceedings* as follows:

... examination of the legal framework (legality) and effectiveness (reality) of the body of laws on criminal procedure reveals that it violates basic procedural principles (...). The Venezuelan criminal trial, with its mixed origins, was gradually corrupted (from a system of judicial investigation to one of police investigation and the possibility of admitting as evidence information obtained in the preliminary proceeding), to the extent where it became an almost purely inquisitorial proceeding. The preliminary proceeding, which was a phase preparatory to the trial proper, became the principle phase, where the police prepare the file of the case, detain the “alleged” author of the crime and, furthermore, in violation of express legal provisions, publicly censure him through the mass media; and the trial proper, bereft of

any substantial content, became a meaningless ritual: today, the criminal trial ends, materially speaking, with the issuance of the warrant of arrest.

....

This situation considered, the need arises to update Venezuelan procedural law and to replace a system of legal procedure, which is said to be “mixed” but is fundamentally inquisitorial (a system characteristic of absolutist states), with one in which the parties have equal status and the judge acts as a disinterested third party.

....

Starting with the area of criminal justice, the aim is to provide the citizenry in each case with a concrete response on a fixed date-- of justice dispensed swiftly and with a sense of equity.

....

The accuser and the accused, appear before the judge with equal rights and obligations, and the case is, generally speaking, judged with the accused at liberty until judgment is pronounced.

....

Given that criminal matters are too important to be addressed secretly, all proceedings, except as provided otherwise by law, must be conducted publicly, inasmuch as this constitutes a guarantee of the legality and fairness of the decision, permits the ordinary citizen to become more familiar with the system of justice administration, and reinforces his faith in it, which, in turn, represents a form of democratic control over legal proceedings. Thus, in protecting the parties from a system of justice removed from public control, one of the principles of due process is guaranteed.

136. The Inter-American Commission regards as positive the fact that the Venezuelan Government has corrected legal provisions that were incompatible with the purpose and aims of the American Convention. However, irrespective of the fact that that legislation has been amended in order to make it compatible with the obligations adopted by the Government in the framework of the above-cited instrument, the fact remains that the application of the old Code of Criminal Trial Procedure in the instant case had negative repercussions on the procedural rights of the victim, whose right to the guarantees of due process of law and, by that token, to a fair trial, was violated. Accordingly, the Venezuelan Government also bears international responsibility for violation of Article 8(5) of the Convention in connection with Article 1(1) of the above-cited instrument.

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**Diennet v. France**

325-A Eur. Ct. H. R. (ser. A) (1995)

<<http://www.echr.coe.int>>

*[The applicant, a general practitioner, was the object of disciplinary proceedings for professional misconduct. He had engaged in “consultation by correspondence” with patients that he never personally examined. Consequently, the Regional Council of the Medical*

*Association permanently struck him off its register. The applicant appealed to the disciplinary section of the National Council, which ordered that he be suspended from practicing medicine for three years rather than be permanently disqualified. The applicant appealed to the Conseil D'Etat, which quashed that decision on the ground that there had been an irregularity in the proceedings. The case was remitted to the disciplinary section which, after a hearing in private, again prohibited the applicant from practicing medicine for three years. The applicant appealed on points of law to the Conseil D'Etat, but his appeal was rejected. In his submission to the European System, he argued, inter alia, that his right to a public trial ensured in Article 6(1) of the Convention had been violated.]*

I. *ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION*

26. Dr Diennet complained that he had not had a public hearing by an impartial tribunal. He relied on Article 6 para. 1 (art. 6-1) of the Convention, which provides . . . .

C. *Applicability of Article 6 para. 1 (art. 6-1)*

27. It is clear from the Court's settled case-law that disciplinary proceedings in which, as in the instant case, the right to continue to practise medicine as a private practitioner is at stake give rise to "contestations (disputes) over civil rights" within the meaning of Article 6 para. 1 (art. 6-1) (see, among other authorities, the König v. Germany judgment of 28 June 1978, Series A no. 27, pp. 29-32, paras. 87-95; the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 23 June 1981, Series A no. 43, pp. 19-23, paras. 41-51; and the Albert and Le Compte v. Belgium judgment of 10 February 1983, Series A no. 58, pp. 14-16, paras. 25-29). The applicability of Article 6 para. 1 (art. 6-1) to the circumstances of this case, which was in issue before the Commission but was not disputed before the Court, is therefore not in doubt.

. . . .

B. *Compliance with Article 6 para. 1 (art. 6-1)*

29. Dr Diennet submitted that there had been a breach of Article 6 para. 1 (art. 6-1) both because the proceedings before the professional disciplinary bodies had not been public and because one of those bodies had not been impartial.

1. *Holding of proceedings in public*

30. The applicant complained that the proceedings before the Ile-de-France Regional Council and the disciplinary section of the National Council of the ordre des médecins had not been held in public.

31. The Government did not dispute the fact. They recognised, moreover, that the applicant could not be regarded as having tacitly waived a public hearing by not seeking one, inasmuch as the French rules expressly excluded one (see paragraph 20 above and, among other authorities and *mutatis mutandis*, the *H. v. Belgium* judgment of 30 November 1987, Series A no. 127-B, p. 36, para. 54). They considered, nevertheless, that the Conseil d'Etat had compensated for that shortcoming by sitting in public on 15 January 1988 and 15 October 1990. When sitting in disciplinary cases, the Conseil d'Etat had, they continued, powers of review that went beyond questions of law alone since it verified the accuracy of the facts which formed the basis of the charges and the correctness of the legal classification of those facts and also, where appropriate, reviewed the assessment made by the tribunal of fact, by checking that evidence had not been misinterpreted; it had proceeded in that manner in the instant case.

In the alternative, the Government argued that, at all events, the misconduct of which the applicant had been accused related directly to practice of the medical profession and therefore came under the exceptions provided for in Article 6 para. 1 (art. 6-1). The disciplinary bodies of the *ordre* were under a duty to verify the factual accuracy of the charges against the applicant, against whom proceedings had been taken for having issued medical prescriptions for the treatment of obesity without examining his patients or following up their treatment. Specific examples therefore had to be cited during the proceedings, so that inevitably, if these had been held in public, professional confidentiality would have been jeopardised and patients' private lives intruded upon.

32. The Commission, referring to the Court's case-law on the matter, found that there had been a violation of the right to public proceedings.

33. The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6 (art. 6-1) (see, as the most recent authority, the *Schuler-Zgraggen v. Switzerland* judgment of 24 June 1993, Series A no. 263, p. 19, para. 58). This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 para. 1 (art. 6-1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention (see, for example, the *Sutter v. Switzerland* judgment of 22 February 1984, Series A no. 74, p. 12, para. 26).

Admittedly, the Convention does not make this principle an absolute one, since by the very terms of Article 6 para. 1 (art. 6-1), "... the press and public may be excluded from all or part of the trial in the interests of morals ..., where the ... protection of the private life of the parties so require[s], or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

34. The Court takes account of several factors.

Firstly, the Government did not dispute that the hearings before the disciplinary bodies of the *ordre des médecins* had not been held in public.

Secondly, where the Conseil d'Etat hears appeals on points of law from decisions of the disciplinary section of the National Council of the *ordre des médecins*, it cannot be regarded as a “judicial body that has full jurisdiction”, in particular because it does not have the power to assess whether the penalty was proportionate to the misconduct; the fact that hearings before it are held in public is therefore not sufficient to remedy the defect found to exist at the stage of the disciplinary proceedings (see, *inter alia* and *mutatis mutandis*, the *Albert and Le Compte* judgment previously cited, p. 16, para. 29, and p. 19, para. 36).

Lastly, while the need to protect professional confidentiality and the private lives of patients may justify holding proceedings *in camera*, such an occurrence must be strictly required by the circumstances. In the instant case, however, as the applicant and the Commission rightly pointed out, the proceedings were to deal only with the “method of consultation by correspondence” adopted by Dr Diennet (see paragraph 8 above). There was no good reason to suppose that either the tangible results of that method in respect of a given patient or any confidences that Dr Diennet might have picked up in the course of practising his profession would be mentioned. If it had become apparent during the hearing that there was a risk of a breach of professional confidentiality or an intrusion on private life, the tribunal could have ordered that the hearing should continue *in camera*.

At all events, the public was excluded because of the automatic prior application of the provisions of the Decree of 26 October 1948 (see paragraph 20 above). That decree was amended after the events in the instant case had occurred; with a number of strictly defined exceptions, hearings before a body of the *ordre* in disciplinary proceedings are now held in public (see paragraph 21 above).

35. In sum, there has been a breach of Article 6 para. 1 (art. 6-1) in that the applicant did not receive a “public” hearing before the Ile-de-France Regional Council and the disciplinary section of the National Council of the *ordre des médecins*.

....

### ***Questions***

1. Articles 14(1) of the ICCPR and 6(1) of the European Convention ensure the right to a public trial in the determination of civil rights and obligations, as well as in the determination of a criminal charge. On the other hand, Article 8(5) of the American Convention only establishes the right to a public trial in the context of criminal proceedings. How would you argue that under the American Convention the right to a public trial is also applicable to other proceedings?

2. Identify the permissible grounds for restriction in the human rights provisions that protect the right to a public trial. How would you define “interest of justice”? What is the standard that must be met to justify the restriction of the right to a public trial? Compare other provisions that allow for restrictions and discuss whether the applicable standard is similar in all cases.

3. Does the right to a public trial include the right to a public pronouncement of the judgment? If so, is that right subject to the same restrictions as those relating to the publicity of the trial? Compare the language of Article 8(5) of the American Convention, 14(1) of the ICCPR, and 6(1) of the European Convention.

3. *Figueredo Planchart* reflects a shared problem by some Latin American countries where criminal proceedings are written and the investigating judge is permitted under domestic law to keep the investigation secret and to prevent the defendant from having access to the record during the initial inquiry. Do you consider that the decision of the Commission in that case implies that those types of restrictions should be considered *per se* incompatible with Article 8(5)? Explain.

4. European case law has consistently held that the right to a public trial can be waived under certain conditions. In *Håkansson and Sturesson v. Sweden*,<sup>25</sup> the European Court stated that “a waiver must be made in an unequivocal manner and must not run counter to any important public interest.” What was the analysis on that point in the *Diennet* case?

5. The European Court in *Diennet* concluded that the public hearing at the Conseil d’Etat was not sufficient to remedy the lack of a public hearing during the investigation of the disciplinary proceedings. In what circumstances do you think that review by a higher tribunal in a public hearing could remedy the initial shortcoming?

### **Note**

In a recent decision in *Riepan v. Austria*,<sup>26</sup> the European Court found a violation of the right to a public trial in the case of a prisoner who was tried in a prison facility on charges involving the making of threats to prison officers. The Court stated that:

28. It was undisputed in the present case, that the publicity of the hearing was not formally excluded. However, hindrance in fact can contravene the Convention just like a legal impediment (see the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, p. 14, § 25). The Court considers that the mere fact that the trial took place in the precincts of Garsten Prison does not lead necessarily to the conclusion that it lacked publicity. Nor did the fact that any potential spectators would have had to undergo certain

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<sup>25</sup> 171 Eur. Ct. H.R. (ser. A)(1990), <<http://www.echr.coe.int>>.

<sup>26</sup> Judgment of November 14, 2000 (2000), <<http://www.echr.coe.int>>.

identity and possibly security checks in itself deprive the hearing of its public nature (see no. 35580/97, *Allen v. the United Kingdom*, Dec. 22.10.98).

29. Nevertheless, it must be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see the *Artico v. Italy* judgment of 13 May 1980, Series A no. 37, p. 16, § 33). The Court considers a trial will only comply with the requirement of publicity if the public is able to obtain information about its date and place and if this place is easily accessible to the public. In many cases these conditions will be fulfilled by the simple fact that a hearing is held in a regular court room large enough to accommodate spectators. However, the Court observes that the holding of a trial outside a regular court room, in particular in a place like a prison to which the general public on principle has no access, presents a serious obstacle to its public character. In such a case, the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.

30. The Court will therefore examine whether such measures were taken in the present case. As to the question whether the public could obtain information about the date and place of the hearing, the Court notes that the hearing was included in a weekly hearing list held by the Steyr Regional Court, which apparently contained an indication that the hearing would be held at Garsten Prison (see paragraph 12 above). This list was distributed to the media and was available to the general public at the Regional Court's registry and its entrance office. However, apart from this routine announcement, no particular measures were taken, such as a separate announcement on the Regional Court's notice-board accompanied, if need be, by information about how to reach Garsten Prison with a clear indication of the access conditions.

Moreover, the other circumstances in which the hearing was held were hardly designed to encourage public attendance: it was held early in the morning in a room which, though not being too small to accommodate any audience, does not appear to have been equipped as a regular court room.

31. In sum, the Court finds that the Steyr Regional Court failed to adopt adequate compensatory measures to counterbalance the detrimental effect which the holding of the applicant's trial in the closed area of Garsten Prison had on its public character. Consequently, the hearing of 29 January 1996 did not comply with the requirement of publicity laid down in Article 6 § 1 of the Convention.

Ultimately, the Court found that the lack of publicity was not justified for any of the reasons set out in Article 6(1).

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**CHAPTER VI**  
**ECONOMIC, SOCIAL AND CULTURAL RIGHTS**  
**(ESCR)**

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## A. THE RIGHT TO DEVELOPMENT: SCOPE AND CHARACTERISTICS

### 1. THE RIGHT TO DEVELOPMENT

The right to development has been characterized as a “third generation” right. The scope and content of this right are the subject of ongoing debate due to divergent legal, political and ideological approaches as well as the very diverse and complex set of preconditions necessary for its implementation. The following excerpts illustrate the basic concepts that characterize this right.

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Allan Rosas, *The Right to Development, in, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 247* (Asbjorn Eide *et al.* eds., 2001)<sup>1</sup>  
[Footnotes omitted]

The fact that a relationship exists between human rights and economic and social developments is already indicated in the UN Charter. Article 55 requires the United Nations to promote (a) higher standards of living and conditions of economic and social progress and development nationally; (b) solutions to international economic, social, health and related problems and international cultural and educational cooperation; and (c) universal respect for human rights and fundamental freedoms. According to Article 56, ‘all Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55’.

Article 55 of the Charter also notes that the central objective is the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations ‘based on respect for the principle of equal rights and self-determination of peoples’. As was indicated in Chapter 6 above, the right of self-determination subsequently achieved the status of a legal principle. As expressed in Article 1(1) common to the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (CESCR), the right of self-determination includes the right of all peoples to ‘freely pursue their economic, social and cultural development’.

In the year of the adoption of the Covenants (1966), the right to development was mentioned by the Foreign Minister of Senegal in the context of a call for a new international economic order. In 1969, the UN General Assembly adopted a Declaration on Social Progress and Development. In the early 1970s, the idea was put forward to formulate a specific right to development as a human right. In 1977, the UN Commission on Human Rights called for a UN study on the international

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<sup>1</sup> Reprinted from *The Right to Development, in, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK*, Asbjorn Eide *et al.*, © Kluwer Law International 2001, by permission of the publisher.

dimensions of the right to development. These developments were based on what has been called the structural approach, which means linking human rights to global issues such as economic and social development and the root causes of human rights violations.

This approach has mainly been advanced by Third World countries, while Western states have expressed reservations, arguably based on the fear not only that the concept of human rights will be diluted but also that they would be faced with claims on the part of the developing countries for entitlements to resources.

Thus it is understandable that the only binding international human rights treaty which has recognized the right to development is the African Charter on Human and Peoples' Rights (AfCHPR). Article 22 of the AfCHPR reads as follows:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

As this is a regional treaty, its application is naturally geographically limited. However, it also served as a source of inspiration for the then initiated preparations of a universal instrument on the right to development.

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**Declaration on the Right to Development**  
(*United Nations*)

Adopted by the General Assembly Resolution 41/128, 4 December 1986

The General Assembly,

Bearing in mind the purposes and principles of the Charter of the United Nations relating to the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian nature, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom,

Considering that under the provisions of the Universal Declaration of Human Rights everyone is entitled to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized,

Recalling the provisions of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights,

Recalling further the relevant agreements, conventions, resolutions, recommendations and other instruments of the United Nations and its specialized agencies concerning the integral development of the human being, economic and social progress and development of all peoples, including those instruments concerning decolonization, the prevention of discrimination, respect for and observance of, human rights and fundamental freedoms, the maintenance of international peace and security and the further promotion of friendly relations and co-operation among States in accordance with the Charter,

Recalling the right of peoples to self-determination, by virtue of which they have the right freely to determine their political status and to pursue their economic, social and cultural development, Recalling also the right of peoples to exercise, subject to the relevant provisions of both International Covenants on Human Rights, full and complete sovereignty over all their natural wealth and resources,

Mindful of the obligation of States under the Charter to promote universal respect for and observance of human rights and fundamental freedoms for all 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,

Considering that the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war would contribute to the establishment of circumstances propitious to the development of a great part of mankind,

Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, inter alia, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms,

Considering that international peace and security are essential elements for the realization of the right to development,

Reaffirming that there is a close relationship between disarmament and development and that progress in the field of disarmament would considerably promote progress in the field of development and that resources released through disarmament measures should be devoted to the economic and social development and well-being of all peoples and, in particular, those of the developing countries,

Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development,

Recognizing that the creation of conditions favourable to the development of peoples and individuals is the primary responsibility of their States,

Aware that efforts at the international level to promote and protect human rights should be accompanied by efforts to establish a new international economic order,

Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations,

Proclaims the following Declaration on the Right to Development:

### **Article 1**

1 The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

### **Article 2**

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

2. All human beings have a responsibility for development, individually and collectively, taking

into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

### **Article 3**

1. States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.

2. The realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations.

3. States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

### **Article 4**

1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.

2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

### **Article 5**

States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination.

## **Article 6**

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.

## **Article 7**

All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.

## **Article 8**

1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.
2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.

## **Article 9**

1. All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.
2. Nothing in the present Declaration shall be construed as being contrary to the purposes and principles of the United Nations, or as implying that any State, group or person has a right to engage in any activity or to perform any act aimed at the violation of the rights set forth in the Universal Declaration of Human Rights and in the International Covenants on Human Rights.

## Article 10

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

### *Questions*

1. What is the international legal status of the right to development? Can it be characterized as a “right?” What are the main characteristics of the right to development? Who is “entitled” to the right to development? Is this right an individual or collective right?
  2. What are the means to supervise compliance by States with an internationally recognized right to development? What domestic mechanisms would be most appropriate to enforce such a right?
  3. What domestic implementation measures by a State do you think would be required under the international right to development? As a judge, how would you apply the right to development in a case brought before a domestic court? Are there some aspects of the right to development that can be adjudicated in a court of law without considering the availability of resources?
  4. Within the right to development could you establish specific subcategories of rights that could be more clearly identified and enforced by international and domestic mechanisms?
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## **B. ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ESCR), THEIR NATURE AND CHARACTERISTICS: INTERDEPENDENCE AND PROGRESSIVE REALIZATION**

### **1. GENERAL COMMENT ON ESCR**

It is a common understanding that economic, social and cultural rights are objectives that are to be achieved only progressively by the States entrusted to guaranty them since their implementation is subject both to the availability of scarce resources and to the political and social arrangements within society. Therefore, the notion of “progressiveness” generally implies that they are not immediately enforceable or justiciable. In other words, States are only bound to increasingly implement economic, social and cultural rights over time.

ESCR have been distinguished from civil and political rights on the basis of certain differentiating characteristics. Generally, civil and political rights are considered immediately enforceable or justiciable. States cannot condition the duty to respect and ensure them on the lack of availability of resources. Consequently, the rights to life, personal integrity, personal liberty, and due process, among others, must be respected and guaranteed immediately and unconditionally.

The protection of ESCR is closely related to certain civil and political rights, such as the principles of non-discrimination and equality under the law, as well as to the judicial guarantees necessary for their enforcement. It is internationally expected that States will discharge their obligations by adopting “legislative or other measures” on ESCR with a distributive and egalitarian perspective. Similarly, it is an international obligation to afford the necessary due process guarantees when adjudicating cases regarding ESCR.

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### **The Realization of Economic, Social and Cultural Rights in the Region**

*Inter-Am. C.H.R., Annual Report 1993, OEA/Ser.L/V/II.85 (1993)*

available in Internet: <<http://www.cidh.oas.org/annualrep/93english/93ench5.htm#I>>. THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL

### **INTRODUCTION**

The Commission has prepared the following report on economic, social and cultural rights in response to the General Assembly’s resolution AG/RES. 1213 (XXIII-0/93) which urges the Inter-American Commission on Human Rights (“Commission”) to continue “its work in support of economic, social and cultural rights in order to contribute to the development of the member states.”

The underlying premise of this report is the principle set forth in the General Assembly's resolution AG/RES. 1213 (XXIII-093):

That the ideal of a free human being, unfettered by fear or poverty, can only be realized if conditions are established which permit individuals to enjoy their economic, social, and cultural rights, as well as their civil and political rights (emphasis supplied).

This resolution is itself inspired by the member states' commitment to the principles established in the OAS Charter. Article 33 of the Charter stipulates:

that equality of opportunity, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development.

Moreover, in article 44(f) of the Charter, the member states agree to encourage:

The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system.

These principles are reaffirmed in the American Convention on Human Rights ("American Convention"), which, in Article 1, obliges the signatory states:

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 for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition (emphasis supplied).

Article 26 of the American Convention articulates the principle of progressive development. It states:

State Parties undertake to adopt measures, both internally and through international cooperation, 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.

The American Declaration of the Rights and Duties of Man ("Declaration") sets forth in its Preamble that the American peoples "have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress..." The Declaration acknowledges that the initial system of protection it established was one suited to "the present social and juridical conditions, not without recognition

(on the part of the American States) that they should increasingly strengthen that system in the international field as conditions become more favorable.” The Declaration enumerates a list of civil and political rights as well as economic, social and cultural ones.

In light of the need to increasingly strengthen the system, the Additional Protocol to the American Convention on Human Rights Concerning Economic, Social and Cultural Rights (“Protocol of San Salvador”) adopted by the General Assembly in 1988 signals a further commitment within the Inter-American human rights system to enforce these rights. The Protocol compiles in treaty form principles of social equality and individual rights set forth in earlier human rights instruments, including the OAS Charter and General Assembly Resolutions. Article 1 of the Protocol of San Salvador establishes that:

The States Parties to this Additional Protocol to the American Convention on Human Rights 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 into 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.

Articles 10, 11, 12 and 13 of the Protocol of San Salvador guarantee the rights to health, a healthy environment, to food, and to education respectively. The respect for these rights guarantees basic needs for survival, which in combination with the other rights set forth in the Protocol, such as the right to work (article 6), to just, equitable, and satisfactory conditions of work (article 7), to trade union rights (article 8), to social security (article 9), to the benefits of culture (14), to the protection and formation of families (article 15) etc., create the conditions “whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights” (Preamble to Protocol).

#### **I. The indivisibility of civil and political rights, and economic, social and cultural rights**

The Commission has always recognized “the organic relationship between the violation of the rights to physical safety on the one hand, and neglect of economic and social rights and the suppression of political participation. Any distinctions drawn between civil and political rights and economic, social and cultural rights are categorical formulations that detract from the promotion and guarantees of human rights.

Freedom from fear and want necessarily entails the guarantee of civil and political rights. Through popular participation those who are affected by the neglect of their economic and social rights are able to participate in the decisions that concern the allocation of national resources and the establishment of social, educational, and health care programs. Popular participation, which is the aim of a representative democracy, guarantees that all sectors of society have an input during the formulation, application and review of national policies. While, on one hand, it may

be asserted that political participation enforces the protection of economic, social and cultural rights, at the same time, the implementation of these rights creates the condition in which the general population is able, i.e. is healthy and educated, to participate actively and productively in the political decision-making process.

The formalities of a democracy through the election of presidents and parliamentarians is not a strong enough foundation to ensure stable and enduring political and economic systems. This is demonstrated by the fact that despite the region's transition to democratic rule over the past decade, there has been a marked increase in the incidence of poverty which, in effect, endangers political stability in many of the region's states. For example, in 1980, 41% of the total population in Latin America were living below the poverty level. By the end of the decade, this number had risen to more than 45%.

Poverty is, in part, a result of a state's inadequate commitment and organization to protect and promote economic, social and cultural rights. As discussed above, the state's failure to guarantee economic, social and cultural rights, also signals a lack of civil and political guarantees. The ability to participate in society comprises civil and political rights, together with economic, social and cultural rights. It therefore follows that without progress in the area of economic and social rights, the pursuit of civil and political rights (which have been attained with great hardship and human sacrifice) will remain merely aspirations for particularly those sectors with the least resources and lowest levels of education. In the final analysis, the consolidation of representative democracy - a major goal of the member states - entails the exercise of full membership for all in society.

In this respect, the Commission cites Article 33 of the Charter which stipulates "that equality of opportunity, equitable distribution of wealth and income and the full participation of their peoples in decisions related to their own development are, among others, basic objectives of integral development."

When the most vulnerable members of society are denied access to the basic needs for survival which would enable them to break out of their condition, it results in the right to be free from discrimination; the right to the consequent principles of equality of access, equity and distribution; and the general commitment to protect the vulnerable elements in society being willingly or complicitly contravened. Moreover, without satisfaction of these basic needs, an individual's survival is directly threatened. This obviously diminishes the individual's rights to life, personal security, and as discussed above, the right to participate in the political and economic processes.

The Commission notes that poverty has its greatest impact on children. According to the Inter-American Children's Institute, 45% of Latin America's population are children, and around 50% of these live in conditions of extreme poverty. Extreme poverty is described as a condition of life so limited by malnutrition, disease, illiteracy, low life expectancy and high infant mortality as to be beneath any rational definition of human decency and dignity. Without food

and access to basic health services, and with little or no education or no time to become educated, as they must either fend for themselves or help their families, these children remain trapped in a daily struggle for survival.

## **II. The principle of progressive achievement**

The principle that economic, social and cultural rights are to be achieved progressively does not mean that governments do not have the immediate obligation to make efforts to attain the full realization of these rights. The rationale behind the principle of progressive rights is that governments are under the obligation to ensure conditions that, according to the state's material resources, will advance gradually and consistently toward the fullest achievement of these rights.

Moreover, the progressive development of rights is not limited to economic, social and cultural rights but is applicable to and inherent in all human rights instruments as they are elaborated and expanded. Human rights treaties frequently include provisions which either implicitly or explicitly envision expansion of the rights contained therein. The method by which they are expanded may depend on the direct application of provisions set forth in the treaty itself, or through amendments or additional protocols that complement, elaborate or perfect rights already established in the treaty. An example is the evolution and expansion of the Inter-American human rights instruments. The principles articulated in the American Declaration of the Rights and Duties of Man were elaborated and expanded into the American Convention on Human Rights. Similarly, the Protocol of San Salvador is an extension of norms and principles set forth in the previous two texts as well as in the Charter.

It therefore follows that the obligation of member states to observe and defend the human rights of individuals within their jurisdictions, as set forth in both the American Declaration and the American Convention, obligates them, regardless of the level of economic development, to guarantee a minimum threshold of these rights. A state's level of development may be a factor that is calculated into the analysis of its implementation of these rights, but this is not a factor that precludes the state's obligation to implement, to the best of its abilities, these rights. Rather the principle of progressivity demands that as the level of development in a state improves, so must its level of commitment to guaranteeing economic, social and cultural rights. This follows because the guarantee of economic, social and cultural rights requires, in most instances, public expenditure for social programs.

In theory, the more resources a state has, the greater its ability to provide services that guarantee economic, social and cultural rights. This idea is affirmed in article 32 of the OAS Charter which describes development as the "primary responsibility of each country and should constitute an integral and continuous process for the establishment of a more just economic and social order..." (emphasis supplied). The Commission notes, however, that in view of the unequal distribution of wealth within the states in the region, coupled with other structural inadequacies (as will be discussed below), an increase in national revenues does not automatically translate into an improvement in the general welfare of the entire population. The commitment of states to take

steps with the aim to achieving progressively the full realization of economic, social and cultural rights requires an effective use of resources available to guarantee a minimum standard of living for all.

### **III. Factors that contribute to the neglect of economic, social and cultural rights**

In a joint 1993 Report published by the World Bank and the International Monetary Fund (“IMF”), Latin America is singled out as the region of the world with the most unequal distribution of wealth, a situation which has been worsening since the 1950s. The report explains that the poorest 20% of the population in Latin America and the Caribbean receives 4% of their national revenues whereas the richest 10% of the population in this region receives between 42-43% of the revenues. Similarly, the 1992 Human Development Report of the UNDP notes that while Latin America has some of the most advanced economies of the developing world, these countries at the same time, also have some of the sharpest contrasts between their social classes, with millions of people living below poverty levels.

Some examples set forth in the UNDP report are: Brazil which has one of the most unequal distributions of income in the world with the richest 20% of the population receiving 26 times the income of the poorest 20%; in Chile, between 1970 and 1988, the real income of the poorest 20% fell by 3% while that of the richest 20% increased by 10%. Similarly in the United States, the UNDP Report indicates that by desegregating the white, black and hispanic communities in terms of their purchasing power, education and health, there is a marked distinction that reflects the unequal access to education and basic health services. The white population in the United States, taken by itself, would rank number one in the world in terms of human development, whereas the black population would rank 31 and the hispanic population 35.

The 1991 UNDP Report indicates that Costa Rica has a good record for guaranteeing the basic needs of its people. Social reforms began in the 1940s following the abolishment of the Army and the subsequent creation of health, education, and social insurance institutions. Primary health care was emphasized beginning in the 1970s with rural and community health programs.

It is argued that the world economic recession during the 1980s, compounded by the foreign debt crisis that afflicts most member states, accounts for the incidence in poverty. On the other hand, however, the structural economic adjustments that many states in the region have implemented to make them eligible for international financial loans, have required drastic reductions precisely in the area of public expenditures at a time when the vulnerable groups in these societies are most in need of social programs. Thus, an unintentional result of these economic adjustment programs has in fact been a deepening of poverty. It is the poor who bear the majority of economic and social burdens wrought by restrictions in public expenditures.

Economic adjustments should not entail a decreased observance of human rights. Instead, they can be used to redress social imbalances and correct the structural violations that are built into the economic and social structures of countries in the region. In fact, the prevailing view on

adjustment has recently altered. The World Bank and, to some extent, the International Monetary Fund have begun incorporating the need for poverty alleviation and social safety nets into their adjustment policies and programs.

#### **IV. Country reports**

At the behest of the General Assembly, in June 1993, the Commission asked all member states to provide information on measures implemented to enhance economic, social and cultural rights. The Commission is appreciative of the efforts of member states that submitted reports regarding the status of these rights in their jurisdiction as well as reports that address that status of the rights of children, women, and the handicapped in their countries. In 1993, Canada, Chile, the Dominican Republic, El Salvador, Mexico, Nicaragua, Panama, Paraguay, and Venezuela submitted reports. These reports set forth the applicable laws that cover specific rights and also include, in many cases, programs of action that the respective governments have already implemented or intend to implement. Many of the reports also point out the failures and inequities within their systems. Some of these points are discussed in the paper, such as the lack of public funds allocated for health and educational programs and the historical structural problems that continue to frustrate efforts to alleviate poverty and illiteracy.

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#### ***Comment***

In the Inter-American system, the concept of progressiveness is prescribed by Article 26 of the American Convention on Human Rights and Article 1 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador").

#### **Article 26 Progressive Development American Convention on Human Rights**

The States Parties undertake to adopt measures, both internally and through international cooperation, 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.

**Article 1**  
**Obligation to Adopt Measures**  
**Additional Protocol to the American Convention on Human Rights**  
**in the Area of Economic, Social and Cultural Rights**

The States Parties to this Additional Protocol to the American Convention on Human Rights 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 into 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.

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**Matthew Craven, *The Protection of Economic, Social and Cultural Rights Under the Inter-American System of Human Rights*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 289(David Harris *et al.* eds., 1998)<sup>2</sup>**  
*[Footnotes omitted]*

Specific recognition of economic, social and cultural rights is to be found in all of the major human rights instruments of the inter-American system, namely, the Charter of the OAS, the American Declaration, the American Convention on Human Rights and its Additional Protocol on Economic, Social and Cultural Rights. The relationship between these instruments and the associated role of the inter-American Commission on Human Rights and the inter-American Court on Human Rights is intricate, but significant nonetheless for the protection of economic, social and cultural rights.

**THE CHARTER OF THE OAS**

The Charter of the OAS, adopted in 1948, contained only a few human rights provisions of a general nature, and lacked the necessary machinery for supervision. The Protocol of Buenos Aires, however, which amended the Charter and came into force in 1970, added to it a number of provisions relating to the economic, social, scientific and cultural development of Member States, and outlined certain obligations of international cooperation. Within these provisions, several individual economic, social and cultural rights found recognition. Article 45, in particular, speaks of the right of all human beings to ‘material well being’ and to ‘spiritual development’, the right to work and the right of employers and workers to associate for the defense and promotion of their interests. Article 49 similarly mentions the right to education. In

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<sup>2</sup> Reprinted from *The Protection of Economic, Social and Cultural Rights Under the Inter-American System of Human Rights*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 289, David Harris *et al.*, eds. 1998, © Oxford University Press 1998, with permission of the publisher.

no sense, however, do these and other articles of the Charter that relate to the economic, social and cultural well-being of the populations amount to a coherent body of rights. Use of the term 'right' is for the most part incidental and more often than not can only be inferred from the existence of State obligations. . . .

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## **THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN**

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[T]he Declaration as adopted does contain a number of economic, social and cultural rights. Specific recognition is given, inter alia, to the right to health (Article XI), the right to education (Article XII), the right to the benefits of culture (Article XIII), the right to work (Article XIV), the right to rest and leisure (Article XV), and the right to social security (Article XVI). In addition, the Declaration contains a number of rights that might be closely associated with an individual's economic and social interests, such as the right to associate for the protection of labour-union interests (Article XXII), the right of women and children to special protection (Article VII), the right to the inviolability of the home (Article IX), and the right to property (Article XXIII).

When it was adopted, the American Declaration was considered, like the Universal Declaration of Human Rights, to have no binding force in law. It was adopted as a resolution of the Conference and was intended merely as a statement of moral, or political, principle. Since that time, however, the Declaration has, by virtue of institutional recognition and subsequent State practice, acquired some 'normative force'. Although its significance has certainly declined since the entry into force of the American Convention, it remains of particular importance, in terms of the rights it contains. Indeed, pending the entry into force of the Additional Protocol to the American Convention (the San Salvador Protocol), the Declaration remains the only instrument in the inter-American system that gives detailed recognition to economic, social and cultural rights.

. . . .

[W]ith respect to the other rights in the Declaration, such as all the economic, social and cultural rights, it considered itself as retaining its right to 'take cognizance' of communications for the purpose of identifying gross and systematic violations of human rights.<sup>33</sup> The procedure of taking cognizance, however, eventually evolved and became part of general case procedure and was later used in the examination of the general human rights situation in a country. The Commission was therefore in a position to receive, and act upon, complaints relating to economic, social and cultural rights.

Between the years of 1978 and 1982 the Commission received and considered a number of

communications concerning putative violations of economic, social and cultural rights in the Declaration. Since that time, however, the Convention has largely replaced the Declaration in the Commission's work vis a vis Convention parties (following the terms of Article 2(1) of the Commission's Statute), and the number of communications on these rights has declined dramatically. This in itself does not mean that the level of protection within the inter-American system for economic, social and cultural rights has necessarily declined. Even though the American Convention pays little attention to them as such, economic, social and cultural rights may receive protection through provisions that essentially concern civil and political rights. For example, during the Declaration's active period, a good number of complaints related to the ill-treatment of prisoners in detention involving the deprivation of food and health care. Although this was treated as a violation of the right to health and well being under the Declaration (Article XI), it now falls under the terms of the Convention which guarantees the humane treatment of prisoners. That being said, it is undoubtedly the case that the protection of economic, social and cultural rights has in general suffered as a result of the apparent replacement of the Declaration by the Convention.

....

#### **THE AMERICAN CONVENTION ON HUMAN RIGHTS (THE PACT OF SAN JOSE)**

[D]uring the drafting of the Convention there was some debate as to whether, and to what extent, economic, social and cultural rights should be given specific recognition within the Convention. Although each of the draft Conventions presented by the American Committee of Jurists, by Panama, and by Chile, gave extensive recognition to economic, social and cultural rights (all of which were more or less adaptations of the International Covenant on Economic, Social and Cultural Rights (ICESCR)), the final 'working draft' presented by the inter-American Commission virtually excluded all reference to them. The Commission's reasoning was predictable if somewhat self-justificatory. It argued that the Convention should only cover those rights to which American States were actually willing to extend protection and noted, in that respect, that both the Council of Europe and the United Nations had decided to address economic, social and cultural rights in separate instruments with specially tailored implementation procedures.

....

According to Article 26 as it was to appear in final form (in which it was elliptically entitled 'Progressive development'):

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.

Although largely modeled upon the terms of Article 2(1) of the ICESCR, Article 26 is peculiar in a number of respects. First, it refers not to a list of rights enumerated within the American Convention itself, but to rights found in another instrument—the OAS Charter. Even then, it does not allude to rights that have gained specific recognition in the OAS Charter, but rather to the ‘rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter’ [emphasis added]. . . .

. . . .

Given the obvious limitations of both Articles 26 and 42 [of the American Convention], it would appear that economic, social and cultural rights are afforded greater protection under the terms of the American Declaration than under the Convention. This raises an interesting question as regards the precise relationship between these two instruments, particularly as to whether the Declaration obligations subsist even for States parties to the Convention. There are essentially two views on the question, each of which has certain distinct consequences in terms of the protection of economic, social and cultural rights. The first approach is to view the inter-American human rights system as one in the process of organic development in which the later instruments are taken to provide the most complete expression of the human rights to which they all refer. The Convention, as such, is taken to supersede the Declaration both chronologically and normatively, with the effect that once a State becomes party to the Convention, the Declaration no longer has legal significance. This view gains some support from the terms of Article 2(1) of the Commission’s Statute, which provides that in the exercise of its functions the Commission is to treat ‘human rights’ as being those contained in the Declaration for member states which are not yet party to the Convention, and those in the Convention for those States which have duly ratified that instrument.

The second approach would be to view the Convention, not as a replacement of the Declaration, but rather as a complementary instrument. Just as much as the Universal Declaration forms part of the International Bill of Rights alongside the UN Covenants, the Declaration would therefore retain its full effect and stand alongside the American Convention. This approach has some support in the terms of Article 29(d) of the Convention, which provides that: ‘No provision of this Convention shall be interpreted as: . . . (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.’ On this view, any obligations that might have been assumed in relation to the Declaration will therefore subsist for all States, even for those that have become party to the Convention. This would enable the Commission to continue its ‘Charter role’ in supervising the implementation of the economic, social and cultural rights in the Declaration even in relation to States parties to the Convention on the basis of their Charter obligations concerning human rights.

. . . .

[T]he Court considered some of the implications of Article 29(d) of the Convention in Opinion OC-10/89 where it was determining the scope of its own competence in relation to the Declaration. Having found that for States parties to the Convention ‘the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself’, it went on to note that ‘given the provisions of Article 29(d), these States cannot escape their obligations they have as members of the OAS under the Declaration’. Although the Court was not altogether unambiguous in its comments, this wording does suggest at least that States retain their substantive obligations in relation to the Declaration, obligations which, in the scheme of the Charter arrangements, would carry with it supervision by the Commission.

....

## **THE PROTOCOL ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

....

The rights recognized in the Protocol by and large follow those in the International Covenant on Economic, Social and Cultural Rights. Articles 6 to 9, for example, bear remarkable similarities in form and terminology to the same articles in the Covenant. They recognize the right to work (Article 6), the right to just, equitable and satisfactory conditions of work (Article 7), trade union rights (Article 8) and the right to social security (Article 9). Such differences in wording as do exist are for the most part superficial. Similar comments could be made about Article 10 (the right to health), Article 13 (the right to education) and Article 14 (the right to the benefits of culture). In several places the Protocol improves upon the wording of the ICESCR. For example, Article 9 spells out the content of the right to social security in considerably greater detail, including, in particular, a right of beneficiaries to social security. It also expands upon the right to food (using the broader notion of adequate ‘nutrition’) and provides more specific objectives in relation to the right to health (Article 10). The principle difference between the instruments, however, lies in the fact that the Protocol gives recognition to a number of rights in addition to those in the Covenant. In particular, the Protocol gives recognition to the right to a healthy environment (Article 11), the right to the formation and the protection of the family (Article 15), the rights of children (Article 16), the protection of the elderly (Article 17) and the protection of the handicapped (Article 18).

This is not to say, however, that the Protocol is an improvement on the Covenant in all respects. It is less demanding of States in a number of ways. First, whereas the Covenant provides recognition of the right to housing no such recognition is to be found in the Protocol. This is a particularly significant omission given the extent to which housing has become a major issue in the work of the UN Committee. Secondly, in places the Protocol has reproduced obligations in a somewhat diluted form. In Article 13, for example, the Protocol merely states that ‘primary education should be compulsory and accessible to all without cost’ [emphasis added] whereas the Covenant uses the stricter term ‘shall’ in the equivalent provision. Similarly, in Article 7 the right to equal remuneration for work of equal value, has been reduced to the considerably weaker

'equal wages for equal work' to emphasize that comparison should only be made within the same place of work.

....

As regards the mechanism of supervision, the terms of the Protocol similarly reflect a desire to mimic the Covenant, in spite of the suggestions of the Commission otherwise. States undertake to submit 'periodic reports' to the Secretary General of the OAS 'on the progressive measures they have taken to ensure due respect for the rights set forth' in the Protocol which are then to be transmitted to the inter-American Economic and Social Council (I/A ECOSOC) and the inter-American Council for Education, Science and Culture (I/A CESC) for 'examination'. Parts of the reports may also be sent to the specialized organizations of the OAS for their input. The I/A ECOSOC and I/A CESC will then communicate, in their annual reports to the General Assembly, a summary of the information received and any 'general recommendations they consider to be appropriate'. That the primary responsibility for implementation appears to lie with the I/A ECOSOC and the I/A CESC, both of which are bodies composed of government representatives and concerned with predominantly matters of technical assistance and cooperation, does not augur well. As the experience of supervising the ICESCR has shown, bodies composed of governmental representatives are notably poor in terms of their ability to supervise human rights treaties adequately, especially in cases where the representatives have no real human rights expertise.

The main saving grace, as far as supervision of the Protocol is concerned, is the subsidiary role retained for the Commission in Articles 19(6) and 19(7). Article 19(6) provides that the individual petition system of the American Convention (in Articles 44-51 and 61-69) may be operated in cases where a violation of Article 8(a) or Article 13 has occurred and is 'directly attributable to a State Party to this Protocol'. That this additional protection has been created in the case of the right to join and form trade unions (Article 8(a)) and the right to education (Article 13) is probably a reflection of the fact that they are similarly protected under the European Convention on Human Rights and that States therefore had a clearer understanding of what they entailed. Although it suggests an unusually selective approach to the implementation of the rights in the Protocol, this provision is nevertheless to be welcomed. Article 19(7) provides, in addition, that the Commission may formulate 'such observations and recommendations as it deems pertinent' concerning the status of the rights in the Protocol and may include such observations in its annual report to the General Assembly. Depending on the approach of the Commission, this provision may well become the most significant in the Protocol's supervision system.

....

**The integrated approach: protection of economic and social rights through treaties on civil and political rights**

**Martin Scheinin, *Economic and Social Rights as Legal Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 32 (Asbjorn Eide, et al. eds., 2001)<sup>3</sup>**

*[Footnotes omitted]*

On the international plane, the justiciability of economic and social rights-or at least of some elements of them-has developed mainly through the complaint procedures under treaties on civil and political rights. Below, a number of cases decided by the UN Human Rights Committee or the supervisory organs of the ECHR are used to illustrate the so-called integrated approach, the possibility of the treaty bodies in question to protect or at least take into account social and economic rights through their task to afford international protection to those rights explicitly covered by the treaties in question.

3.1 Non-Discrimination (Article 26 of the CCPR). The Human Rights Committee, acting under the CCPR, adopted on 9 April 1987, after long discussions, its final views in three Dutch cases relating to social security. Through these cases it was, for the first time, settled that the non-discrimination clause in Article 26 of the CCPR is applicable also in relation to the enjoyment of economic, social and cultural rights.

In two of the three cases a violation of Article 26 was found by the Committee. These cases, *Zwaun-de Vries v. the Netherlands* and *Broeks v. the Netherlands* related to Dutch legislation according to which married women were denied certain unemployment benefits that were granted to unmarried women and to all men, regardless of their being married or not. This distinction was implemented through the application of a legal presumption according to which a married woman was presumed not to be the 'breadwinner' of her family. Only through submitting evidence proving herself as a breadwinner, could a married woman receive certain unemployment benefits, a condition not applied to married men. The relevance of Article 26 of the CCPR for social rights was explained by the Committee as follows:

Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

Discrimination because of sex has remained the area in which the application of Article 26 has most often occurred. Although one could be tempted to draw a conclusion that sex-possibly

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<sup>3</sup> Reprinted from *Economic and Social Rights as Legal Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 32, Asbjorn Eide et al., ed. 2001, © Kluwer Law International 2001, by permission of the publisher.

together with race and colour-are particularly suspect grounds for making any differentiations in, for example, allocating social security benefits, great caution in applying such an approach is recommended. All the prohibited grounds for discrimination mentioned in Article 26 of the CCPR-including 'other status'-may also be applied in the field of social and economic rights. This is demonstrated by the case of *Gueye et al. v. France* in which the Human Rights Committee found a violation of Article 26 because of nationality, classified as 'other status' in the terms of the treaty provision. The Committee, after dismissing a claim on racial discrimination, found a violation of Article 26 whereby French legislation afforded lower pensions to retired Senegalese soldiers of the French army than to French citizens in an otherwise equal position.

As a treaty text, the European Convention on Human Rights is weaker than the CCPR in the field of non-discrimination. Unlike Article 26 of the CCPR, Article 14 of the ECHR does not guarantee a self-standing right not to be discriminated against. The provision merely prohibits discrimination in the enjoyment of human rights otherwise protected under the ECHR. Therefore, no violation of Article 14 alone can be established, but the European Court of Human Rights always deals with Article 14 'in conjunction with' another substantive right in the ECHR. Over the years, however, the requirement of 'a link' to another treaty provision has undergone a development towards a less restrictive approach to Article 14. This trend is illustrated by the case of *Gaygusuz v. Austria*, where a violation of Article 14 taken in conjunction with the property rights clause in Article 1 of Protocol No. 1 was established due to denial of social assistance to a Turkish migrant worker on the basis of a distinction based on nationality. We shall shortly return to the question of non-discrimination in our discussion on the case of *Schuler-Zgraggen v. Switzerland*, decided in 1993 by the European Court of Human Rights.

3.2 Procedural Safeguards (Article 6(1) of the ECHR). If the non-discrimination clause in Article 26, perhaps the 'strongest' provision in the CCPR, has been suitable for extending the protection of the Covenant to some aspects of economic and social rights, the same can be said about the fair trial clause in Article 6(1) of the ECHR. Under the European Convention, the far-reaching procedural safeguards of the last-mentioned provision are perhaps the clearest example of the ECHR giving additional protection to rights that are basically also covered by other human rights treaties. Therefore, it is not a coincidence that the fair trial clause has, at least so far, been the starting-point for the most important interpretations that give protection to some economic and social rights.

The right to free legal assistance as a 'social' dimension of the right to a fair trial was emphasized by the European Court of Human Rights already in the *Airey* case. In this case the Court also, in express terms, discussed the relationship between civil and political, and economic and social rights:

Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature .... [T]he mere fact that an interpretation of the Convention may extend into the sphere of social and

economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.

Another aspect of the protection of social and economic rights through Article 6 of the ECHR relates to access to courts in social security disputes. According to Article 6(1) of the ECHR, everyone is entitled to a fair and public hearing with an independent and impartial tribunal established by law 'in the determination of his civil rights and obligations' (soit des contestations sur ses droits et obligations de caractere civil). The provision has been the source of delicate interpretations, both as the various elements of 'fair trial' are at issue, and in relation to the concept of 'civil rights'. To the extent that the provision is interpreted to cover services or benefits that develop economic and social rights, these rights receive far-reaching procedural protection which, however, is not without material implications. In matters covered by Article 6(1), the States parties are obliged to provide, for example, access to a court; full equality of arms with administrative authorities; free legal aid under certain conditions; independent, impartial, and timely decision-making; full reasoning for the decision; and under certain conditions oral hearings. The provision does not establish binding standards on the level of social security benefits, but in case a social security benefit is interpreted as falling under the 'civil rights' clause in Article 6(1), it becomes a truly individual right with all necessary safeguards against any arbitrariness or discrimination in its allocation.

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**P. VAN DIJK *ET AL.*, THEORY AND PRACTICE OF THE  
EUROPEAN CONVENTION ON HUMAN RIGHTS 294 (3d. ed. 1998)<sup>4</sup>**  
*[Footnotes omitted]*

Precisely these two points, the formulation and the supervisory mechanism, were used as arguments for a separate regulation of, on the one hand, the civil and political rights and, on the other hand, the economic, social, and cultural rights; a solution which was ultimately also chosen within the framework of the UN. The first category of rights was considered to concern the sphere of freedom of the individual vis-a-vis the Government. These rights and liberties and their limitations would lend themselves to a detailed regulation, while the implementation of the

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<sup>4</sup> Reprinted from *Theory and Practice of the European Convention on Human Rights*, P. Van Dijk et al., 3<sup>rd</sup> ed. 1998, © Kluwer Law International 1998, with permission of the publisher.

resulting duty on the part of the Government to abstain from interference could be reviewed by national and/or international bodies. The second category, on the other hand, was considered to consist not of legal rights but of programmatic rights, the formulation of which necessarily is much vaguer and for the realisation of which the States must pursue a given policy, an obligation which does not lend itself to incidental review of government action for its lawfulness.

It is undeniable that there are differences, roughly speaking, between the two categories of rights with respect to their legal character and their implementation. However, such differences are also present within those categories. Thus, the right to a fair trial and the right to periodic elections by secret ballot, unlike, for instance, the prohibition of forced labour or of torture, call not only for abstention but also for affirmative action on the part of the Governments. And in the other category the right to strike has less the character of a programmatic right than has the right to work. The classic distinction therefore, certainly for some rights, is better explained by history than by essential differences in character. In the modern welfare State - which typifies most of the Member States of the Council of Europe - the civil rights and liberties are being 'socialised' more and more and the social, economic, and cultural rights are increasingly becoming more concrete as to their content. Therefore, the question arises whether such a stringent distinction between the two categories is still justified, in particular if this entails the risk that the necessary relation between the two categories of rights is misunderstood. This principle has already been stated in the Proclamation of Teheran of 1968 and reaffirmed in the Vienna Declaration and Programme of Action, where it has been set forth that:

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.

### *Questions*

1. Considering that all human rights are universal, indivisible, interdependent and interrelated, how would you relate civil and political rights with social, economic and cultural rights? What similarities and differences would you identify between these rights? Would you prioritize any of the rights over the others?
2. Taking into account the notion of "programmatic rights," what distinctions would you draw between rights that require allocation of resources for implementation and those that do not? Could such distinctions be the basis on which to argue that there is a hierarchy of rights? Could such distinctions be used to argue against the notion of universal, indivisible, interdependent and interrelated human rights?

3. Taking into account that some rights are derogable while others are non-derogable (*see* Article 27 of the American Convention), could this distinction support the notion that there is a hierarchy of rights? Could this distinction be used to argue against the notion of universal, indivisible, interdependent, and interrelated human rights?

4. Is it possible to establish a hierarchy of economic, social and cultural rights? Which rights, if any, would you propose as “non-derogable?”

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## 2. JUSTICIABILITY OF ESCR

### *Comment*

The effectiveness of the international protection of economic, social and cultural rights has two dimensions: 1) monitoring and supervising the domestic implementation of ESCR in general, and 2) applying ESC standards in individual cases. The first dimension is generally related to legislative and/or budgetary policies of States, while the second one is more related to the applicability of certain ESCR in specific cases by tribunals or other adjudicatory bodies. Therefore, the second dimension is more relevant regarding the activities of the members of the judiciary when approaching ESCR.

The notion of “rights” without remedies, which is a consequence of the concept of progressiveness of ESCR, is problematic from a strictly legal point of view. For this reason, it is particularly useful to refer to the justiciability of certain rights, which in practice leads us to identify those economic, social and cultural rights recognized in international treaties and constitutional or other domestic laws that are actually enforceable through judicial action.

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### **Economic and social rights as legal rights**

**Martin Scheinin, *Economic and Social Rights as Legal Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 29(Asbjorn Eide *et al.* eds., 2001)<sup>5</sup>**

*[Footnotes omitted]*

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## 1. ON THE RELATIONSHIP BETWEEN A 'RIGHT' AND 'JUSTICIABILITY'

Economic and social rights are an essential part of the normative international code of human rights. They have their place in the Universal Declaration of Human Rights (UDHR), in universal and regional general conventions on human rights and in the network of human rights treaties aimed at the eradication of discrimination and the protection of certain vulnerable groups. These treaties are legally binding in the sense that they create legal obligations to their States Parties. In many countries, existing treaties on economic and social rights have also been incorporated into the domestic legal order, which affords them with formal legal validity on the domestic plane as well.

The problem relating to the legal nature of social and economic rights does not relate to their validity but rather to their applicability. Many authors are of the opinion that economic and social rights, because of their very nature, are not 'justiciable' in the sense that they are not capable of being invoked in courts of law and applied by judges. Some authors base this position on the predominantly 'political' character of treaty obligations under existing treaties on economic and social rights. Others make a distinction between obligations of result and obligations of conduct and classify economic and social rights under the latter category.

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### The Justiciability of Economic, Social and Cultural Rights

**Victor Abramovich and Christian Courtis, *Toward the Enforceability of Economic, Social and Cultural Rights: International Standards and Criteria of Application Before Local Tribunals*, in THE APPLICATION OF HUMAN RIGHTS TREATIES BY LOCAL TRIBUNALS, (Martín Abregú and Christian Courtis, 1997)<sup>6</sup>**  
[Footnotes omitted]

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<sup>6</sup> Reprinted from *Toward the Enforceability of Economic, Social and Cultural Rights: International Standards and Criteria of Application Before Local Tribunals*, in THE APPLICATION OF HUMAN RIGHTS TREATIES BY LOCAL TRIBUNALS, Martín Abregú et al., 1997, with the permission of the authors.

The historical origin of Welfare States is the history of the transformation of aid to the poor motivated by charity and at the discretion of public authorities to concrete benefits to which citizens are individually entitled. Although the principal economic, social and cultural rights have been recognized in numerous instruments at the international level, their universal recognition as authentic rights will not be achieved until the obstacles preventing their adequate *justiciability* have been overcome. Justiciability is understood as the possibility of asserting a claim before a judge or tribunal for the enforcement of at least some of the obligations constituting the object of such a right. If a State ordinarily fulfills particular needs or interests protected by a social right (for example, if it develops a broad program to provide food to the sector of the population threatened by starvation), no observer could claim that the beneficiaries of the State action enjoy this right (for example, the right to adequate food and the right to be free from hunger - art. 11.1 and 11.2, International Covenant on Economic, Social and Cultural Rights (ICESCR)) as a subjective right, until it could be shown that the population is really in the condition to be able to legally demand the State's assistance in the case of its non-compliance. The existence of a social right as a true right is demonstrated not simply by the State's compliance, but rather by the existence of some power on the part of the individual to take legal action in the case that the State fails to comply with its duty. It is only possible to consider an economic, social or cultural right a true right if - at least in some measure - the individual entitled to the right is in the position to obtain, through a lawsuit or complaint, a sentence ordering compliance with the obligation that constitutes the object of his right.

It is evident that the condition of justiciability requires the identification of minimum State obligations in relation to economic, social and cultural rights. This is perhaps the principal shortcoming of international human rights law, in the formulation of norms recognizing rights, as well as in the views expressed by the international organs responsible for the application of the treaties and in the scarce doctrinal contributions.

In Scheinin's opinion, there are false and true reasons which have impeded the development of the justiciability of economic, social and cultural rights. Among the false reasons he points to the conceptions that non-justiciability is a defect inherent to the nature of this category of rights. Among the true reasons he mentions the vagueness of the normative texts in which the rights are formulated, and the lack of an institutional practice of interpreting those texts, due principally to the absence of appropriate implementation mechanisms.

From the previous discussion, conclusions can be drawn which clearly question the idea that only civil and political rights are justiciable. Understanding that every right produces a set of positive and negative obligations for the State, it is fitting to analyze then what type of obligations offer the possibility of enforcement through legal action. The problem refers to one of the classical discussions on the definition of rights, regarding the relationship between a right and the legal action existing to demand its enforcement. Some conceptual difficulties posed by this discussion, which is a constant source of circular answers, are directly related to the close links between the classical notion of subjective law, the notion of property and the model of the liberal State. Given

that a large part of the substantive and procedural notions pertaining to traditional continental legal development arise from the particular conceptual framework determined by this connection, many of the nearly automatic responses to the possible justiciability of economic, social and cultural rights insist upon pointing out the lack of legal actions or concrete procedural guarantees which protect social rights. Some of the aspects indicated in this respect are linked to the collective character of many claims having to do with economic, social and cultural rights, the inadequacy of the structure and position of the Judicial Branch to demand that the political branches comply with their obligations to provide funds, or the inequality that would be produced by the success of some individual lawsuits in which a right is made enforceable amidst continuing non-compliance with regard to the rest of the identical cases not brought to the courts. Even if this theoretical difficulty is taken into account -which of course creates limits to the justiciability of *some* obligations arising from economic, social and cultural rights- it is necessary to undertake a detailed theoretical analysis in order to outline different types of situations in which the violation of economic, social and cultural rights may be remedied through legal action.

On one hand, violations of economic, social and cultural rights arise in many cases from the State's non-compliance with its negative obligations. In addition to some of the examples given, it is useful to recall that one of the basic principles established on the subject of economic, social and cultural rights is the State obligation to guarantee the exercise of these rights without discrimination (see ICESCR art. 2.2), which essentially constitutes a negative obligation for the State. This type of violation opens an enormous space for the justiciability for economic, social and cultural rights, the recognition of which becomes a limit and therefore a standard for challenging State action which fails to respect those rights. Consider, for example, the following: the violation on the part of the State of the right to health, stemming from the pollution of the environment by state agents; or the violation of the right to housing as a result of the forced eviction of the inhabitants of a particular area with no offer of alternative housing; or the violation of the right to education by limiting access to education based on sex, nationality, economic status or another prohibited discriminatory factor; or the violation of any other right of this type, when the regulation upon which access and enjoyment depend is discriminatory. In these cases, many of the traditional types of legal action are perfectly viable, whether they be constitutional challenges, suits challenging or seeking to nullify regulations of general or particular scope, actions seeking declaratory judgments, *amparo*, or even claims for damages through actions in tort. The positive action of the State which violates the negative limits imposed by a particular economic, social or cultural right is legally questionable and, if the violation is proven, a judge will decide to deprive the invalidated State action of legal value, requiring it to remedy the violation in such a manner as to respect the affected right.

On the other hand, we face cases of non-compliance with positive obligations of the State. These are omissions whereby the State fails to take required actions or measures to protect, assure and promote the rights in question. This is the point at which the greatest number of doubts and questions arise with respect to the justiciability of economic, social and cultural rights. Nevertheless, the question presents a multiplicity of facets, which we shall review. It may be conceded that in the extreme case of general and absolute non-compliance with every positive

obligation on the part of the State, it is exceedingly difficult to promote its direct compliance through legal action. Some of the traditional objections made with regard to this matter are valid: the Judicial Branch is the least adequate to design public policy; the framework of a legal case is not very appropriate for discussing measures of general scope; procedural discussion creates problems of inequality toward the persons affected by the same non-compliance but who do not participate in the lawsuit; the Judicial Branch lacks the compulsory means for the forced execution of a supposed sentence which orders the State to provide the omitted services in all of the cases involved, or to issue the omitted regulation; the substitution of general measures for *ad hoc* decisions effected by the judge in the particular case may also turn out to be a source of undesirable inequalities, and so on.

Even admitting the difficulties, some shadings to these objections can be pointed out. In principle, it is difficult to imagine a situation in which the State totally and absolutely fails to comply with all positive obligations related to economic, social and cultural rights. As mentioned previously, the State complies in part with rights such as the right to health care, housing or education, through regulations which extend duties to individuals, intervening in the market through regulations, and the exercise of police powers exercised *a priori* (through authorizations or licensing) or *a posteriori* (through oversight). So, once the obligation to take measures guaranteeing these rights has been partially fulfilled, even in cases in which the measures do not directly entail the provision of services by the State, the possibility of legally asserting that the State has violated its obligations through the discriminatory assurance of rights always remains open. The possibilities are more evident when the State effectively provides a service only partially, thus discriminating against entire sectors of the population. Clearly, there may be procedural and operative difficulties in bringing similar suits, but it would be difficult to argue that the partial or discriminatory compliance with a positive obligation is not a justiciable issue.

Second, beyond the multiple theoretical and practical difficulties which arise from collective legal action, the State's non-compliance in many cases may be reformulated in terms of a concrete and individualized violation, rather than in general terms. The general violation of the right to health care may be redirected or reformulated through a lawsuit in the name of an individual plaintiff who alleges a violation based on the failure to provide a vaccination, or the denial of a medical service upon which the life or health of this person depends, or the establishment of discriminatory conditions in access to education or housing, or the establishment of irrational or discriminatory guidelines for access to welfare benefits. The success of the claim will lie in the intelligent description of the intertwining of violations of positive and negative obligations, or in the concrete demonstration of the consequences of the violation of a positive obligation derived from an economic, social or cultural right upon the enjoyment of a civil and political right. It could be pointed out that if the violation affects a generalized group of persons, in the situation that contemporary procedural law denominates *homogeneous individual rights or interests*, the numerous individual judicial decisions will be a warning sign to the political branches in regard to a generalized situation of failure to comply with obligations in matters relevant to public policy, an especially valuable effect that we refer to in the next paragraph.

Third, even in cases in which a judge's sentence is not directly executable because it requires the provision of funds by the political branches, the value of a legal action in which the Judicial Branch declares that the State is in default or has failed to comply with obligations undertaken in matters of economic, social and cultural rights must be emphasized. In the case of the above paragraph (multiple enforceable individual judicial decisions) as well as in this paragraph (judicial decisions that declare the non-compliance of the State in a particular matter, and are perhaps transmitted to the political branches) the sentences obtained might constitute important means of channeling the needs of the public agenda to the political branches, through the language of rights, and not merely through lobbying activities or partisan political demands. As stated by José Reinaldo de Lima Lopes, "the Judicial Branch, adequately provoked, can be a powerful instrument in the development of public policy. An example of this is the case of social security in Brazil. If it were not for the inclination of citizens to vindicate their interests or rights legally and *en masse*, we would be more or less where we always were." It is beyond doubt that the implementation of economic, social and cultural rights depends in part upon activities related to planning, budget-making and implementation, which because of their nature correspond to the political branches. Thus, the cases in which the Judicial Branch can carry out the task of substituting for the inaction of the political branches is very limited. One of the purposes of adopting treaties which establish rights for individuals and obligations or commitments for the State is the possibility of demanding compliance with these obligations not as a gratuitous concession, but rather as an internationally assumed government program. It seems evident that, in this context, it is important to establish mechanisms for communication, debate and dialogue through which the political branches are reminded of the commitments assumed, and are forced to include among government priorities measures directed toward compliance with their obligations concerning economic, social and cultural rights. It is especially relevant in this respect that it be the Judicial Branch itself which "communicates" to the political branches their non-compliance with these duties. The logic of this process is similar to that behind the requirement of the exhaustion of domestic remedies in the international system for the protection of human rights: to offer the State the opportunity to take cognizance of and make reparations for the alleged violation before allowing victims to have recourse to mechanisms for denunciation at the international level. When the political branch does not comply with the duties for which it is "declared in default" by the Judicial Branch, in addition to the possible adverse consequences at the international level, it will face the corresponding political responsibility for its failure to act before its own people.

Finally, as previously suggested, some of the objections to the justiciability of economic, social and cultural rights are circular in nature, since all they point out is that traditional procedural instruments -arising from the context of litigation measured by individual interests, property rights and an abstentionist conception of the State- are limited means of demanding the legal enforcement of these rights. We have already said that in many cases the demand for enforcement of economic, social and cultural rights can be redirected as claims for civil and political rights, and that in these cases the traditional procedural mechanisms are at least partially suitable. The lack of adequate mechanisms or judicial guarantees says nothing about the conceptual impossibility of making economic, social and cultural rights justiciable; rather, it

requires us to imagine procedural mechanisms appropriate for bringing these types of claims. Some of the advances in contemporary procedural law address this objective: the new perspectives on *amparo*, the possibilities for bringing constitutional challenges, the development of declaratory judgments, class action suits, the Brazilian *segurança* and *injunção* orders, and the authorization of the Public Prosecutor's Office and the Ombudsman to represent collective interests are all examples of this tendency. It may further be added that another source of supposed difficulties in the advocacy of actions seeking to bring to light State non-compliance in matters of economic, social and cultural rights lies precisely in the privileges that the State has when brought to trial- privileges which would not be admissible if similar issues were raised among private individuals. Thus, far from constituting a closed matter, the adaptation of procedural mechanisms to force State compliance with economic, social and cultural rights through litigation requires an imaginative effort involving new ways of using traditional procedural mechanisms; the increased consideration of economic, social and cultural rights as true rights; a certain judicial activism which includes a dose of praetorian creativity; and legislative proposals for new types of legal actions capable of mobilizing collective claims and lawsuits of general scope before the public authorities.

In sum, although it may be conceded that there are limits to the justiciability of economic, social and cultural rights, it can be concluded in exactly the opposite sense that: given its complex structure, there is no economic, social or cultural right which does not present *at least some characteristic* or facet which would allow for its judicial enforcement in case of violation. In the words of Alexy: "As the jurisprudence of the (German) Federal Constitutional Court has demonstrated, in no way is a constitutional court impotent in the face of an inoperative legislature. The spectrum of its constitutional-procedural possibilities extends from the mere confirmation of a violation of the Constitution, through the setting of a time limit within which legislation compatible with the Constitution must be passed, to the direct judicial formulation of that which is ordered by the Constitution"

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### ***Comment on Articles 8 and 13 of the ("Protocol of San Salvador")***

The following are relevant provisions of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") that establish that Trade Union Rights (Article 8) and the Right to Education (Article 13) can be adjudicated by the Inter-American Commission and the Inter-American Court through the individual petition system. This instrument entered into force on November 15, 1999.

**Article 8**  
**Trade Union Rights**

1. The States Parties shall ensure:

a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;

b. The right to strike.

2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.

3. No one may be compelled to belong to a trade union.

....

**Article 13**  
**Right to Education**

1. Everyone has the right to education.

2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.

3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:

a. Primary education should be compulsory and accessible to all without cost;

b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;

c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;

d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;

e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.

5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.

....

**Article 19**  
**Means of Protection**

....

6. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

7. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.

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**DONNA GOMIEN ET AL., LAW AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE EUROPEAN SOCIAL CHARTER 377 (1996)<sup>7</sup>**

*[Footnotes omitted]*

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<sup>7</sup> Reprinted from *Law and Practice of the European Convention on Human Rights and the European Social Charter 377*, 1996, © Council of Europe 1996, with permission of the Council of Europe.

## *Introduction to the European Social Charter*

The European Social Charter was signed in its official English and French language texts by member states of the Council of Europe in Turin on 18 October 1961. It entered into force on 26 February 1965. There are now twenty Contracting Parties. They are Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey and the United Kingdom. The Charter is open to member states of the Council of Europe. Most of the missing eighteen members are new Council members from central and eastern Europe who have the question of acceptance of the Charter under consideration. In a new development, in 1995 the Parliamentary Assembly, in its opinions on the accession of new member states, asked Andorra to ratify the Charter, and asked Albania, Latvia, Moldova, “the former Yugoslav Republic of Macedonia” and Ukraine to study the Charter with a view to ratification and to pursue a policy in keeping with the principles set forth therein.

The Charter is a creature of the Council of Europe and is the counterpart of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention was adopted in 1950 and protects only civil and political rights. This was a matter of priorities and tactics. While it was not disputed that economic and social rights required protection too, the immediate need was for a short, relatively non-controversial text which governments could accept at once, while the tide for human rights was strong. Given the values dominant within the Council, this meant limiting the Convention to the civil and political rights that were essential for a democratic way of life: economic and social rights would have been too controversial and difficult of enforcement to have been included at that stage. Fortunately, however, it proved possible, a decade or so later, to adopt the Social Charter to complement the Convention. Together the two treaties secure for the individual in western Europe most of the human rights set forth in the Universal Declaration of Human Rights. They are the regional counterparts of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights respectively.

But there the parallel with the European Convention on Human Rights ends. Whereas the Convention is firmly established as the Council of Europe’s main achievement, the Charter has led a twilight existence. Although an extensive jurisprudence interpreting and applying a demanding Charter guarantee has evolved over a quarter of a century, various factors have conspired to prevent the Charter realising its full potential. Most such factors result from a lack of political will, either as reflected in the original text or as has become manifest since.

As a result of a 1990 initiative by the Committee of Ministers of the Council of Europe, a process of “revitalising” the Charter was begun, leading to the adoption in 1991 of the Protocol amending the European Social Charter (hereafter referred to as the “Amending Protocol”) which proposes many changes in the system of supervision. The “revitalisation” process has also led to other developments, including most significantly the preparation of a draft Revised European

Social Charters containing a complete and more ambitious substantive guarantee.

***The rights protected under the European Social Charter***

***The substantive guarantee: The basic undertakings in respect of the rights protected***

The two basic undertakings which a state must accept when it becomes a Contracting Party are set out in Article 20. In the first place, it must “undertake to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means . . .” The aims referred to are the “attainment of conditions” in which the nineteen rights listed in Part I “may be effectively realised”. Although contained in a treat, this is a political, not a legal, undertaking. It is essentially a policy commitment, similar to that in the Universal Declaration of Human Rights, by which Contracting Parties to the Charter agree to achieve the full protection in due course of all of the rights listed in Part I.

It contrasts with the second, and clearly legal, undertaking in Article 20, which is to accept at least ten of the nineteen Articles that make up Part II or forty-five of the seventy- two “numbered paragraphs” of which these Articles consist. Each of these nineteen Articles relates to one of the rights listed in Part I. Although urged upon them, the possibility that a state might be required to accept all of the obligations in Part II was never seriously countenanced by the drafting states. This was because economic and social progress within the membership of the Council of Europe was too diverse and the commitment of resources for any state would be substantial; if compliance with the mainly negative and abstentional requirements of the European Convention on Human Rights was within the power of all members, the fulfilment of many economic and social rights required positive government intervention that was dependent upon the availability of economic resources. A system of variable and progressive acceptance was inevitable if the Charter was to be widely ratified and if the standards it set were to be worthwhile.

A result of the complicated and unusual scheme that was devised is that a state need accept only between a half and two-thirds of the substantive undertakings in Part II in order to become a party. In fact, most of the twenty Contracting Parties have accepted far more than this. Six parties have accepted all or virtually all of the Articles in Part II, and the contracting parties as a whole have accepted 87% of its provisions. Some states have added to the list of provisions accepted by them after ratification, although others have withdrawn their acceptance of provisions. Finally, it may be noted that some matters are within the scope of more than one article, so that a state that has not accepted one article within which a particular matter falls may find that it is subject to the Charter under another article that it has accepted on the same matter.

To accomplish one of the Charter’s avowed purposes of furthering European unity in the social field by imposing a “hard core” of obligations common to all Contracting Parties, it is provided that a Contracting Party must accept in their entirety at least five of seven specified Articles. These seven Articles and the rights they concern are:

Article 1: the right to work

Article 5: the right to organise  
Article 6: the right to bargain collectively  
Article 12: the right to social security  
Article 13: the right to social and medical assistance  
Article 16: the right of the family to social, legal and economic protection

Article 19: the right of migrant workers and their families to protection and assistance. The Articles were chosen not because they necessarily protect the seven most important rights, but in order to achieve a balance between the different groups of rights in the Charter. The arrangement imposes some degree of uniformity, but the choice of five Articles out of seven that is given has limited its effectiveness in this regard. In fact, twelve of the twenty parties have accepted all seven “hard core” articles. Seventeen parties have accepted at least six of them. The one real weakness in practice has been that two parties have failed to accept the two key articles concerning labour relations: the rights to organise and to bargain collectively (Articles 5 and 6).

Finally, it is of interest to compare the basic obligation just described with the comparable obligation of parties to the International Covenant on Economic, Social and Cultural Rights. By Article 2(1) of the Covenant, a party undertakes:

to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant . . . .

In contrast with the basic obligation in the Charter, this obligation extends to all Covenant rights: there is (subject to the rules concerning reservations to treaties) no possibility of choosing only certain rights, as there is in the Charter. It also imposes an obligation concerning international co-operation that has no Charter counterpart, although this is a Covenant obligation that has proved difficult to apply in practice. However, the Covenant guarantee is less strong than that in the Charter in that it makes express allowance for a state’s economic and other “available resources” and generally requires only that “steps” be taken to achieve the “progressive” realisation of the protected rights from the level at which those rights are realised or protected by the particular state at the time that it ratifies the Covenant. In contrast, the Charter generally requires of its parties that they satisfy the Charter standards in the paragraphs that they accept irrespective of their national resources and that they do so immediately upon ratification.

. . . .

### ***Rights guaranteed in the 1988 Additional Protocol***

A protocol to the Charter was adopted in 1988. It imposes legal obligations in respect of the following further economic and social rights for the Contracting Parties thereto: the right to equal opportunities and treatment in matters of employment and occupation regardless of sex (Article 1); the right of workers to information and consultation (Article 2) the right of workers to take

part in the determination and improvement of their working conditions and environment (Article 3); and the right of elderly persons to social protection (Article 4). As the protocol only entered into force in 1992, the Committee of Independent Experts has as yet not had occasion to interpret or apply it.

### *The Revised European Social Charter*

While the “revitalization” process concentrated initially upon improving the Charter supervisory system, which was correctly seen as the most urgent problem, it was all understood that the substantive guarantee of the Charter was in need of overhaul. As result, a draft Revised European Social Charter was prepared. The text is currently before the Committee of Ministers for adoption. The approach taken in the new draft differs radically from that followed in the 1988 Additional Protocol, which contains just a small number of additional rights not in the 1961 Charter. The draft Revised Charter will, adopted and for those states that ratify it, completely replace the substantive guarantee in the original 1961 Charter and the Additional Protocol. What the new draft contains is the text of the old Articles 1 to 19 of the Charter and Articles 1 to 4 of the Additional Protocol, amended to bring them up to date, plus texts for other rights not found in the 1961 or 1988 texts. The amendments and additions considerably improve the present texts.

As far as new rights are concerned, the following are added:

- the right to protection in cases of termination of employment (Article 24);
- the right of workers to the protection of their claims in the event of the insolvency of their employers (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 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).

There is also an article that prohibits discrimination in the enjoyment of Charter rights on grounds of race, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status (Article E).

As far as amendments to existing 1961 Charter rights are concerned, there are many, of which

the following are examples:

- the guarantee of annual holidays with pay (Article 2(3)) is increased from two to three weeks;
- a new paragraph is added to Article 2 protecting the right of employed persons to be informed about the essential aspects of their contract of employment,
- the length of maternity leave (Article 8(1)) has been increased from 12 to 14 weeks;
- the reference in Article 12(2) to ILO Convention No. 102 is replaced by references to the European Code of Social Security which sets higher standards;
- the guarantee of the “right of mothers and children” (Article 17) has been recast so as to be a guarantee of the “right of children and young persons” and the emphasis and elements of the guarantee have been changed and refocused (on education, see below);
- the guarantee of the right of migrant workers to be reunited with their families (Article 19(6)) extends only to children up to the age of 18, instead of 21, in line with the current age of majority in Europe generally. It also applies to the “spouse” of a migrant worker and not only to the “wife” of a migrant worker.

In addition, a party to the draft Revised Charter would have to accept six out of nine hard core» articles, these being the seven present “hard core” articles plus Article 7 of the 1961 Charter (protection of young persons) and Article 1 of the Additional Protocol (equal opportunities in employment without discrimination on grounds of sex).

The same supervisory procedures as apply under the 1961 Charter would continue to apply under the draft Revised European Social Charter.

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**Maastricht Guidelines on Violations of Economic, Social and Cultural Rights,  
Maastricht, 22-26 January 1997**

*available in Internet:* <<http://www.law.uu.nl/english/sim/instr/maastricht.asp>>

**Introduction**

On the occasion of the 10th anniversary of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter ‘the Limburg Principles’), a group of more than thirty experts met in Maastricht from 22-26 January 1997 at

the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The objective of this meeting was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.

The participants unanimously agreed on the following guidelines which they understand to reflect the evolution of international law since 1986. These guidelines are designed to be of use to all who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional and international levels.

## **THE MAASTRICHT GUIDELINES ON VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

### **I. The significance of economic, social and cultural rights**

1. Since the Limburg Principles were adopted in 1986, the economic and social conditions have declined at alarming rates for over 1.6 billion people, while they have advanced also at a dramatic pace for more than a quarter of the world's population. The gap between rich and poor has doubled in the last three decades, with the poorest fifth of the world's population receiving 1.4% of the global income and the richest fifth 85%. The impact of these disparities on the lives of people - especially the poor - is dramatic and renders the enjoyment of economic, social and cultural rights illusory for a significant portion of humanity.

2. Since the end of the Cold War, there has been a trend in all regions of the world to reduce the role of the state and to rely on the market to resolve problems of human welfare, often in response to conditions generated by international and national financial markets and institutions and in an effort to attract investments from the multinational enterprises whose wealth and power exceed that of many states. It is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the state, although, as a matter of international law, the state remains ultimately responsible for guaranteeing the realization of these rights. While the challenge of addressing violations of economic, social and cultural rights is rendered more complicated by these trends, it is more urgent than ever to take these rights seriously and, therefore, to deal with the accountability of governments for failure to meet their obligations in this area.

3. There have also been significant legal developments enhancing economic, social and cultural rights since 1986, including the emerging jurisprudence of the Committee on Economic, Social and Cultural Rights and the adoption of instruments, such as the revised European Social Charter of 1996 and the Additional Protocol to the European Charter Providing for a System of Collective Complaints, and the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988. Governments have made

firm commitments to address more effectively economic, social and cultural rights within the framework of seven UN World Summits conferences (1992-1996). Moreover, the potential exists for improved accountability for violations of economic, social and cultural rights through the proposed Optional Protocols to the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. Significant developments within national civil society movements and regional and international NGOs in the field of economic, social and cultural rights have taken place.

4. It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.

5. As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty. Building upon the Limburg Principles, the considerations below relate primarily to the International Covenant on Economic, Social and Cultural Rights (hereinafter “the Covenant”). They are equally relevant, however, to the interpretation and application of other norms of international and domestic law in the field of economic, social and cultural rights.

## **II. The meaning of violations of economic, social and cultural rights**

### **Obligations to respect, protect and fulfil**

6. Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.

### **Obligations of conduct and of result**

7. The obligations to respect, protect and fulfil each contain elements of obligation of conduct and obligation of result. The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. In the case of the right to health, for example, the obligation of conduct could involve the adoption and implementation of a plan of action to reduce maternal mortality. The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard. With respect to the right to health, for example, the

obligation of result requires the reduction of maternal mortality to levels agreed at the 1994 Cairo International Conference on Population and Development and the 1995 Beijing Fourth World Conference on Women.

### **Margin of discretion**

8. As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights. The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question. The State cannot use the “progressive realization” provisions in article 2 of the Covenant as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds.

### **Minimum core obligations**

9. Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [...]. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, violating the Covenant.” Such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.

### **Availability of resources**

10. In many cases, compliance with such obligations may be undertaken by most States with relative ease, and without significant resource implications. In other cases, however, full realization of the rights may depend upon the availability of adequate financial and material resources. Nonetheless, as established by Limburg Principles 25-28, and confirmed by the developing jurisprudence of the Committee on Economic, Social and Cultural Rights, resource scarcity does not relieve States of certain minimum obligations in respect of the implementation of economic, social and cultural rights.

### **State policies**

11. A violation of economic, social and cultural rights occurs when a State pursues, by action or omission, a policy or practice which deliberately contravenes or ignores obligations of the Covenant, or fails to achieve the required standard of conduct or result. Furthermore, any discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status with the purpose or effect of nullifying or impairing the equal enjoyment or exercise of economic, social and cultural rights constitutes a violation of the Covenant.

### **Gender discrimination**

12. Discrimination against women in relation to the rights recognized in the Covenant, is understood in light of the standard of equality for women under the Convention on the Elimination of All Forms of Discrimination Against Women. That standard requires the elimination of all forms of discrimination against women including gender discrimination arising out of social, cultural and other structural disadvantages.

### **Inability to comply**

13. In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations. A State claiming that it is unable to carry out its obligation for reasons beyond its control has the burden of proving that this is the case. A temporary closure of an educational institution due to an earthquake, for instance, would be a circumstance beyond the control of the State, while the elimination of a social security scheme without an adequate replacement programme could be an example of unwillingness by the State to fulfil its obligations.

### **Violations through acts of commission**

14. Violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

- (a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;
- (b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;
- (c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;
- (d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of

increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;

(e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;

(f) The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;

(g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

### **Violations through acts of omission**

15. Violations of economic, social, cultural rights can also occur through the omission or failure of States to take necessary measures stemming from legal obligations. Examples of such violations include:

(a) The failure to take appropriate steps as required under the Covenant;

(b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;

(c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;

(d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;

(e) The failure to utilize the maximum of available resources towards the full realization of the Covenant;

(f) The failure to monitor the realization of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;

(g) The failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;

(h) The failure to implement without delay a right which it is required by the Covenant to provide immediately;

(i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;

(j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

### **III. Responsibility for violations**

#### **State responsibility**

16. The violations referred to in section II are in principle imputable to the State within whose jurisdiction they occur. As a consequence, the State responsible must establish mechanisms to correct such violations, including monitoring investigation, prosecution, and remedies for victims.

#### **Alien domination or occupation**

17. Under circumstances of alien domination, deprivations of economic, social and cultural rights may be imputable to the conduct of the State exercising effective control over the territory in question. This is true under conditions of colonialism, other forms of alien domination and military occupation. The dominating or occupying power bears responsibility for violations of economic, social and cultural rights. There are also circumstances in which States acting in concert violate economic, social and cultural rights.

#### **Acts by non-state entities**

18. The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.

#### **Acts by international organizations**

19. The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organizations, individually or through the governing bodies, as well as the secretariat and

nongovernmental organizations should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights.

#### **IV. Victims of violations**

##### **Individuals and groups**

20. As is the case with civil and political rights, both individuals and groups can be victims of violations of economic, social and cultural rights. Certain groups suffer disproportionate harm in this respect such as lower-income groups, women, indigenous and tribal peoples, occupied populations, asylum seekers, refugees and internally displaced persons, minorities, the elderly, children, landless peasants, persons with disabilities and the homeless.

##### **Criminal sanctions**

21. Victims of violations of economic, social and cultural rights should not face criminal sanctions purely because of their status as victims, for example, through laws criminalizing persons for being homeless. Nor should anyone be penalized for claiming their economic, social and cultural rights.

#### **V. Remedies and other responses to violations**

##### **Access to remedies**

22. Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.

##### **Adequate reparation**

23. All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

##### **No official sanctioning of violations**

24. National judicial and other organs must ensure that any pronouncements they may make do not result in the official sanctioning of a violation of an international obligation of the State concerned. At a minimum, national judiciaries should consider the relevant provisions of international and regional human rights law as an interpretive aide in formulating any decisions

relating to violations of economic, social and cultural rights.

### **National institutions**

25. Promotional and monitoring bodies such as national ombudsman institutions and human rights commissions, should address violations of economic, social and cultural rights as vigorously as they address violations of civil and political rights.

### **Domestic application of international instruments**

26. The direct incorporation or application of international instruments recognizing economic, social and cultural rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.

### **Impunity**

27. States should develop effective measures to preclude the possibility of impunity of any violation of economic, social and cultural rights and to ensure that no person who may be responsible for violations of such rights has immunity from liability for their actions.

### **Role of the legal professions**

28. In order to achieve effective judicial and other remedies for victims of violations of economic, social and cultural rights, lawyers, judges, adjudicators, bar associations and the legal community generally should pay far greater attention to these violations in the exercise of their professions, as recommended by the International Commission of Jurists in the Bangalore Declaration and Plan of Action of 1995.

### **Special Rapporteurs**

29. In order to further strengthen international mechanisms with respect to preventing, early warning, monitoring and redressing violations of economic, social and cultural rights, the UN Commission on Human Rights should appoint thematic Special Rapporteurs in this field.

### **New standards**

30. In order to further clarify the contents of States obligations to respect, protect and fulfil economic, social and cultural rights, States and appropriate international bodies should actively pursue the adoption of new standards on specific economic, social and cultural rights, in particular the right to work, to food, to housing and to health.

### **Optional protocols**

31. The optional protocol providing for individual and group complaints in relation to the rights recognized in the Covenant should be adopted and ratified without delay. The proposed optional protocol to the Convention on the Elimination of All Forms of Discrimination Against Women should ensure that equal attention is paid to violations of economic, social and cultural rights. In addition, consideration should be given to the drafting of an optional complaints procedure under the Convention on the Rights of the Child.

### **Documenting and monitoring**

32. Documenting and monitoring violations of economic, social and cultural rights should be carried out by all relevant actors, including NGOs, national governments and international organizations. It is indispensable that the relevant international organizations provide the support necessary for the implementation of international instruments in this field. The mandate of the United Nations High Commissioner for Human Rights includes the promotion of economic, social and cultural rights and it is essential that effective steps be taken urgently and that adequate staff and financial resources be devoted to this objective. Specialized agencies and other international organizations working in the economic and social spheres should also place appropriate emphasis upon economic, social and cultural rights as rights and, where they do not already do so, should contribute to efforts to respond to violations of these rights.

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### **Committee on Economic, Social and Cultural Rights, General Comment 3, The Nature of States Parties Obligations (Art. 2, para. 1 of the Covenant)**

*Fifth session, 1990, U.N. Doc. HRI/GEN/1/Rev.1 at 45 (1994)*

1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate General Comment, and which is to be considered by the Committee at its sixth session, is the “undertaking to guarantee” that relevant rights “will be exercised without discrimination ...”.

2. The other is the undertaking in article 2(1) “to take steps”, which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is “to take steps”, in French it is “to act” (“s’engage agir”) and in Spanish it is “to adopt measures” (“a adoptar medidas”). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

3. The means which should be used in order to satisfy the obligation to take steps are stated in article 2(1) to be “all appropriate means, including particularly the adoption of legislative measures”. The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.

4. The Committee notes that States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasize, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase “by all appropriate means” must be given its full and natural meaning.

While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the “appropriateness” of the means chosen will not always be self-evident. It is therefore desirable that States parties’ reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most “appropriate” under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.

5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, “shall have an effective remedy” (art. 2(3)(a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7(a)(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.

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

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

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

9. The principal obligation of result reflected in article 2(1) is to take steps “with a view to achieving progressively the full realization of the rights recognized” in the Covenant. The term “progressive realization” is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be

read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

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

11. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. The Committee has already dealt with these issues in its General Comment 1 (1989).

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

13. A final element of article 2(1), to which attention must be drawn, is that the undertaking given by all States parties is "to take steps, individually and through international assistance and

cooperation, especially economic and technical ...”. The Committee notes that the phrase “to the maximum of its available resources” was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance. Moreover, the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23. With respect to article 22 the Committee has already drawn attention, in General Comment 2 (1990), to some of the opportunities and responsibilities that exist in relation to international cooperation. Article 23 also specifically identifies “the furnishing of technical assistance” as well as other activities, as being among the means of “international action for the achievement of the rights recognized ...”.

14. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment 2 (1990).

### **Comment**

Although international protection of ESCR is of great importance, it is subsidiary to the domestic protection afforded by States. The role of domestic implementation of international standards, especially regarding the justiciability of ESCR, is explained in the following excerpt from Martin Scheinin:

**The role and potentials of domestic implementation in  
strengthening the legal nature of economic and social rights**  
**Martin Scheinin, *Economic and Social Rights as Legal Rights*, in ECONOMIC, SOCIAL AND  
CULTURAL RIGHTS: A TEXTBOOK 49 (Asbjorn Eide *et al.* eds., 2001)<sup>8</sup>**  
*[Footnotes omitted]*

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<sup>8</sup> Reprinted from *Economic and Social Rights as Legal Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 49, Asbjorn Eide *et al.*, 2001, © Kluwer Law International 2001, with the permission of the publisher.

6.1 Various Forms of Domestic Assertion of Economic, Social and Cultural Rights. In many countries, the constitution includes at least some economic, social and cultural rights. Also ordinary Acts of Parliament and collective agreements between workers and employers are important sources for rights, the latter primarily in relation to issues relating to work. The degree to which these rights become justiciable varies, but at least some social rights are rather often capable of being invoked in courts of law, in some jurisdictions already on the basis of a generally formulated constitutional clause.

In countries where international treaties on economic and social rights are incorporated into domestic law—either because of ‘monism’ or as a consequence of a treaty-specific incorporating statute—these treaties might also become applicable in courts. The ESC is an interesting example in this context as the Appendix of the ESC includes a statement according to which ‘the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof’. Irrespective of the fact that this clause is sometimes understood as excluding domestic applicability of ESC provisions, at least some of its provisions have been applied by Dutch and German courts. When the Parliament of Finland gave its consent to the ratification of the ESC and passed an incorporating Act, the Social Affairs Committee explicitly stated that a consequence of incorporation was that the provisions of the ESC would become applicable in domestic courts and for administrative authorities. These examples show that the possibilities for treaty provisions on social and economic rights to become ‘justiciable’ on the domestic level are highly dependent on the constitutional framework into which the treaty provisions are incorporated. Treaty provisions may become ‘self-executing’ or directly applicable, even if this was against the actual intent of their framers.

It is, however, possible to go even further in demonstrating the possibilities for domestic applicability of international treaties on economic and social rights. In Sweden, international treaties are usually not made part of domestic law through incorporation. They are internationally binding on the state and domestic implementation is taken care of through the method of transformation, that is, by amending relevant domestic laws to be consistent with treaty obligations. Still, we can find sporadic court cases in which reference is made to the ESC. In a ruling of 12 June 1991, the Swedish Supreme Administrative Court (Regeringsrätten) quashed the ruling by a lower court and ordered social assistance benefits to be paid to two asylum-seekers, after making reference to the ESC.

6.2 Economic and Social Rights as Subjective Rights in Domestic Law. What has been said above illustrates that there are situations in which a treaty provision, a constitutional clause or a statutory affirmation of an economic or social right is understood as creating a ‘subjective right’, capable of being invoked by an individual in a court case as a basis of a lawsuit or an appeal. Article 13(1) of the ESC on social and medical assistance or the non-discrimination clause in Article 26 of the CCPR are but two examples of such treaty provisions. If made part of domestic law through ‘monism’ or incorporation, they may at least provide for locus standi and operate without the assistance of other legal norms. As the international implementation mechanisms of economic and social rights are improved by, for example, introducing complaint procedures, and

as these developments and the operation of already existing procedures lead to institutionalized practices of interpretation, the possibilities for direct domestic applicability of treaties on social rights grow.

Another line of development, having similar effects, is the assertion of statutory subjective rights within national jurisdictions. For instance, in the Nordic countries one can note a gradual trend towards securing various benefits and services in the fields of, for example, social security, health and education as individual rights. In Finland, for instance, the right to municipal day-care for small children, the right to social assistance, as well as the right to housing and to certain services for the severely handicapped have been defined as subjective rights in Acts of Parliament. In connection with the Constitutional Rights Reform in 1995, some provisions on economic, social and cultural rights were formulated as subjective rights at constitutional level. The same provisions were included in the new Constitution, which entered into force 1 March 2000. For example, 'Everyone has the right to basic education free of charge' and 'Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care'.

In one area—the right to work—the new Constitution is, however, less ambitious than the old 1919 Constitution Act. As amended in 1972, the old Constitution included or at least gave rise to an individual right to a job: 'Unless otherwise prescribed in an Act of Parliament, it is incumbent for the State to arrange for a Finnish citizen a possibility to work'. Somewhat paradoxically, it was only after this provision had already been repealed through the Constitutional Rights Reform of 1995 that the justiciability of 'the right to a job' was proved in a concrete case.

In 1997, the Supreme Court of Finland confirmed a ruling by a lower court to the effect that a municipality which had failed to comply with its duty to arrange, for a long-term unemployed person who was looking for a job, a possibility to work for six months, was ordered to pay compensation to the individual. The lower court had based its ruling both on (then applicable) section 6(2) of the Constitution Act and ordinary legislation enacted to implement and concretize the constitutional 'right to a job'. While the Supreme Court based its ruling on ordinary legislation only, it was quite clear in accepting the justiciability of the right to a job through compensation proceedings against a public authority:

The objective of the Employment Act is to arrange to a citizen the opportunity to work. The goal of the Act is to reach full employment. This goal is sought through measures of economic policy, as well as through employment policy measures. Chapter 4 of the Employment Act (No. 275 of 1987) includes provisions on the arrangement of employment and education opportunities. In the provisions that were in force in 1988-1992, special emphasis was put on the employment of long-term unemployed and young unemployed persons. According to Section 18(3) of the Employment Act (No. 275 of 1987) the State or the municipality was under an obligation to arrange, in accordance with a referral by the labour authorities, to a long-term unemployed person an opportunity to

work for six months if other efforts to employ the person in question had failed... The objective of the norms on the right of long-term unemployed persons to an arranged job was not merely to promote employment in general but explicitly to guarantee to a person qualifying as a long-term unemployed under the Employment Act, an individual right to an arranged job. In their case, the possibility to receive a subsistence social security income was not an alternative to employing the person. Hence, a long-term unemployed person to whom the municipality has not arranged an opportunity to work, in accordance with section 18(3) of the Employment Act, has a right to receive compensation for the loss he or she has suffered.

Neither the old nor the new Constitution includes a provision on a subjective right to housing. Nevertheless, specific provisions guaranteeing an individual right to housing do exist at the level of ordinary law. According to the Act on Child Protection, a municipality is under an obligation to arrange 'such housing that meets the needs of the person' to an individual who after being subject to earlier measures of child protection (basically removal from the original family) reaches the age of 18 years.

Turning to another Nordic country, an illustrative example of the capability of ordinary legislation to create subjective social and economic rights is the Fusa case, decided by the Norwegian Supreme Court (Hoyesterett) on 25 September 1990. The case concerned a severely handicapped person who had been denied certain assistance and services by the municipal authorities. The Supreme Court took the position that the person in question had a legal right to the assistance and services in question and that her right was 'justiciable' in the sense that courts of law could determine the contents of the right in a concrete case and order the municipality to pay compensation for the denied services.

### *Questions*

1. Bearing in mind the problems for judicial implementation of the right to development as explored above, discuss whether economic, social and cultural rights are enforceable or justiciable in international adjudicatory bodies and before domestic tribunals.
2. What are the implications of the concept of "progressiveness" in the exercise and enforcement of these rights? Would you consider that a State contravenes international law when it adopts "regressive" measures regarding a economic, social or cultural right? How would you analyze both the problem of availability and allocation of resources within social sectors and the discretion that States may have in making resources available or allocating them?
3. How would you compare economic, social and cultural rights with civil and political rights, especially in terms of enforcement? In your view, are certain economic, social and cultural rights more susceptible to enforcement or justiciability than others?

4. Certain violations of civil and political rights can constitute international crimes that involve individual criminal responsibility. Do you support the idea that certain systematic violations of economic, social and/or cultural rights could similarly constitute international crimes? If so, specify which violations of economic, social and cultural rights.

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**C. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING: THE RIGHT TO HEALTH AND THE RIGHT TO EDUCATION, AND OVERCOMING POVERTY**

**The right to an adequate standard of living including the right to food**  
Asbjorn Eide, *The Right to an Adequate Standard of Living and the Right to Food, in*  
**ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 133**  
(Asbjorn Eide, *et al.* eds., 2001)<sup>9</sup>  
[Footnotes omitted]

**1. COMPONENTS OF THE RIGHT TO AN ADEQUATE STANDARD OF LIVING**

According to Article 25(1) of the Universal Declaration of Human Rights (UDHR), ‘every-one has the right to a standard of living adequate for the health and wellbeing of himself and of his family’. Under Article 11 of the International Covenant on Economic, Social and Cultural Rights (CESCR), ‘States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family’ (emphasis added). Under Article 27 of the Convention on the Rights of the Child (CRC), ‘States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development’.

The term ‘adequate standard of living’ has not been given a more precise definition in the relevant international instruments, but its meaning can to some extent be understood from the context. In Article 25 of the UDHR the term means ‘adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services’; and in Article 11 of the CESCR it includes ‘adequate food, clothing and housing’; whereas the right of the child is to ‘a standard of living adequate for the child’s physical, mental, spiritual, moral and social development’ (emphasis added).

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<sup>9</sup> Reprinted from *The Right to an Adequate Standard of Living and the Right to Food*, in **ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 133**, Asbjorn Eide, et al., eds. 2001, © Kluwer Law International 2001, with permission of the publisher.

The basic necessities are food, clothing and housing, but an adequate standard of living requires more. How much more is required cannot be stated in general terms, but will depend on cultural conditions in the society concerned. The essential point is that everyone shall be able, without shame and without unreasonable obstacles, to be a full participant in ordinary, everyday interaction with other people. This means, inter alia, that they shall be able to enjoy their basic needs under conditions of dignity. No one shall have to live under conditions whereby the only way to satisfy their needs is by degrading or depriving themselves of their basic freedoms, such as through begging, prostitution or bonded labour.

In purely material terms, an adequate standard of living implies a living above the poverty line of the society concerned, which according to the World Bank comprises two elements: 'The expenditure necessary to buy a minimum standard of nutrition and other basic necessities and a further amount that varies from country to country, reflecting the cost of participating in the everyday life of society'. Necessities produced for own consumption by the person or family concerned should also be taken into account. Since they are often not bought they escape calculation in monetary terms.

The realization of human rights clearly requires the eradication of poverty worldwide, as envisaged in the 'Four Freedoms Address' by Franklin D. Roosevelt in 1941, which was among the inspirations of the UDHR and the subsequent human rights instruments.

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### **The Right to Health**

**Brigit Toebes, *The Right to Health*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 169 (Asbjorn Eide, et al. eds., 2001)<sup>10</sup>**  
*[Footnotes omitted]*

#### **1. INTRODUCTION**

Individual health, subjective and intangible as this concept may be, is an important condition for one's well-being and dignity as a human being. States are generally considered to bear a certain responsibility in this regard. Obviously states cannot guarantee good health, but they are the entities best suited to create certain basic conditions under which the health of the individual is

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protected and possibly even enhanced.

Health is, therefore, guaranteed as a human right in several international and national instruments. A considerable number of international human rights conventions and national constitutions formulate health as a human right, using their own particular language. Such provisions express the responsibility for health on the part of states by formulating health as an individual right and/or by stipulating concrete state obligations.

The definition of health as a human right has given rise to much confusion as well as some controversy. Different terms are used to address health as a human right, such as the 'right to health', 'right to health care', 'right to health protection', and in a broader sense, 'health rights'. At the United Nations level, the broader term 'right to health' is that which is most often used. This term is best in line with the international treaty provisions that proclaim not only the right to health care services, but also the right to a number of underlying preconditions for health, such as safe drinking water, adequate sanitation, environmental health, and occupational health.

At first, hearing the term 'right to health' may sound somewhat odd. It may sound like the right to be healthy, or resemble a claim to everything required to maintain or attain complete health. In this regard, a comparison may be drawn to the civil and political right to life. The term 'right to life' does not refer to the right to eternal life, but rather is used as a shorthand expression referring to the more elaborate treaty-based texts. The latter describe the meaning of the right to life more specifically and have been further spelled out in international and national jurisprudence. Similarly, the 'right to health' is not a 'right to be healthy'. It refers as a form of shorthand to the more complete treaty texts, and may be further explained by jurisprudence at various levels.

The right to health is generally considered to be part of the group of economic, social and cultural human rights as opposed to civil and political human rights. Nevertheless, the right to health serves as a good example of the fact that there is no clear-cut division between the two categories. The right to health has economic, social as well as cultural aspects. It is economic and social in character to the extent that it seeks to safeguard that the individual does not suffer social and economic injustices with respect to his or her health. Furthermore, it is cultural in character because it seeks to safeguard that the available health services are sufficiently- adapted to one's cultural background.

As mentioned, the right to health does not cover everything which involves health. The right to health is one right in a set of human rights that are all important for the protection of people's health. Several human rights-civil and political as well as economic, social and cultural ones-are related to health, a fact that underlines the interdependence and indivisibility of all human rights.

....

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**Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal)**  
*Case CCT 32/97, Constitutional Court of South Africa, Heard on November 11, 1997,*  
*Decided on November 27, 1997*

**Judgment**  
*[Some footnotes included]*

Chaskalson P:

[1] The appellant, a 41 year old unemployed man, is a diabetic who suffers from ischaemic heart disease and cerebro-vascular disease which caused him to have a stroke during 1996. In 1996 his kidneys also failed. Sadly his condition is irreversible and he is now in the final stages of chronic renal failure. His life could be prolonged by means of regular renal dialysis. He has sought such treatment from the renal unit of the Addington state hospital in Durban. The hospital can, however, only provide dialysis treatment to a limited number of patients. The renal unit has 20 dialysis machines available to it, and some of these machines are in poor condition. Each treatment takes four hours and a further two hours have to be allowed for the cleaning of a machine, before it can be used again for other treatment. Because of the limited facilities that are available for kidney dialysis the hospital has been unable to provide the appellant with the treatment he has requested.

[2] The reasons given by the hospital for this are set out in the respondent's answering affidavit deposed to by Doctor Saraladevi Naicker, a specialist physician and nephrologist in the field of renal medicine who has worked at Addington Hospital for 18 years and who is currently the President of the South African Renal Society. In her affidavit Dr Naicker says that Addington Hospital does not have enough resources to provide dialysis treatment for all patients suffering from chronic renal failure. Additional dialysis machines and more trained nursing staff are required to enable it to do this, but the hospital budget does not make provision for such expenditure. The hospital would like to have its budget increased but it has been told by the provincial health department that funds are not available for this purpose.

[3] Because of the shortage of resources the hospital follows a set policy in regard to the use of the dialysis resources. Only patients who suffer from acute renal failure, which can be treated and remedied<sup>11</sup> by renal dialysis are given automatic access to renal dialysis at the hospital. Those patients who, like the appellant, suffer from chronic renal failure which is irreversible are not admitted automatically to the renal programme. A set of guidelines has been drawn up and adopted to determine which applicants who have chronic renal failure will be given dialysis

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<sup>11</sup> Where the renal failure can be cured by dialysis this is usually achieved within a period of four to six weeks from the commencement of the treatment.

treatment. According to the guidelines the primary requirement for admission of such persons to the dialysis programme is that the patient must be eligible for a kidney transplant. A patient who is eligible for a transplant will be provided with dialysis treatment until an organ donor is found and a kidney transplant has been completed.

....

[9] The constitutional commitment to address these conditions is expressed in the preamble which, after giving recognition to the injustices of the past, states:

“We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to –

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

....

Improve the quality of life of all citizens and free the potential of each person”.

This commitment is also reflected in various provisions of the bill of rights<sup>12</sup> and in particular in sections 26 and 27 which deal with housing, health care, food, water and social security.

[10] Sections 26 and 27 contain the following provisions:

“26. Housing

- (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) ....

27. Health care, food, water and social security

- (1) Everyone has the right to have access to–
  - (a) health care services, including reproductive health care;
  - (b) sufficient food and water; and
  - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

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<sup>12</sup> For instance in section 7 where the bill of rights is described as the cornerstone of democracy in South Africa and as affirming “the democratic values of human dignity, equality and freedom”, section 28 which deals with childrens’ rights, and section 29 which deals with education.

- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.”

[11] What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.

[12] The appellant urges us to hold that patients who suffer from terminal illnesses and require treatment such as renal dialysis to prolong their lives are entitled in terms of section 27(3) to be provided with such treatment by the state, and that the state is required to provide funding and resources necessary for the discharge of this obligation.

....

[18] In developing his argument on the right to life counsel for the appellant relied upon a decision of a two-judge bench of the Supreme Court of India in *Paschim Banga Khet Mazdoor Samity and others v State of West Bengal and another*, where it was said:

“The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.”

These comments must be seen in the context of the facts of that case which are materially different to those of the present case. It was a case in which constitutional damages were claimed. The claimant had suffered serious head injuries and brain haemorrhage as a result of having fallen off a train. He was taken to various hospitals and turned away, either because the hospital did not have the necessary facilities for treatment, or on the grounds that it did not have

room to accommodate him. As a result he had been obliged to secure the necessary treatment at a private hospital. It appeared from the judgment that the claimant could in fact have been accommodated in more than one of the hospitals which turned him away and that the persons responsible for that decision had been guilty of misconduct. This is precisely the sort of case which would fall within section 27(3). It is one in which emergency treatment was clearly necessary. The occurrence was sudden, the patient had no opportunity of making arrangements in advance for the treatment that was required, and there was urgency in securing the treatment in order to stabilise his condition. The treatment was available but denied.

....

[19] In our Constitution the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in section 27. If section 27(3) were to be construed in accordance with the appellant's contention it would make it substantially more difficult for the state to fulfill its primary obligations under sections 27(1) and (2) to provide health care services to "everyone" within its available resources. It would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for purposes such as preventative health care and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening. In my view much clearer language than that used in section 27(3) would be required to justify such a conclusion.

[20] Section 27(3) itself is couched in negative terms – it is a right not to be refused emergency treatment. The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers a sudden catastrophe which calls for immediate medical attention, such as the injured person in *Paschim Banga Khet Mazdoor Samity v State of West Bengal*, should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment.<sup>13</sup> What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.

[21] The applicant suffers from chronic renal failure. To be kept alive by dialysis he would require such treatment two to three times a week. This is not an emergency which calls for immediate remedial treatment. It is an ongoing state of affairs resulting from a deterioration of the applicant's renal function which is incurable. In my view section 27(3) does not apply to these facts.

[22] The appellant's demand to receive dialysis treatment at a state hospital must be

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<sup>13</sup> We have only recently emerged from a system of government in which the provision of health services depended on race. On occasions seriously injured persons were refused access to ambulance services or admission to the nearest or best equipped hospital on racial grounds.

determined in accordance with the provisions of sections 27(1) and (2) and not section 27(3). These sections entitle everyone to have access to health care services provided by the state “within its available resources”.

[23] In the Court a quo Combrinck J held that “[i]n this case the respondent has conclusively proved that there are no funds available to provide patients such as the applicant with the necessary treatment.” This finding was not disputed by the appellant, but it was argued that the state could make additional funds available to the renal clinic and that it was obliged to do so to enable the clinic to provide life saving treatment to the appellant and others suffering from chronic renal failure.

....

[29] The provincial administration which is responsible for health services in KwaZulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.

....

[31] One cannot but have sympathy for the appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment that the appellant seeks in order to prolong his life. The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the state to provide him with the treatment. But the state’s resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities, and social security. These too are aspects of the right to

“... human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity.”

The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.

....

[36] The state has a constitutional duty to comply with the obligations imposed on it by section 27 of the Constitution. It has not been shown in the present case, however, that the

state's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of those obligations. In the circumstances the appellant is not entitled to the relief that he seeks in these proceedings and his appeal against the decision of Combrinck J must fail. This is not an appropriate case for an order for costs to be made and the respondent correctly does not seek such an order.

[37] The following order is made. The appeal against the order made by Combrinck J is dismissed. No order is made as to costs.

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***Tutela* No. T-505/92**  
**Rights of Sick Persons / AIDS Patients**  
*Constitutional Court of Colombia, Judgment No. T-505/92, August 22, 1992*

**Plaintiff: DIEGO SERNA GOMEZ**

**Judge Eduardo Cifuentes Muñoz delivered the opinion of the Court**

In *tutela*<sup>14</sup> proceedings T-2535, brought by plaintiff DIEGO SERNA GOMEZ against defendant Hospital Universitario del Valle Evaristo García, the record states that:

1. DIEGO SERNA GOMEZ brought suit against Hospital Universitario del Valle Evaristo García, seeking a court order directing the hospital to provide him, “an indigent person suffering from the serious illness known as AIDS, with the necessary medical services and specialized tests, free of charge.” The petitioner invoked articles 13, 23, 49 and 86 of the Constitution in support of his claim.

2. The petitioner claims that, because of his deteriorating health, he went in 1991 to San Jorge, the Pereira Departmental Hospital, where he was diagnosed with acquired immune deficiency syndrome (AIDS). He received complete services at the hospital at all times. He underwent various medical tests, as well as medical and psychological consultations, having been told that “because he had an epidemiological illness, and did not have sufficient resources, he was not required to pay.”

The petitioner asserts that he initially stayed at his sister's house, but due to the rejection

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<sup>14</sup> The *acción de tutela* is an extraordinary remedy which provides injunctive relief for the protection of fundamental rights established in the Colombian Constitution. It is an exceptional remedy that can only be used in cases of urgency when no other remedy is suitable to redress the situation.

expressed by certain relatives, he was forced to return to Cali and move in with his sixty-nine-year-old mother. In view of his worsening health, he went to several different Cali hospitals, all of which demanded payment for medical services. Eventually he could not return to any hospital for lack of funds to cover the costs of medical consultations, tests and medicines. At the suggestion of a family member, the petitioner appealed to the Superintendent of Health, who attempted to mediate on his behalf by giving him a letter addressed to the Hospital Universitario del Valle. The hospital offered the petitioner a partial waiver of fees, but informed him that he would still be required to pay the remaining balance.

3. In its January 24, 1992 ruling, the First Division of the Valle del Cauca Contentious-Administrative Court denied the petitioner's claim, having found no violation of the right to equal protection, and not having found the right to health (Const. art. 49) to be a fundamental right.

....

5. The Council of State, through the March 17, 1992 judgment of the Plenary Chamber of the Contentious-Administrative Court (appeals court), revoked the sentence of the Valle del Cauca Contentious-Administrative Court, and allowed the petitioner's claim. It ordered the director of the Hospital Universitario del Valle Evaristo García and the Governor of Valle del Cauca to "arrange for the immediate provision of the necessary services which would tend to protect DIEGO SERNA GOMEZ's life and restore his health."

Basing its reasoning on a systematic interpretation of articles 49 and 93 of the Constitution, the highest Contentious-Administrative Court highlighted the tendency of different human rights treaties and conventions (the American Convention, the Protocol of San Salvador) to confer a fundamental character upon economic, social and cultural rights, "insofar as the different categories of such rights 'constitute an indivisible whole, based upon the recognition of the dignity of the human person', characteristics which require permanent protection and promotion in order to obtain their full validity, 'without ever justifying the violation of some in the fulfillment of others.'"

....

## **LEGAL ARGUMENTS**

### **Basis of the violation**

1. According to the petitioner, equal protection and the right to health are the fundamental rights violated by the decision of the Hospital Universitario del Valle Evaristo García to deny him free access to the medical services and specialized tests that he requires as an AIDS patient.

Mr. SERNA GOMEZ's assertion of the right to free medical care, as a person with an

epidemiological illness who is unable to pay, originated with the information he received from a social worker at the San Jorge Pereira Departmental Hospital. The constitutional magistrate must determine whether there is a constitutional basis for the petitioner's claim; that is, whether it finds support in a fundamental right which, given the circumstances, would require immediate protection (Const. art. 86).

....

### **Rights and duties of persons infected with HIV or AIDS**

A person with AIDS possesses the same rights as others. However, due to the nature of the illness, the State has an obligation to give such individuals special protection for the purpose of guaranteeing their human rights and dignity. In particular, the State must prevent all discriminatory measures or stigmatization against members of this group in the provision of services and with regard to their freedom of movement.

The rights of equal protection, intimacy, free development of one's personality, work, health and others could be violated or threatened by state authorities or private individuals, in many cases, as an exclusive consequence of the fear that AIDS provokes.

This negative reaction must be countered with effective state action tending to encourage understanding and solidarity, and thus preventing the spread of the disease. The Constitution contains effective mechanisms for protecting the rights of AIDS patients, including suits against private individuals in charge of public health services when the rights to life, intimacy, equal protection and autonomy depend upon those services (Decree Law 2591 of 1991, art. 42).

The real and potential harm that AIDS signifies for society as a whole imposes upon infected persons the responsibility of unqualified compliance with their constitutional duties (Const. art. 95). The parameters of responsibility that can be required of such persons are broader because of the possibility of contagion to others. Consideration toward others and the ethical and juridical imperative not to abuse one's individual rights obliges AIDS patients to take the necessary measures (i.e., not to donate blood, semen, organs or tissue, and to use condoms during sexual intercourse) in order not to put at risk or infect third persons with the disease. The principle of reciprocity must take precedence in the conduct of people with AIDS: having the right to demand special protection from the State, they must also act with the utmost care and diligence in situations which involve risks to third persons.

### ***Ordre Public of Health***

4. AIDS poses a current and growing public health threat, given its character as a fatal disease which is transmittable and has no cure. Fortunately, this problem has a normative response of constitutional relevance. The legal provisions which regulate the issue cover the different stages of the disease's progress, and contain preventive diagnostic and treatment measures which must

be observed by all medical service institutions, whether public or private.

The notion of *ordre public* includes health; accordingly, state authorities must take the measures necessary and sufficient for its preservation. (Const. art. 1). Since the AIDS epidemic has the potential to gravely affect *ordre public*, the State must react to the threat with effectiveness.

....

The failure to adopt necessary and opportune measures could generate a public catastrophe, with responsibility imputable to the State by omission. Thus, the allocation of State resources to the health sector, and to the fight against AIDS in particular, must be given priority.

....

The *ordre public* character of epidemic disease control norms requires medical centers to provide integral services to AIDS patients. Prevention will not be effective if public or private hospitals deny preventive and relief services to these individuals. The cost of services, although not irrelevant to the allocation of scarce medical resources, cannot be, in the struggle against a transmittable and fatal disease, the determining factor in the rendering of medical care. Although integral service is not without its costs, the collection of payment must be subordinate to the provision of services. The denial of tests, treatment or consultation unless they are paid for, or unless payment is judicially guaranteed, is contrary to the *ordre public* objective of preventing and containing an epidemic.

### **Social Rule of Law, human dignity, solidarity and public spending**

The social character of our Rule of Law is not a rhetorical or empty formula. On the contrary, the social nature of juridical order finds clear expression in the prevalence of fundamental rights, in the surmounting of the crisis of the Rule of Law as synonym for abstract legality and in the immediate fulfillment of urgent social tasks, all in the development of the principles of solidarity and human dignity.

Human dignity and solidarity are the principles which underlie the social character of the Rule of Law. Situations injurious to the dignity of the person are repugnant to constitutional order because they are contrary to the idea of justice which inspires it. The reduction of the person to a mere object of public or private will (e.g., slavery, servitude, banishment), cruel, inhuman or degrading treatment (Const. art. 12) or simply that conduct which demonstrates indifference to life itself (e.g., contract killings), is conduct which denies human dignity and, in the case of violation or threat to fundamental rights, may be subject to immediate condemnation through the *acción de tutela*, without prejudice to other legal action.

....

The principle of distributive justice, according to which the allocation of a society's economic resources should tend to favor the disadvantaged sectors, serves as a basis for the tax system, budget-making rules, the prioritization of spending and the setting of priorities in the delivery of public services.

Social Rule of Law, the principles of human dignity and social solidarity, the essential aim of promoting general prosperity and guaranteeing the effectiveness of constitutional rights, duties and principles and the fundamental right to equal opportunity all guide the interpretation of economic aspects of the Constitution and shed light upon all fields of its regulation-- private property, freedom of enterprise, exploitation of resources, production, distribution, utilization and consumption of goods and services, tax, budget and public spending regimens.

The Constitutional norms regarding budgetary issues give priority to social spending above any other appropriations (Const. art. 350), and their application is mandatory in the plans and budgets of the Nation as well as regional entities. With a view to meeting the population's needs in health, education, sanitation and potable water (Const. art. 366), the framers of the constitution opted to recognize a hierarchy of public spending priorities and subordinated the constitutionality of the respective budgetary laws to the principle of social spending.

On the other hand, the Constitution establishes that every person has a duty to contribute to the financing of the State's spending and investments (Const. art. 95-9). Correlatively, it is the taxpayer's right that the income received by the treasury be applied with priority above any other purpose to the satisfaction of society's basic needs, so as to prevent a deficit of resources in, among other sectors, the health sector, which might alter and endanger the taxpayer's life and property.

### **Right to equal protection and special protection**

6. The petitioner, an indigent AIDS patient, considers that his right to equal protection and special protection of the State was violated by the denial of the Hospital Universitario del Valle to provide him, free of charge, the required medical relief services.

According to the judge in the court of first instance, "the right that Mr. SERNA GOMEZ asks us to recognize does not square with the fundamental right enshrined in article 13 of the Constitution." In the judge's opinion, this article establishes equality before the law for all citizens, allowing for neither discrimination nor privilege. Special protection for people in circumstances of manifest vulnerability "means that they are not outside the guarantee established in the article under consideration, notwithstanding the defenseless state in which they find themselves."

This interpretation was rejected by the Council of State. Given that the plaintiff's right to life was at stake, the Court of second instance ruled that the State must concede special protection to him. It corrected the lower court's erroneous interpretation of article 13 of the Constitution. The

indifferentiation of the hypotheses contained in the article led the Valle Contentious-Administrative Court, in the exercise of its constitutional jurisdiction, to ignore the State obligation to promote real and effective equal protection, particularly through the special protection of persons situated in circumstances of manifest vulnerability (Const. art. 13).

One of the Constitution's framers who was party to the debates surrounding the conceptual change from formal equal protection to substantive equal protection, in accordance with the real situation of inequality especially in the economic, physical and mental fields, expressed that:

"(...) The first paragraph is the principle of formal equal protection, that is, that the law itself cannot permit that some people have more privileges than others, which is equality before the law. But in practice this equality does not exist because people are born disabled, or become incapacitated, or are old, or are defenseless children. That is where the principle of solidarity comes in, by which the State is obliged to protect all these people who are in circumstances of vulnerability compared to the rest, (...). If the bases of the State, the norms and activity of state authorities are truly directed so that no one can be discriminated against, so that everyone is on equal footing, then we are talking about this equal level. But there are people who can in no way compete within these egalitarian rules, so it is in those places that the State is obliged to intervene, that is the idea (...)."

Some sectors of the Colombian population who are not self-sufficient and who lack access to information on the dangers of AIDS are more exposed to contagion. The pernicious effect of this disease falls primarily upon disadvantaged and marginalized sectors of the population, hitting low-income groups disproportionately. For this reason they require support and protection.

The indigent who demonstrates his condition of manifest vulnerability (Const. art. 13-3), and requests provision of the basic necessity of health care, makes operative the principle that social spending has priority. This, by virtue of the predominance of fundamental rights over the organizational framework of the constitution, creates an obligation for the competent authority and, correlatively, a subjective public right for the solicitor.

### **Public health service as a scarce resource**

7. The socio-economic reality of the country, the insufficient coverage of health services, the sector's budget deficit and the delay in transfers of financial allotments to the various regions of the country are some of the problems which impede the efficient delivery of public services, making them in practice a truly "scarce resource."

The aspiration of the Colombian people to attain a just political, economic and social order (Const., Preamble) and the principles of universality, efficiency and solidarity in the delivery of public health services (Const. art. 49), constitute the axiological-normative framework that must guide the distribution of the scarce resource of health care. The disjunctive of giving one person priority over another involves an ethical judgment for the administration and for the doctor. In

such a decision, however, minorities and the sectors traditionally discriminated against or marginalized from the benefits of society must be given priority.

The conveyance of free health services is a privilege which can be constitutionally justified depending upon the purposes or the objectives sought. This is true, among other cases, when to prevent a greater risk-- such as an epidemic-- it is indispensable to earmark funds without regard to payment for services.

Free, integral services form part of the special protection within the State's obligation (Const. art. 13-3) when the inadequacy of financial means prevents a person from lessening his suffering, as well as the discrimination and the social uncertainty that living with a terminal, transmittable and incurable disease entails.

The fundamental right to equal protection, in its modality of special protection for persons in circumstances of manifest vulnerability, is a right of immediate application (Const. art. 85). AIDS is a fatal illness. The delivery of health services to AIDS patients is an imperative which arises from the solidarity and respect for human dignity which our judicial system proclaims and seeks to make effective.

#### **Violation of fundamental rights and affirmation of the lower court's decision**

8. In the instant case, Mr. DIEGO SERNA GOMEZ has demonstrated that he suffers from AIDS and that he had turned, unsuccessfully because of his precarious economic condition and that of his immediate family, to the medical relief services of the State. The refusal of the Hospital Universitario del Valle to provide him with the integral relief services required by law constitutes a violation of the special protection guaranteed equally by the Constitution to persons placed in circumstances of manifest vulnerability. Not to correct this situation would result not only in a clear act of discrimination against the petitioner, but also in an increase of the social risk involved in not preventing and controlling the spread of his disease. Accordingly, this Court affirms the decision reviewed herein.

#### **JUDGMENT**

The Second Review Chamber of the Constitutional Court,

#### **RESOLVES**

**FIRST** - to AFFIRM the March 17, 1992 judgment of the Council of State.

**SECOND** - . . . .

. . . .

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## The Right to Education

Manfred Nowak, *The Right to Education, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 245*(Asbjorn Eide, et al. eds., 2001)<sup>15</sup>

[Footnotes omitted]

### I. HUMAN RIGHTS AND EDUCATION

The right to education, including various aspects of freedom of education and academic freedom, constitutes an essential part of contemporary human rights law. Although the right to education is generally considered to be a cultural right, it is also related to other human rights.

Education is a precondition for the exercise of human rights. The enjoyment of many civil and political rights, such as freedom of information, expression, assembly and association, the right to vote and to be elected or the right of equal access to public service depends on at least a minimum level of education, including literacy. Similarly, many economic, social and cultural rights, such as the right to choose work, to receive equal pay for equal work, the right to form trade unions, to take part in cultural life, to enjoy the benefits of scientific progress and to receive higher education on the basis of capacity, can only be exercised in a meaningful way after a minimum level of education has been achieved.

Education aims at strengthening human rights. Although the goals and objectives of education may vary according to the respective historical, political, cultural, religious or national context, there is a growing consensus under present international law that tolerance and respect of human rights shall be major characteristics of educated human beings. For instance, the 143 States Parties to the International Covenant on Economic, Social and Cultural Rights (CESCR) 'agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms'.

Education is an important means of promoting human rights. Tolerance of, and respect for, human rights is not only an important goal of education, but human rights education at all levels is also the most important means to create a universal human rights culture. In order to promote increased awareness of human rights and mutual tolerance, the 171 governments participating in the 1993 World Conference on Human Rights 'called on all States and institutions to include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all

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<sup>15</sup> Reprinted from *The Right to Education*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 245, Asbjorn Eide et al., 2001, © Kluwer Law International 2001, with permission of the publisher.

learning institutions in formal and non-formal settings'. The dissemination of information on the ethics and philosophical foundations of human rights, as well as of practical knowledge as to the protection of one's human rights against undue interference by the state, society and other human beings aimed at reducing the huge gap between theory and practice of human rights, is one of the major contemporary tasks for governments, educational facilities, non-governmental and intergovernmental organizations.

....

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## **American Declaration of the Rights and Duties of Man**

### ***Article XI***

Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

### ***Article XII***

Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.

Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society. The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide. Every person has the right to receive, free, at least a primary education.

### ***Article XIII***

Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

### ***Article XIV***

Every person has the right to work, under proper conditions, and to follow his vocation freely, in

sofar as existing conditions of employment permit.

Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.

#### *Article XV*

Every person has the right to leisure time, to wholesome recreation, and to the opportunity for advantageous use of his free time to his spiritual, cultural and physical benefit.

#### *Article XVI*

Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.

....

#### *Questions*

1. What is the judicial relevance of the right to an adequate standard of living? To what extent can a "right to health" be said to exist? Can international or constitutional provisions that recognize health rights be applied directly in specific cases by domestic courts?

2. How can the courts draw the line of justiciability of health rights, according to *Thiagraj Soobramoney v. Minister of Health* of the South African Constitutional Court and *Tutela No. T-505/92 Rights of sick persons / AIDS patients* of the Colombian Constitutional Court? Do you agree with the decision reached in either case?

3. Could you think of an existing international norm that recognizes health rights as self-executing? What type of constitutional provision would strengthen such an interpretation?

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#### **D. INTERNATIONAL IMPORTANCE OF ECONOMIC SOCIAL AND CULTURAL RIGHTS RECOGNIZED DOMESTICALLY OR IN OTHER TREATIES**

#### *Comment*

In accordance with Article 29 of the American Convention, this treaty must be interpreted by

reference to the legal standard that is less restrictive (more protective) of the rights of persons. If domestic tribunals adopt a more protective interpretation of a right than that afforded at the international level, then the domestic interpretation must be preferred in regard to that country. By the same token, if the international interpretation is more protective, then domestic tribunals must opt for this standard. The less-restrictive-clause is applicable to international adjudicatory bodies.

Article 4 of the Additional Protocol to the American Convention on Human Rights Concerning Economic, Social and Cultural Rights (“Protocol of San Salvador”) and Article 5(2) of the International Covenant on Economic, Social and Cultural Rights of the U.N. also establish the less-restrictive-clause referred to above.

**Article 4**  
**Inadmissibility of Restrictions**  
**Additional Protocol to the American Convention on Human Rights**  
**Concerning Economic, Social and Cultural Rights**

A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.

**Article 5**  
**International Covenant on Economic, Social and Cultural Rights**

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

The following are comparative examples of constitutional provisions recognizing economic, social and cultural rights of several countries in the Americas. Some of them provide for rights that can be enforced immediately in cases brought before domestic courts. Furthermore, such provisions and their interpretation by a domestic tribunal may constitute a source of international standards that must be taken into account and applied by international supervisory bodies *vis a vis* the State concerned, by virtue of the above mentioned “less-restrictive-clause” (Article 29 of the American Convention).

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**1. EXAMPLES OF CONSTITUTIONS OF THE AMERICAS THAT RECOGNIZE ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**CONSTITUTION OF BARBADOS**  
*reprinted in 2 Constitutions of the Countries of the World*  
*(Gisbert H. Flanz Ed., Oceana Publications Inc., 1997)*

**Article 103**

***Economic, social and cultural rights***

Protection of pension rights

1. Subject to the provisions of section 104, the law applicable to the grant and payment to any officer, or to his widow, children, dependants or personal representatives, of any pension, compensation, gratuity or other like allowance (in this section and section 104 referred to as an “award”) in respect of the service of that officer in a public office shall be that in force on the relevant date or any later law that is not less favorable to that person.

2. In subsection (1) “the relevant date” means -

a. in relation to an award granted before 30th November 1966, the date on which the award was granted;

b. in relation to an award granted or to be granted on or after 30th November 1966 to or in respect of any person who was a public officer before that date, 29th November 1966;

c. in relation to an award granted or to be granted to or in respect of any person who becomes a public officer on or after 30<sup>th</sup> November 1966, the date on which he becomes a public officer.

3. Where a person is entitled to exercise an option as to which of two or more laws shall apply in his case, the law specified by him in exercising the option shall, for the purposes of this section, be deemed to be more favorable to him than the other law or laws.

....

7. In this section “pensions law” means any law relating to the grant to any person or to the widow, children, dependants or personal representatives of that person, of an award for any pension, compensation, gratuity or other like allowance in respect of the service of that person in a public office.

**CONSTITUTION OF CHILE**

*reprinted in 4 Constitutions of the Countries of the World  
(Gisbert H. Flanz Ed., Oceana Publications Inc., 1991)*

## **Article 19**

### ***Economic, Social and Cultural Rights***

The Constitution guarantees to all persons:

....

10. The right to education.

The objective of education is the complete development of the individual in the various stages of his life.

Parents have the preferential right and duty to educate their children. The State shall provide special protection for the exercise of this right.

Basic education is mandatory; to that effect, the State must finance a gratuitous system designed to assure access thereto by the entire population.

It is, likewise, the duty of the State to promote the development of education at all levels, stimulate scientific and technological research, artistic creation, and the protection and increase of the cultural patrimony of the Nation.

It is the duty of the community to contribute to the development and perfecting of education;

....

19. The right to affiliation to unions in the cases and in the manner prescribed for by the law. Unions affiliation shall always be voluntary.

Union organizations shall have juridical personality by mere registration of their by-laws and constitutive acts, in the manner and conditions prescribed for by law.

The law shall provide for the mechanisms for assuring the autonomy of these organizations. Union organizations and their leaders may not intervene in political-partisan activities.

## **Article 20**

### ***Judicial Protection***

He who should, due to arbitrary or illegal actions or omissions, suffer privation, disturbance or threat in the legitimate exercise of the rights and guarantees established in Article 19, numbers 1, 2, 3 (paragraph 4), 4, 5, 6, 9 (final paragraph), 11, 12, 13, 15, 16 relative to freedom to work and the right of freedom of choice and freedom of contract, and those established in the fourth paragraph and numbers 19, 21, 22, 23, 24 and 25, may, on his own, or through a third party, resort to the respective Court of Appeals, which

shall immediately take the steps necessary to re-establish the rule of law and assure due protection to the person affected, without prejudice to the other rights which he might invoke before the authorities or the corresponding courts.

The recourse of protection in the case of No. 8 of Article 19, shall also be applied when the right to live in a contamination-free atmosphere has been affected by an arbitrary or unlawful action imputable to an authority or a specific person.

**CONSTITUTION OF COLOMBIA**  
*reprinted in 4 Constitutions of the Countries of the World*  
*(Gisbert H. Flanz Ed., Oceana Publications Inc., 1995)*

**Article 13**

***Economic, Social and Cultural Rights***

All individuals are born free and equal before the law, will receive equal protection and treatment from the authorities, and will enjoy the same rights, freedoms, and opportunities without any discrimination on account of gender, race, national or family origin, language, religion, political opinion, or philosophy.

The state will promote the conditions so that equality may be real and effective and will adopt measures in favor of groups which are discriminated against or marginalized.

The state will especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and will sanction the abuses or ill-treatment perpetrated against them.

**Article 25**

Work is a right and a social obligation and enjoys, in all its forms, the special protection of the state. Every individual is entitled to a job under dignified and equitable conditions.

**Article 39**

Workers and employers have the right to form trade unions or associations without interference by the state. Their legal recognition will occur by the simple registration of their constituent act.

The internal structure and functioning of the trade unions and social or labor organizations will be subject to the legal order and to democratic principles.

The cancellation or suspension of legal identity may only occur through legal means.

Jurisdiction and other guaranties necessary for the performance of their administration is recognized to trade union representatives.

Members of the police force do not have the right to form associations.

#### **Article 44**

The following are basic rights of children: Life, physical integrity, health and social security, a balanced diet, their name and citizenship, to have a family and not be separated from it, care and love, instruction and culture, recreation, and the free expression of their opinions. They will be protected against all forms of abandonment, physical or moral violence, sequestration, sale, sexual abuse, work or economic exploitation, and dangerous work. They will also enjoy other rights upheld in the Constitution, the laws, and international treaties ratified by Colombia.

The family, society and the state have the obligation to assist and protect children in order to guarantee their harmonious and integral development and the full exercise of their rights. Any individual may request from the competent authority the enforcement of these rights and the sanctioning of those who violate them.

The rights of children have priority over the rights of others.

#### **Article 48**

Social Security is a mandatory public service which will be delivered under the administration, coordination, and control of the state, subject to principles of efficiency, universality, and solidarity within the limits established by law.

All the population is guaranteed the irrevocable right to Social Security.

With the participation of individuals, the state will gradually extend the coverage of Social Security which will include the provision of services in the form determined by law.

Social Security may be provided by public or private entities, in accordance with the law.

It will not be possible to assign or use the resources of the Social Security organs for different purposes.

The law will define the means whereby the resources earmarked for retirement benefits may retain their constant purchasing power.

#### **Article 49**

Public health and environmental protection are public services for which the state is responsible. All individuals are guaranteed access to services that promote, protect, and rehabilitate public health.

It is the responsibility of the state to organize, direct, and regulate the delivery of health services and of environmental protection to the population in accordance with the principles of efficiency, universality and solidarity. Too, to establish policies for the provision of health services by private entities and to exercise oversight and control over them. Similarly, to establish the jurisdiction of the nation, territorial entities, and individuals, and to determine the shares of their responsibilities within the limits and under

the conditions determined by law. Public health services will be organized in a decentralized manner broken down in accordance with levels of responsibility and with the participation of the community.

The law will determine the limits within which basic care for all the people will be free of charge and mandatory.

Every individual has the right to have access to the integral care of his /her health and that of his/ her community.

#### **Article 50**

Any child under a year old who may not be covered by any type of protection or social security will be entitled to receive free care in all health entities that receive state subsidies. The law will regulate the matter.

#### **Article 51**

All Colombian citizens are entitled to live in dignity. The state will determine the conditions necessary to give effect to this right and will promote plans for public housing, appropriate systems of long-term financing, and community plans for the execution of these housing programs.

#### **Article 54**

It is the obligation of the state and employers to offer training and professional and technical skills to whoever needs them. The state must promote the employment of individuals of working age and guarantee to the handicapped the right to employment appropriate to their physical condition.

#### **Article 55**

The right of collective bargaining to regulate labor relations, with the exceptions provided by law, is guaranteed.

It is the duty of the state to promote agreement and other measures for the peaceful solution of collective labor conflicts.

#### **Article 56**

The right to strike is guaranteed, except in the case of essential public services defined by the legislature.

The law will regulate this right.

A permanent commission composed of the government, the representatives of employers, and of workers will promote sound labor relations, contribute to the settlement of collective labor disputes, and coordinate wage and labor policies. The law will regulate their makeup and functioning.

#### **Article 67**

Education is an individual right and a public service that has a social function. Through education individuals seek access to knowledge, science, technology, and the other benefits and values of knowledge.

Education will train the Colombian when it comes to respect for human rights, peace and democracy, and in the practice of work and recreation for cultural scientific, and technological improvement and for the protection of the environment.

The state, society, and the family are responsible for education, which will be mandatory between the ages of five and 15 years and which will minimally include one year of preschool instruction and nine years of basic instruction.

Education will be free of charge in the state institutions, without prejudice to those who can afford to defray the costs.

It is the responsibility of the state to perform the final inspection and supervision of education in order to oversee its quality, for fulfilling its purposes, and for the improved moral, intellectual, and physical training of those being educated; to guarantee an adequate supply of the service, and to guarantee for minors the conditions necessary for their access to and retention in the educational system.

The nation and the territorial entities will participate in the management, financing, and administration of the state educational services within the limits provided for in the Constitution and the law.

#### **Article 70**

The state has the obligation to promote and foster access to the culture of all Colombians equally by means of permanent education and scientific, technical, artistic, and professional instruction at all stages of the process of creating the national identity.

Culture in its diverse manifestations is the basis of nationality. The state recognizes the equality and dignity of all those who live together in the country. The state will promote research, science, development, and the defusion of the nation's cultural values.

#### **Article 366**

The general well-being and improvement of the population's quality of life are social purposes of the state. A basic objective of their activity will be to address the unsatisfied public health, educational, environmental, and drinking water needs of those affected.

For such an outcome, in the plans and budgets of the nation and of the territorial entities, public social expenditures will have priority over any other allocation.

### ***Judicial Protection***

#### **Article 83**

The activities of individuals and of the public authorities will have to conform to the postulates of good faith which will be presumed in all the measures that the former promote vis-à-vis the latter.

#### **Article 84**

When a right or an activity has been regulated in a general way, the public authorities may not establish or demand permits, licenses, or impose additional conditions for their exercise.

#### **Article 85**

The rights mentioned in Articles 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 31, 33, 34, 37 and 40 are applicable immediately.

#### **Article 86**

Every individual may claim legal protection to claim before the judges, at any time or place, through a preferential and summary proceeding, for himself/herself or by whoever acts in his /her name, the immediate protection of his/her fundamental constitutional rights when the individual fears the latter may be jeopardized or threatened by the actions or omission of any public authority.

The protection will consist of an order so that whoever solicits such protection may receive it by a judge enjoining others to act or refrain from acting. The order, which will have to be implemented immediately, may be challenged before the competent judge, and in any case the latter may send it to the Constitutional Court for possible revision.

This action will be followed only when the affected party does not dispose of other means of judicial defense, except when the former is used as a temporary device to avoid irreversible harm. In no case can more than 10 days elapse between the request for protection and its resolution.

The law will establish the cases in which the order of protection should apply to individuals entrusted with providing a public service of whose conduct may affect seriously and directly the collective interest or in respect of whom the applicant may find himself / herself in a state of subordination or vulnerability.

#### **Article 87**

Any individual may appear before the legal authority to make effective the application of a law of administrative act. In case of a successful action, the sentence will order the delinquent authority to perform its mandated duty.

#### **Article 88**

The law will regulate popular actions for the protection of collective rights and interests related to the homeland, space, public safety and health, administrative morality, the environment, free economic competition, and other areas of similar nature defined in it.

It will also regulate the actions stemming from the harm caused to a large number of individuals, without barring appropriate individual action.

In the same way, it will define cases of responsibility of a civil nature for the damage caused to collective rights and interests.

#### **Article 89**

In addition to what is mentioned in the previous articles, the law will determine the other resources, actions, and procedures necessary so that these may protect through the integrity of the legal order the individual rights of groups or collective against the deeds of commission or omission of the public authorities.

#### **Article 90**

The state will answer materially for the extralegal damages for which it is responsible, caused by deeds of commission or omission of the public authorities.

In the event that the state is ordered to make compensation for some damage or another, which may have been the consequence of the fraudulent or seriously criminal behavior of one of its agents, the former will have to claim restitution from the latter.

### **CONSTITUTION OF COSTA RICA**

*reprinted in 5 Constitutions of the Countries of the World  
(Gisbert H. Flanz Ed., Oceana Publications Inc., 1993)*

#### ***Economic, Social and Cultural Rights***

#### **Article 60**

Both employers and workers may organize freely, for the exclusive purpose of obtaining and preserving economic, social, or occupational benefits.

Foreigners are prohibited from exercising direction or authority in unions.

#### **Article 61**

The right of employers to lockout and of workers to strike is recognized except in public services, in accordance with provisions of law and regulations on the subject, which must prohibit any act of coercion or violence.

#### **Article 78**

General basic education is compulsory; this, the preschool stage, and diversified education are free and supported by the nation.

The State shall facilitate the pursuit of higher studies by persons lacking their own resources. The awarding of appropriate scholarships and assistance shall be a function of the Ministry of Public Education through such organizations as the law may specify.

## **Article 82**

The state shall provide food and clothing for indigent pupils according to law.

### ***Judicial Protection***

## **Article 48**

Every person has the right of habeas corpus if he believes himself illegally deprived of his liberty.

This writ is exclusively within the jurisdiction of the Supreme Court, which determines whether to order appearance of the accused, and due obedience or any other pretext may not be alleged to prevent it.

To maintain or reestablish the enjoyment of other rights conferred by this Constitution, everyone also has the right of amparo in such courts as the law may determine.

## **CONSTITUTION OF GUATEMALA**

*reprinted in 8 Constitutions of the Countries of the World  
(Gisbert H. Flanz Ed., Oceana Publications Inc., 1997)*

### ***Economic, Social and Cultural Rights***

## **Article 71**

Right to education. The freedom of education and educational standards is guaranteed. It is the obligation of the State to provide and facilitate education to its inhabitants without any discrimination whatever. The foundation and maintenance of cultural educational centers and museums is declared of public utility and necessity.

## **Article 74**

Obligatory education. The inhabitants have the right and obligation to receive early, pre-primary, primary and basic education within the age limits set by the law.

Education provided by the State is free.

The State will provide and promote scholarships and educational credits.

Scientific education, technology, and the humanities represent the goals that the State will have to guide and develop on a permanent basis.

The State will promote special education, diversified education and education outside of school.

## **Article 94**

Obligation of the State regarding health and social assistance. The State will see to the health and social assistance of all its inhabitants. It will develop through its institutions preventive measures, promotion, recuperation, rehabilitation, coordination, and appropriate auxiliary measures in order to procure for them the most complete physical, mental, and social well-being.

#### **Article 100**

Social security. The State recognizes and guarantees the right to social security for the benefit of the inhabitants of the Nation. Its system is instituted as a public function in national, unitary, and mandatory form.

The State, the employers, and the workers covered by the system, with the sole exception of what is provided in Article 88 of this Constitution, have the obligation to help finance said system and the right to participate in its management, achieving its progressive improvement.

The application of the system of social security is the responsibility of the Guatemalan Social Security Institute, which is an autonomous entity with a juridical character, patrimony, and its own functions; it enjoys a total exemption from taxes, levies and assessments, whether established or to be established. The Guatemalan Social Security Institute must cooperate with the public health institutions in coordinated manner.

The Executive organs will allocate annually in the Budget of Revenues and Expenditures of the State a specific portion to cover the share that pertains to the State as such and as an employer, which cannot be transferred or canceled during the fiscal year and will be set in accordance with the technical actuarial studies of the Institute.

Against the resolution decreed in this respect, administrative and contentious-administrative recourse in accordance with the law are in effect. When services that the system must provide are involved, the labor and social insurance tribunals will be competent.

#### **Article 119**

Obligations of the State. The following are basic obligations of the State:

- a. To promote the economic development of the Nation, stimulating initiative in agricultural, livestock, industrial, tourist, and other types of activity;
- b. To promote systematically administrative economic decentralization to achieve the adequate regional development of the country;
- c. To adopt the means that may be necessary for the conservation, development and exploitation of natural resources in efficient form;
- d. To see to the raising of the standard of living of all of the inhabitants of the country, securing the well-being of the family;
- e. To promote and protect the creation and operation of cooperatives, giving them the necessary

technical and financial aid;

f. To grant incentives according to the law to industrial enterprises that may be established in the interior of the Republic and which contribute to decentralization;

g. To promote on a priority basis the construction of popular housing through systems of financing so that a larger number of Guatemalan families can benefit from the property. When resulting of cooperatively-held housing is involved, the system of land tenure may be different;

h. To prevent the functioning of excessive practices leading to the concentration of assets and means of production at the expense of the collectivity;

i. The protection of consumers and users when it comes to protecting the quality of domestic and export consumer products to guarantee their health, security, and legitimate economic interests;

j. To actively promote programs of rural development that tend to increase and diversify national production based on private property and the protection of family property. The peasant and artisan are entitled to receive technical and economic assistance;

k. To protect the formation of capital, savings and investment;

l. To promote the ordered and efficient development of the domestic and foreign trade of the country, fomenting markets for national products;

m. To maintain within the framework of economic policy an appropriate relationship between public spending and national production; and

n. To create conditions adequate to promote the investment of national and foreign capital.

### ***Judicial Protection***

#### **Article 265**

Proceeding of Amparo. Amparo is instituted for the purpose of protecting persons against the threats of violations of their rights or to restore the rule of same should the violation have occurred. There is no area which is not subject to amparo, and it will always proceed whenever the acts, resolutions, provisions, or laws of authority should imply a threat, restraint, or violation of the rights which the Constitution and the laws guarantee.

#### **CONSTITUTION OF HAITI**

*reprinted in 8 Constitutions of the Countries of the World  
(Gisbert H. Flanz Ed., Oceana Publications Inc., 1987)*

### ***Economic, Social and Cultural Rights***

## Right to life and Health

### **Article 19**

The State has the absolute obligation to guarantee the right to life, health, and respect of the human person for all citizens without distinction, in conformity with the Universal Declaration of the Rights of Man.

....

### **Article 22**

The State recognizes the right of every citizen to decent housing, education, food and social security.

### **Article 23**

The State has the obligation to ensure for all citizens in all territorial divisions appropriate means to ensure protection, maintenance and restoration of their health by establishing hospitals, health centers and dispensaries.

## Education and Teaching

### **Article 32**

The State guarantees the right to education. It sees to the physical, intellectual, moral, professional, social and civic training of the population.

#### **Article 32(1)**

Education is the responsibility of the State and its territorial divisions. They must make schooling available to all, free of charge, and ensure that public and private sector teachers are properly trained.

#### **Article 32(2)**

The first responsibility of the State and its territorial divisions is education of the masses, which is the only way the country can be developed. The State shall encourage and facilitate private enterprise in this field.

#### **Article 32(3)**

Primary schooling is compulsory under penalties to be prescribed by law. Classroom facilities and teaching materials shall be provided by the State to elementary school students free of charge.

#### **Article 32(4)**

Agricultural, vocational, cooperative and technical training is a fundamental responsibility of the State and its communes.

**Article 32(5)**

Preschool and maternal training, as well as nonformal education are encouraged.

**Article 32(6)**

Higher education shall be open to all, on an equal bases, according to merit only.

**Article 32(7)**

The State shall see to it that each territorial division, communal Section, commune or Department shall have the essential educational establishments adapted to the needs of their development, without however prejudicing the priorities assigned to agricultural, vocational, cooperative and technical training, which must be widely disseminated.

**Article 32(8)**

The State guarantees that the handicapped and the gifted shall have the means to ensure their autonomy, education and independence.

**Article 32(9)**

The State and its territorial divisions have the duty to make all necessary provisions to intensify the literacy campaign for the masses. They encourage all private initiatives to that end.

**Article 32(10)**

Teachers are entitled to a fair salary.

**Article 33**

There shall be freedom of education at all levels. This freedom shall be exercised under the control of the State.

**Article 34**

Except where perpetrators of crimes are caught in the act, the premises of educational establishments are inviolable. No police forces may enter them except with the permission of the supervisors of those establishments.

**Article 34(1)**

This provision does not apply when an educational establishment is used for the purposes.

Freedom to work

### **Article 35**

Freedom to work is guaranteed. every citizen has the obligation to engage in work of his choice to meet his own and his family's needs, and to cooperate with the State in the establishment of a social security system.

#### **Article 35(1)**

Every employee of a private or public institution is entitled to a fair wage, to rest, to a paid annual vacation and to a bonus.

#### **Article 35(2)**

The State guarantees workers equal working conditions and wages regardless of their sex, beliefs, opinions and marital status.

#### **Article 35(3)**

Trade union freedom is guaranteed. any worker in the public or private sector may join a union representing his particular occupation solely to protect his work interests.

#### **Article 35(4)**

Unions are essentially nonpolitical, nonprofit, and nondenominational. No one may be forced to join a union.

#### **Article 35(5)**

The right to strike is recognized under the limits set by law.

#### **Article 35(6)**

The minimum age for gainful employment is set by law. Special laws govern the work of minors and servants.

.....

### **Article 48**

The State shall see to it that a Civil Pension Retirement Fund is established in the public and private sectors. The fund shall receive contributions from employers and employees, in accordance with the criteria and in the manner established by law. The granting of a pension is a right and not a privilege.

## **CONSTITUTION OF URUGUAY**

*reprinted in 20 Constitutions of the Countries of the World  
(Gisbert H. Flanz Ed., Oceana Publications Inc., 1998)*

## ***Economic, Social and Cultural Rights***

### **Article 44**

The State shall legislate on all questions connected with public health and hygiene, endeavoring to attain the physical, moral, and social improvement of all inhabitants of the country.

### **Article 46**

The State shall give asylum to indigent persons or those lacking sufficient means who, because of chronic physical or mental inferiority, may be incapacitated for work.

### **Article 57**

The law shall promote the organization of trade unions, according them charters and issuing regulations for their recognition as juridical persons.

It shall likewise promote the creation of tribunals of conciliation and arbitration.

The strike is declared to be a right of trade unions. Regulations shall be made governing its exercise and effect, on that basis.

### **Article 70**

Primary education and intermediate, agrarian or industrial education are compulsory.

The State shall promote the development of scientific research and of technical education.

Appropriate legislation shall be enacted to enforce these provisions.

### **Article 71**

Free official primary, intermediate, advanced, industrial, artistic, and physical education is declared to be of social utility, as well as the creation of scholarships for continued study and specialization in cultural, scientific and occupational fields, and the establishment of public libraries.

## ***Judicial Protection***

### **Article 332**

The provisions of the present Constitution which recognize individual rights, as well as those which confer powers and impose duties on public authorities, shall not be without effect by reason of the lack of corresponding regulations, but such regulations shall be supplied on the basis of analogous laws, general principles of justice, and generally accepted doctrines.

## *Questions*

1. Must the Inter-American Commission or Court take into account domestic laws or other international treaties in order to interpret the American Convention and its Protocols? What problems do you envision when a regional body, such as the Inter-American Commission, defines the scope of a provision of a treaty of the universal system (United Nations) in order to establish the less-restrictive-standard regarding the American Convention?
2. At the domestic level, are the members of the judiciary compelled to resort to the methods of interpretation prescribed by the inter-American human rights instruments? Are they compelled to take into account the jurisprudence of the Inter-American Court or Commission?
3. Economic, social and cultural rights are considered to be of “progressive” implementation according to those international human rights instruments that recognize them. Do States have an international obligation requiring a “progressive” implementation (as opposed to “regressive” standards) of economic, social and cultural rights? If so, do you think that States are allowed, under international law, to repeal a social right previously recognized domestically? If not, what is the legal relevance of establishing that a ‘right’ should be implemented progressively?

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**CHAPTER VII**

**THEMATIC ASPECTS OF THE INTERNATIONAL  
PROTECTION OF HUMAN RIGHTS**

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**A. NO DISCRIMINATION AND EQUALITY UNDER THE LAW, AND THE RIGHTS OF WOMEN**

**1. THE AMERICAN CONVENTION, THE CONVENTION OF BELÉM DO PARÁ AND THE PROTECTION OF THE RIGHTS OF WOMEN.  
NO DISCRIMINATION: PROPORTIONALITY AND REASONABLENESS**

**a. Selected International Provisions on Discrimination against Women in Human Rights Instruments**

**American Declaration of the Rights and Duties of Man**

*Article II*

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

*Article VII*

All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

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**American Convention on Human Rights**

*Article 1*

*Obligation to Respect Rights*

1. The States Parties to this Convention 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 for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

*Article 24*

*Right to Equal Protection*

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

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## **International Covenant on Civil and Political Rights**

### ***Article 26***

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.

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### **Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas**

*Inter-Am. C.H.R., OEA/Ser.L/V/II.100, Doc. 17, October 13, 1998 (1998)*

*[Footnotes omitted]*

The American Convention on Human Rights, like other principal international and regional human rights treaties, is based on broad principles of non-discrimination and equal protection of and before the law. Article 1 of the Convention provides that each State Party undertakes to “respect and ensure the rights and freedoms” set forth “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, inter alia, sex.” Where a recognized right is not already protected by legislative or other means, a State Party is obliged to take the measures necessary to give it effect (Article 2).

The Convention protects a broad range of civil and political rights. The right to be recognized as a person before the law is set forth in Article 3. The right to equal protection of and before the law is established in Article 24, and is manifested more specifically in Article 17, concerning “rights of the family,” which specifies that “States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage....” While the Convention allows for the suspension of certain rights during emergency situations which meet the criteria stipulated in Article 27, such measures may not discriminate on the basis of, inter alia, sex.

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## 2. *The Convention of Belém do Pará*

The Inter-American Convention on Violence against Women, known as the “Convention of Belém do Pará,” is unique. Within the regional system, the development and entry into force of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women represents the re-envisioning of inter-American human rights law to apply in a gender-specific way. The adoption of the Convention reflected a powerful consensus among both state and non-state actors that the struggle to eradicate gender violence requires concrete action and effective guarantees. This initiative both influenced and drew from the recognition of violence against women as a human rights violation at the 1993 World Conference on Human Rights, the adoption of the UN Declaration on the Elimination of Violence against Women later that year, and the further developments of the Fourth World Conference on Women in 1995. Notwithstanding that the Convention of Belém do Pará is the newest of the inter-American human rights instruments, it is the most widely ratified, with 27 States Parties.

The Convention of Belém do Pará recognizes that violence against women is a manifestation of the historically unequal power relations between women and men. Violence against women is defined in Article 1 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 private sphere.

The Convention’s elaboration of violence against women is firmly grounded in the basic rights already recognized in the inter-American human rights system, including the rights to life; physical and mental integrity, personal liberty; and to equal protection of and before the law. Article 5 recognizes that violence prevents and nullifies a woman’s exercise of other fundamental rights, and provides that: “Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights.” The Convention further addresses the interrelationship between gender violence and discrimination, establishing in Article 6 that the right of women to be free from violence includes, *inter alia*:

- 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 behavior and social and cultural practices based on concepts of inferiority or subordination.

Implementing and enforcing the right of women to be free from violence requires determining when gender-violence triggers state responsibility. Article 7 of the Convention sets forth the principal undertakings of States Parties to ensure that their agents refrain from any “act or practice” of gender violence, and to “apply due diligence” to prevent, investigate and punish violence against women whenever it occurs. States Parties must take the measures necessary to

give effect to the objectives of the Convention, and women who have been subjected to violence must have access to available and effective recourse to obtain protective measures, or to seek restitution or reparation.

The protection mechanisms set forth in Articles 10 through 12 are three-fold. First, States Parties are required to report to the CIM on measures adopted and obstacles confronted in addressing gender violence. Second, the Convention authorizes individuals to file petitions with the IACHR complaining of a violation of its principal undertakings. The broad standing requirement replicates that contained in the American Convention: any person, group, or a nongovernmental organization legally recognized in a member state may file such a denunciation, which will then be processed by the Commission according to its Regulations. Third, a State Party or the Commission of Women may request that the Inter-American Court of Human Rights issue an advisory opinion on the interpretation of the Convention.

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1. *The individual petition system*

Any person or group can file a petition alleging the violation of the American Convention, Convention of Belém do Pará, or in the case of States not parties, the American Declaration. While it is usually necessary to identify the victim so that the respective state can investigate and respond to the allegations, the identity of the petitioner may be kept in confidence. The petition must be in writing, it must be signed, and it must set forth facts which tend to show the violation of a protected right.

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2. *Jurisprudence of the system addressing issues of gender*

The first analysis within the system expressly involving gender bias arose in the context of a request for an advisory opinion before the Inter-American Court. In 1983, the State of Costa Rica asked the Court to examine the compatibility of several proposed amendments to its Constitution concerning nationality and naturalization. One of the amendments would have given a foreign woman who married a Costa Rican special consideration in obtaining citizenship, but provided no corresponding consideration for a foreign man in that situation. In its opinion, the Inter-American Court followed the basic jurisprudence of the European system in reasoning that a distinction in treatment is discriminatory if it “has no objective and reasonable justification.” The Court determined that the preference for according a husband’s nationality on his wife was based on the historical practice of conferring authority within matrimony and the family upon the husband/father, and was therefore “an outgrowth of conjugal inequality.” Accordingly, the Court determined that the proposed distinction could not be justified, and was incompatible with the right to equal protection generally (Article 24), and with the requirement that States “take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities ...

[in] marriage” (Article 17).

The Commission’s final report on the case of Raquel Martín de Mejía, adopted in March of 1996, addressed the question of rape as torture under the American Convention and under the Convention to Prevent and Punish Torture. The fact that the State concerned, Peru, contested the admissibility of the case, but never responded to the Commission’s requests for information on the merits raised certain questions with respect to the burden and standard of proof. Pursuant to Article 42 of its Regulations and its longstanding practice, when a government fails to provide information, the Commission may presume the facts alleged to be true to the extent they are not contradicted by other evidence. The Commission took into account that the region of the country in question had been under a state of emergency and military control at the time of the facts, and that the practice of rape by members of the security forces in such areas had been extensively documented and reported on by intergovernmental and nongovernmental groups. On the basis of the petitioners’ claims and these other reports, measured against the criteria of “consistency, credibility and specificity,” the Commission presumed the facts alleged to be true. In addressing the rape itself, the Commission determined that each of the three elements set forth in the Inter-American Convention to Prevent and Punish Torture had been met: (1) “an intentional act through which physical and mental pain and suffering is inflicted on a person;” (2) “committed with a purpose;” (3) “by a public official or by a private person acting at the instigation of the former.” The analysis relative to the first element takes into account both the physical and psychological suffering caused by rape. The report notes the short and long term consequences for the victim, as well as the reluctance of many victims to denounce this violation. In addition to determining that the rapes were inflicted against Raquel Mejía as torture, the Commission found that they violated her right to have her honor respected and her dignity recognized (Article 11). Recalling the words of the UN Special Rapporteur against Torture, that rape affects women “in the most sensitive part of their personality” with the effects aggravated by the fact that “in the majority of cases the necessary psychological treatment and care will not ... be provided,” the Commission characterized sexual abuse generally as “a deliberate outrage” to the dignity of women.

The foregoing case may be compared to that of María Elena Loayza Tamayo, in which the Inter-American Court raised but declined to address certain questions in examining rape as a human rights violation. The Commission, having found Peru responsible for violations of multiple Articles of the American Convention pursuant to its review of the case, presented claims before the Court that the victim had been: arbitrarily and illegally arrested and detained; subjected to torture and inhuman treatment including rape by State agents; and that her right to a fair hearing and judicial protection had been violated. According to the pleadings, she was held incommunicado for the first ten days of her detention, and was subjected to torture and inhuman treatment in order to coerce her to confess to having ties to Sendero Luminoso. The submissions included sworn statements from the victim that, while held incommunicado, she had been raped by several State agents. The Court found the State responsible for violations of the Articles cited by the Commission, and ordered the State to release the victim and pay the costs and reparations to be established in the next stage of the case. At the same time, without setting forth any

substantive examination, or articulating either the standard or burden of proof, the Court indicated that it could not find the alleged rape by State agents to have been proven. In October of 1996, the Commission adopted its final report on the Case of X and Y, which concerned a practice in Argentina of routinely requiring that female family members wishing to have personal contact visits with an inmate undergo vaginal inspections. A petition had been filed with the Commission in December of 1989, alleging that the wife of an inmate and their thirteen year old daughter had been subjected to such inspections without regard for whether there were special circumstances to warrant extraordinary measures. Ms. X had filed a writ of amparo demanding that the inspections cease. This writ was rejected at first instance, accepted on appeal, and then rejected by the Supreme Court of Argentina on the basis that the inspections were not flagrantly arbitrary under the terms of the law of amparo.

In balancing the interests of those subject to such searches against the state's interest in maintaining security within its prisons, the Commission characterized "a vaginal search [as] more than a restrictive measure as it involves the invasion of a woman's body." "Consequently, the balancing of interests involved" must hold the government "to a higher standard." In its report, the Commission set out a four part test to determine the lawfulness of a vaginal inspection or search: "1) it must be absolutely necessary to achieve the security objective in the particular case; 2) there must not exist an alternative option; 3) it should be determined by judicial order; and 4) it must be carried out by an appropriate health professional." With respect to Ms. Y, who was thirteen years old at the time in question, the Commission found "it is evident that the vaginal inspection was an absolutely inadequate and unreasonable method." The Commission determined that the facts denounced gave rise to State responsibility for violations of Articles 5 and 11, 25 and 8, and 1.1.

### *3. Monitoring, on site observations, special and follow up reports*

While it routinely monitors the status of human rights in each member state through communications received from governmental, intergovernmental and nongovernmental sources, on-site visits provide an opportunity for the Commission to examine a situation through direct observation, interviews and documentation. Such visits are conducted pursuant to the consent of the State concerned, which is bound to furnish the Commission with the necessary facilities for carrying out its mission. . . .

This procedure was used, for example, in addressing the systematic use of rape by members of the security forces and paramilitary groups during the de facto regime in Haiti. The victims were unwilling to request individualized investigations of their cases due to fear of reprisals. During a 1994 visit, the Commission interviewed a substantial number of victims in confidence, as well as a few doctors who had treated them. Groups assisting the victims provided the Commission with additional information. The Commission looked to the inter-American and UN definitions of torture in defining that this sexual violence was not only a violation of the right to physical integrity, but also a form of torture. The practice had been utilized to inflict physical and mental pain and suffering in order to punish or intimidate women deemed unsympathetic to the regime.

The Commission described this kind of sexual violence as a brutal expression of discrimination. Moreover, as this practice was “widespread, open and routine” during the de facto regime, the Commission determined that it represented a “weapon of terror” that was a “crime against humanity under customary international law.”

The Commission is developing a practice of regularly analyzing gender-specific human rights problems in its special reports on particular member states. For example, in its Report on the Situation of Human Rights in Ecuador, and its Report on the Situation of Human Rights in Brazil, both released in 1997, as well as in the Report on the Situation of Human Rights in Mexico, to be released in 1998, the Commission included a chapter focusing on gender-specific human rights issues. Common themes addressed in the reports include the status of women in national law and society, gender-discrimination in the sphere of labor and the economy, the ability of women to fully and equally participate in public service, political life and decision making, and the problem of violence against women. Having noted certain advances realized at the national level, the respective examinations provided the basis for the Commission to address recommendations designed to assist each State in enhancing compliance with their inter-American human rights obligations. The recommendations focus on modifying or abolishing legal provisions which discriminate or have the effect of discriminating against women, addressing practices and structural barriers which impede the full incorporation of women in national life, and allocating appropriate resources to pursue such objectives.

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**Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica**  
*Inter-Am. Ct. H.R., Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984, (ser. A) No. 4 (1984)*

52. The provisions of the proposed amendments that have been brought before the Court for interpretation as well as the text of the Constitution that is now in force establish different classifications as far as the conditions for the acquisition of Costa Rican nationality through naturalization are concerned. Thus, under paragraphs 2 and 3 of Article 14 of the proposed amendment, the periods of official residence in the country required as a condition for the acquisition of nationality differ, depending on whether the applicants qualify as native-born nationals of “other countries of Central America, Spaniards and Ibero-Americans” or whether they acquired the nationality of those countries by naturalization. Paragraph 4 of that same Article in turn lays down special conditions applicable to the naturalization of “a foreign woman” who marries a Costa Rican. Article 14 of the Constitution now in force makes similar

distinctions which, even though they may not have the same purpose and meaning, suggest the question whether they do not constitute discriminatory classifications incompatible with the relevant texts of the Convention.

53. Article 1(1) of the Convention, a rule general in scope which applies to all the provisions of the treaty, imposes on the States Parties the obligation to respect and guarantee the free and full exercise of the rights and freedoms recognized therein “without any discrimination.” In other words, regardless of its origin or the form it may assume, any treatment that can be considered to be discriminatory with regard to the exercise of any of the rights guaranteed under the Convention is *per se* incompatible with that instrument.

54. Article 24 of the Convention, in turn, reads as follows:

“Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

Although Articles 24 and 1(1) are conceptually not identical - the Court may perhaps have occasion at some future date to articulate the differences - 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. The prohibition against discrimination so broadly proclaimed in Article 1(1) with regard to the rights and guarantees enumerated in the Convention thus extends to the domestic law of the States Parties, permitting the conclusion that in these provisions the States Parties, by acceding to the Convention, have undertaken to maintain their laws free of discriminatory regulations.

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 that 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.” [Eur.Court H.R., Case relating to “Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Merits),” Judgment of 23rd July 1968, p. 34.] 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.

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.

59. With this approach in mind, the Court repeats its prior observation that as far as the granting of naturalization is concerned, it is for the granting state to determine whether and to what extent applicants for naturalization have complied with the conditions deemed to ensure an effective link between them and the value system and interests of the society to which they wish to belong. To this extent there exists no doubt that it is within the sovereign power of Costa Rica to decide what standards should determine the granting or denial of nationality to aliens who seek it, and to establish certain reasonable differentiations based on factual differences which, viewed objectively, recognize that some applicants have a closer affinity than others to Costa Rica's value system and interests.

60. Given the above considerations, one example of a non-discriminatory differentiation would be the establishment of less stringent residency requirements for Central Americans, Ibero-Americans and Spaniards than for other foreigners seeking to acquire Costa Rican nationality. It would not appear to be inconsistent with the nature and purpose of the grant of nationality to expedite the naturalization procedures for those who, viewed objectively, share much closer historical, cultural and spiritual bonds with the people of Costa Rica. The existence of these bonds permits the assumption that these individuals will be more easily and more rapidly assimilated within the national community and identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve.

61. Less obvious is the basis for the distinction, made in paragraphs 2 and 3 of Article 14 of the proposed amendment, between those Central Americans, Ibero-Americans and Spaniards who acquired their nationality by birth and those who obtained it by naturalization. Since nationality is a bond that exists equally for the one group as for the other, the proposed classification appears to be based on the place of birth and not on the culture of the applicant for naturalization. The provisions in question may, however, have been prompted by certain doubts about the strictness of the conditions that were applied by those states which conferred their nationality on the individuals now seeking to obtain that of Costa Rica, the assumption being that the previously acquired nationality -be it Spanish, Ibero-American or that of some other Central American country- does not constitute an adequate guarantee of affinity with the value system and interests of the Costa Rican society. Although the distinctions being made are debatable on various grounds, the Court will not consider those issues now. Notwithstanding the fact that the classification resorted to is more difficult to understand given the additional requirements that an applicant would have to meet under Article 15 of the proposed amendment, the Court cannot conclude that the proposed amendment is clearly discriminatory in character.

62. In reaching this conclusion, the Court is fully mindful of the margin of appreciation which is reserved to states when it comes to the establishment of requirements for the acquisition of nationality and the determination whether they have been complied with. But the Court's conclusion should not be viewed as approval of the practice which prevails in some areas to limit to an exaggerated and unjustified degree the political rights of naturalized individuals. Most of these situations involve cases not now before the Court that do, however, constitute clear instances of discrimination on the basis of origin or place of birth, unjustly creating two distinct hierarchies of nationals in one single country.

63. Consistent with its clearly restrictive approach, the proposed amendment also provides for new conditions which must be complied with by those applying for naturalization. Draft Article 15 requires, among other things, proof of the ability to "speak, write and read" the Spanish language; it also prescribes a "comprehensive examination on the history of the country and its values." These conditions can be deemed, *prima facie*, to fall within the margin of appreciation reserved to the state as far as concerns the enactment and assessment of the requirements designed to ensure the existence of real and effective links upon which to base the acquisition of the new nationality. So viewed, it cannot be said to be unreasonable and unjustified to require proof of the ability to communicate in the language of the country or, although this is less clear, to require the applicant to "speak, write and read" the language. The same can be said of the requirement of a "comprehensive examination on the history of the country and its values." The Court feels compelled to emphasize, however, that in practice, and given the broad discretion with which tests such as those mandated by the draft amendment tend to be administered, there exists the risk that these requirements will become the vehicle for subjective and arbitrary judgments as well as instruments for the effectuation of discriminatory policies which, although not directly apparent on the face of the law, could well be the consequence of its application.

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## **Human Rights Committee, General Comment 18, Non-discrimination**

*Thirty-seventh session, 1989, U.N. Doc. HRI\GEN\1\Rev.1 at 26 (1994)*

1. 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. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons 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. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees 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.

2. Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, *inter alia*, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.

3. Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3. Similarly, article 25 provides for the equal participation in public life of all citizens, without any of the distinctions mentioned in article 2.

4. It is for the States parties to determine appropriate measures to implement the relevant provisions. However, the Committee is to be informed about the nature of such measures and their conformity with the principles of non-discrimination and equality before the law and equal protection of the law.

5. The Committee wishes to draw the attention of States parties to the fact that the Covenant

sometimes expressly requires them to take measures to guarantee the equality of rights of the persons concerned. For example, article 23, paragraph 4, stipulates that States parties shall take appropriate steps to ensure equality of rights as well as responsibilities of spouses as to marriage, during marriage and at its dissolution. Such steps may take the form of legislative, administrative or other measures, but it is a positive duty of States parties to make certain that spouses have equal rights as required by the Covenant. In relation to children, article 24 provides that all children, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, have the right to such measures of protection as are required by their status as minors, on the part of their family, society and the State.

6. The Committee notes that the Covenant neither defines the term “discrimination” nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that 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. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that “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.

7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes 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.

8. The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. In this connection, the provisions of the Covenant are explicit. For example, article 6, paragraph 5, prohibits the death sentence from being imposed on persons below 18 years of age. The same paragraph prohibits that sentence from being carried out on pregnant women. Similarly, article 10, paragraph 3, requires the segregation of juvenile offenders from adults. Furthermore, article 25 guarantees certain political rights, differentiating on grounds of citizenship.

9. Reports of many States parties contain information regarding legislative as well as administrative measures and court decisions which relate to protection against discrimination in law, but they very often lack information which would reveal discrimination in fact. When reporting on articles 2 (1), 3 and 26 of the Covenant, States parties usually cite provisions of their

constitution or equal opportunity laws with respect to equality of persons. While such information is of course useful, the Committee wishes to know if there remain any problems of discrimination in fact, which may be practised either by public authorities, by the community, or by private persons or bodies. The Committee wishes to be informed about legal provisions and administrative measures directed at diminishing or eliminating such discrimination.

10. The Committee also wishes to point out that 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.

11. Both article 2, paragraph 1, and article 26 enumerate grounds of discrimination such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Committee has observed that in a number of constitutions and laws not all the grounds on which discrimination is prohibited, as cited in article 2, paragraph 1, are enumerated. The Committee would therefore like to receive information from States parties as to the significance of such omissions.

12. While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

**Human Rights Committee, General Comment 4, Article 3**  
*Thirteenth session, 1981, U.N. Doc. HRI\GEN\1\Rev.1 at 4 (1994)*

1. Article 3 of the Covenant requiring, as it does, States parties to ensure the equal right of men and women to the enjoyment of all civil and political rights provided for in the Covenant, has been insufficiently dealt with in a considerable number of States reports and has raised a number of concerns, two of which may be highlighted.

2. Firstly, article 3, as articles 2(1) and 26 in so far as those articles primarily deal with the prevention of discrimination on a number of grounds, among which sex is one, requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done simply by enacting laws. Hence, more information has generally been required regarding the role of women in practice with a view to ascertaining what measures, in addition to purely legislative measures of protection, have been or are being taken to give effect to the precise and positive obligations under article 3 and to ascertain what progress is being made or what factors or difficulties are being met in this regard.

3. Secondly, the positive obligation undertaken by States parties under that article may itself have an inevitable impact on legislation or administrative measures specifically designed to regulate matters other than those dealt with in the Covenant but which may adversely affect rights recognized in the Covenant. One example, among others, is the degree to which immigration laws which distinguish between a male and a female citizen may or may not adversely affect the scope of the right of the woman to marriage to non-citizens or to hold public office.

4. The Committee, therefore, considers that it might assist States parties if special attention were given to a review by specially appointed bodies or institutions of laws or measures which inherently draw a distinction between men and women in so far as those laws or measures adversely affect the rights provided for in the Covenant and, secondly, that States parties should give specific information in their reports about all measures, legislative or otherwise, designed to implement their undertaking under this article.

5. The Committee considers that it might help the States parties in implementing this obligation, if more use could be made of existing means of international cooperation with a view to exchanging experience and organizing assistance in solving the practical problems connected with the insurance of equal rights for men and women.

***Questions***

1. Which internationally recognized civil and political rights are most relevant to the protection

of the rights of women?

2. Could Article 24 (Right to Equal Protection) of the American Convention be applied to find a violation of a right not protected under the American Convention (for example, social security)? What about Article 1.1 of the Convention?

3. Do you consider that the prohibition of discrimination requires strict formal equality? In your opinion, do you believe that affirmative action (positive discrimination) could be required under Article 24? In your answer use the provisions regarding interpretation of international treaties established both in the Vienna Convention on the Law of Treaties and the American Convention on Human Rights.

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## 2. **CERTAIN PRACTICES THAT VIOLATE THE HUMAN RIGHTS OF WOMEN: INTERNATIONAL ADJUDICATION**

### a. **Rape as Torture**

#### **Raquel Martín de Mejía v. Perú**

*Case 10.970, Inter-Am. C.H.R. 157,*

*Annual Report 1995, OEA/Ser.L/V/II.91, Doc. 7 (1996)*

*[For the facts of this case, see Chapter III; footnotes omitted]*

### 3. *Analysis*

- a. The repeated sexual abuse to which Raquel Mejía was subjected constitutes a violation of Article 5 and Article 11 of the American Convention on Human Rights

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.

In the context of international humanitarian law, Article 27 of the Fourth Geneva Convention of 1949 concerning the protection due to civilians in times of war explicitly prohibits sexual abuse. Article 147 of that Convention which lists acts considered as "serious offenses" or "war crimes" includes rape in that it constitutes "torture or inhuman treatment". The International Committee of the Red Cross (ICRC) has declared that the "serious offense" of "deliberately causing great suffering or seriously harming physical integrity or health" includes sexual abuse.

Moreover, Article 76 of Additional Protocol I to the 1949 Geneva Conventions expressly prohibits rape or other types of sexual abuse. Article 85(4), for its part, states that when these practices are based on racial discrimination they constitute “serious offenses”. As established in the Fourth Convention and Protocol I, any act of rape committed individually constitutes a war crime.

In the case of non-international conflicts, both Article 3 common to the four Geneva Conventions and Article 4(2) of Protocol II additional to the Conventions, include the prohibition against rape and other sexual abuse insofar as they are the outcome of harm deliberately influenced on a person. The ICRC has stated that the prohibition laid down in Protocol II reaffirms and complements the common Article 3 since it was necessary to strengthen the protection of women, who can be victims of rape, forced prostitution or other types of abuse.

Article 5 of the Statute of the International Tribunal established for investigating the serious violations of international humanitarian law committed in the territory of the former Yugoslavia, considers rape practiced on a systematic and large scale a crime against humanity.

In the context of international human rights law, the American Convention on Human Rights stipulates in its Article 5 that:

1. Every person has the right to have his physical, mental and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment...

The letter of the Convention does not specify what is to be understood by torture. However, in the inter-American sphere, acts constituting torture are established in the Inter-American Convention to Prevent and Punish Torture, which states:

...torture will be understood to be any act performed intentionally by which physical and mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as a personal punishment, as a preventive measure, as a penalty or for any other purpose. Torture will also be understood to be application to a person of methods designed to efface the victim’s personality or to diminish his physical or mental capacity, even if they do not cause physical pain or mental anguish.

The following will be guilty of the crime of torture:

- a. Public employees or officials who acting in that capacity order, instigate, induce its commission, commit it directly or, when in a position to prevent it, do not do so.

b. Persons who, at the instigation of the public officials or employees referred to in paragraph 1, order, instigate or induce its commission, commit it directly or are accomplices in its commission.

Accordingly, for torture to exist three elements have to be combined:

1. it must be an intentional act through which physical and mental pain and suffering is inflicted on a person;
2. it must be committed with a purpose;
3. it must be committed by a public official or by a private person acting at the instigation of the former.

Regarding the first element, the Commission considers that rape is a physical and mental abuse that is perpetrated as a result of an act of violence. The definition of rape contained in Article 170 of the Peruvian Criminal Code confirms this by using the phrasing “[h]e who, with violence or serious threat, obliges a person to practice the sex act...” The Special Rapporteur against Torture has noted that sexual abuse is one of the various methods of physical torture. Moreover, rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community. In this connection, the above-mentioned Special Rapporteur has stated that, particularly in Peru, “...rape would appear to be a weapon used to punish, intimidate and humiliate.”

Rape 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.

Raquel Mejía was a victim of rape, and in consequence of an act of violence that cause her “physical and mental pain and suffering”. As she states in her testimony, after having been raped she “was in a state of shock, sitting there alone in her room”. She was in no hurry to file the appropriate complaint for fear of suffering “public ostracism”. “The victims of sexual abuse do not report the matter because they feel humiliated. In addition, no woman wants to publicly announce that she has been raped. She does not know how her husband will react. [Moreover], the integrity of the family is at stake, the children might feel humiliated if they know what has happened to their mother”.

The second element establishes that for an act to be torture it must have been committed intentionally, i.e. to produce a certain result in the victim. The Inter-American Convention to Prevent and Punish Torture includes, among other purposes, personal punishment and

intimidation.

Raquel Mejía was raped with the aim of punishing her personally and intimidating her. According to her testimony, the man who raped her told her that she, too, was wanted as a subversive, like her husband. He also told her that her name was on a list of persons connected with terrorism and, finally, warned her that her friendship with a former official in the previous government would not serve to protect her. On the second occasion, before leaving he threatened to come back and rape her again. Raquel Mejía felt terrorized not only for her own safety but also for that of her daughter who was sleeping in another room and for the life of her husband.

The third requirement of the definition of torture is that the act must have been perpetrated by a public official or by a private individual at the instigation of the former.

As concluded in the foregoing, the man who raped Raquel Mejía was member of the security forces who had himself accompanied by a large group of soldiers.

Accordingly, the Commission, having established that the three elements of the definition of torture are present in the case under consideration, concludes that the Peruvian State is responsible for violation of Article 5 of the American Convention.

The petitioners have also asserted that the sexual abuse suffered by Raquel Mejía violates the provisions of Article 11 of the Convention.

Said article specifies that a State must guarantee everybody protection of their honor and dignity, within the framework of a broader right, namely the right to privacy. The relevant parts of paragraphs 1 and 2 of this article read as follows:

1. Everyone has the right to have his honor respected and his dignity respected.
2. No one may be the object of arbitrary or abusive interference with his private life...

The Special Rapporteur against Torture has stated that “Rape is a particularly base attack against human dignity. Women are affected in the most sensitive part of their personality and the long-term effects are perforce extremely harmful, since in the majority of cases the necessary psychological treatment and care will not and cannot be provided.”

The Commission considers that sexual abuse, besides being a violation of the victim’s physical and mental integrity, implies a deliberate outrage to their dignity. In this respect, it becomes a question that is included in the concept of “private life”. The European Court of Human Rights has observed that the concept of private life extends to a person’s physical and moral integrity, and consequently includes his sex life.

For the Commission, therefore, the rapes suffered by Raquel Mejía, in that they affected both her physical and her moral integrity, including her personal dignity, constituted a violation of Article 11 of the Convention, responsibility for which is attributable to the Peruvian State.

Article 1(1) of the Convention states:

The State Parties to this Convention 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.

The Inter-American Court of Human Rights has interpreted this article as establishing two obligations for the States Parties to the Convention: that of respecting the rights and freedoms recognized in it and that of ensuring their free and full exercise to individuals under their jurisdiction. According to the Court, any form of exercise of public power that violates the rights protected by the Convention is unlawful. Thus, when an organ or agent of the public authority violates any of these rights, this is a violation of the obligation to “respect”, and consequently a violation of Article 1(1).

On the basis of these considerations, the Commission concludes that since the Peruvian State omitted to respect the rights to humane treatment and to protection of her honor and dignity of Raquel Mejía, the State is in violation of the obligation contained in Article 1(1).

b. The impossibility for Raquel Mejía to access domestic recourses for remedying the violations of her husband’s human rights and of her own constitutes a violation of Article 25 and 8(1), in relation to Article 1(1) of the Convention.

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### **Aydin v. Turkey**

*Eur. Ct. H.R., Judgment of September 25, 1997, Reports 1997 VI (1997)*

*[Mrs. Sükran Aydin (the applicant), a Turkish citizen of Kurdish origin, claimed that the government of Turkey violated her human rights by torturing her. The applicant claimed that village guards detained Mrs. Aydin, her father, and her sister-in-law. Further, she claimed that she was raped and tortured, and that her father and sister-in-law had been tortured. The government disputed the facts and denied the accusations. The applicant also alleged that the government harassed her and her family after she filed her application with the Commission. Upon its own examinations of the facts, the Court concluded that the applicant proved beyond reasonable doubt the allegations. Thus, the Court held that Turkey violated the applicant’s right*

*not to be tortured, under Article 3 of the Convention. The Court also found that Turkey violated the applicant's right to an effective remedy, as set forth in Article 13. The Commission held that the government only carried out an incomplete inquiry and did not conduct an effective investigation, as required by Article 13.]*

80. The Court recalls that it has accepted the facts as established by the Commission, namely that the applicant was detained by the security forces and while in custody was raped and subjected to various forms of ill treatment.

81. As it has observed on many occasions, Article 3 of the Convention enshrines one of the fundamental values of democratic societies and as such it prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Article 3 admits of no exceptions to this fundamental value and no derogation from it is permissible under Article 15 even having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well founded, that a person may be involved in terrorist or other criminal activities. (See, for example, AKSOY v TURKEY, loc cit, para 62.)

82. In order to determine whether any particular form of ill treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 between this notion and that of inhuman treatment or degrading treatment. This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering. (See IRELAND v UNITED KINGDOM, loc cit, para 167.)

83. While being held in detention the applicant was raped by a person whose identity has still to be determined. 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 physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.

84. The applicant was also 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 was 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 on 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.

85. The applicant and her family must have been taken from their village and brought to Derik gendarmerie headquarters for a purpose, which can only be explained on account of the security situation in the region and the need of the security forces to elicit information. The suffering inflicted on the applicant during the period of her detention must also be seen as calculated to serve the same or related purposes.

86. Against this background the Court is 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. Indeed the Court would have reached this conclusion on either of these grounds taken separately.

87. In conclusion, there has been a violation of Article 3 of the Convention.

....

### **Questions**

1. What are the basic requirements to establish that rape constitutes torture?
2. Bearing in mind the evidentiary difficulties that the act of rape entails, what presumptions could an international supervisory body develop when the rape allegedly occurred under custody of State agents? Can some of these presumptions be applied by domestic tribunals, particularly in civil actions against individuals, or against the State for action or inaction?
3. In your opinion, why was rape only recently recognized as a form of torture in international jurisprudence?
4. Considering that rape as torture has been developed in case-law referring to women, do you think that this is a gender-specific violation?

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### **b. The Right of Women to Personal Integrity and to Honor, Dignity and Privacy**

**X and Y v. Argentina**  
*Case 10.506, Inter-Am. C.H.R. 50,*  
*Annual Report 1996, OEA/Ser.L/V/II.95, doc. 7 rev. (1997)*  
*[Footnotes omitted]*

1. On December 29, 1989, the Commission received a complaint against the Government of Argentina regarding the situation of Ms. X and her thirteen-year-old daughter Y. The complaint alleges that the Argentine State, and particularly the Federal Government's prison authorities who, routinely performed vaginal inspections on the women visitors of Unit No. 1 of the Federal Penitentiary Service (Unidad No. 1 del Servicio Penitenciario Federal) acted in violation of the rights protected under the American Convention on Human Rights. Ms. X and her thirteen-year-old daughter were submitted to vaginal inspections each time they visited her husband and the father of the child, who at the time was incarcerated in the Defendants' Prison in the federal capital. On April of 1989 Ms. X lodged a writ of amparo ("recurso de amparo") demanding that the inspections cease. The petition alleges that this practice by the Federal Penitentiary Service (SPF) constitutes a violation of the American Convention as it offends the dignity of the persons subjected to such a procedure (Article 11), and is a degrading penal measure which extends beyond the person condemned or on trial (Article 5.3) and, furthermore, discriminates against women (Article 24), in relation to Article 1.1.

....

## VI. ANALYSIS

### A. General Considerations

45. It is alleged that vaginal inspections constitute degrading treatment and was tantamount to an invasion of Ms. X's privacy and physical integrity and an unlawful restriction on her right to family. For its part, the Government argues that vaginal inspection is a preventive measure that is conceivably consistent with the purpose of maintaining the security of the inmates and staff of the SPF and that, furthermore, the inspection did not actually take place because the alleged victim refused to submit to it.

46. As regards the Government's assertion that the inspections never took place, it is demonstrated in the files by the declarations of both the Chief of Internal Security and the Attorney General as well as by the very wording of the rulings of the First Instance Court, the Court of Appeals and the Supreme Court of Justice, that Ms. X, though under protest, submitted to this procedure several times before she filed the writ of amparo demanding that the inspections on both herself and her daughter cease.

47. Therefore, when considering this case the Commission must examine two separate issues:

1. whether the requirement that Ms. X and her daughter undergo a vaginal inspection before each physical contact visit with Mr. X is in compliance with the rights and guarantees present in the American Convention on Human Rights;

2. whether this requirement and the performance of the procedure prevented them from fully

exercising their rights protected under the American Convention, particularly those enshrined in Articles 5 (right to humane treatment), 11 (protection of honor and dignity), 17 (protection of the family) and 19 (rights of the child), in relation to Article 1.1, which obliges the States Parties to respect and guarantee the full and free exercise of all the provisions recognized in the Convention without discrimination.

*B. The requirement that visitors undergo a vaginal inspection in order to be permitted a physical contact visit*

48. The petitioners allege that the requirement that visitors to Unit 1 submit to vaginal searches or inspections in order to be permitted personal contact visits was an illegitimate interference with their exercise of the right to family. Moreover, it is alleged that the measure, by not being in compliance with the Convention, in itself contravened the rights protected by that instrument, and that existence of this requirement and its application violated not only the right to family, guaranteed by Article 17 but also the right to privacy, honor, and dignity, protected by Article 11, and the right to physical integrity guaranteed by Article 5.

49. Although Article 19, which protects the rights of the child, was not invoked by the petitioners, the Commission considers that as one of the alleged victims was a 13-year-old child at the time of the events this provision should also be examined. According to the general principle of international law *iura novit curia* international bodies have the power and even the duty to apply all pertinent legal provisions, even if these have not been invoked by the parties.

50. The Government of Argentina argued that all of the measures it adopted are acceptable restrictions to the Convention's provisions and were reasonable under the circumstances of the case. The Commission must thus consider what are the State's obligations regarding the provisions of the Convention, and what are the permissible limitations to those rights.

*1. State obligations to "respect and ensure" and the imposition of conditions on the rights protected by the Convention*

*a. Article 1.1, the obligations to respect and guarantee*

51. Article 1.1 establishes that States Parties undertake to respect and to ensure the rights of the Convention. These obligations limit the State's authority to impose restrictions on the rights protected by the Convention. The Inter-American Court has stated that:

The exercise of public authority has some limits which derive from the fact that human rights are inherent attributes of human dignity which are, therefore, superior to the power of the State.

52. Moreover, the Court has declared that the obligation to guarantee "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.”

53. The Court has thus established that there are a number of aspects of a person’s life, and particularly “certain attributes of human dignity,” that fall outside of the State’s sphere of action and “cannot be legitimately restricted through the exercise of governmental power.” Moreover, States Parties must organize their internal structure so as to ensure the full enjoyment of human rights. The State that proposes measures, the execution of which may lead, either in themselves or because of a lack of adequate guarantees, to a violation of the rights present in the Convention, goes beyond the exercise of legitimate governmental power recognized by the Convention.

*b. The imposition of limitations*

54. The text of the Convention does not establish explicit restrictions to the enjoyment of any of the rights under consideration and indeed, three of those provisions--the right to humane treatment (Article 5), the rights of the family (Article 17) and the rights of the child (Article 19)--are included in the list, set forth in Article 27.2, of rights that cannot be suspended even in extreme circumstances. The Commission cannot, therefore, examine the legitimacy of the alleged imposition of restrictions to these rights within the parameters of Article 30, which defines the scope of restrictions to the Convention, but only within the broader framework of Article 32.2 which acknowledges the existence of limitations to all rights.

55. Article 32.2 recognizes the existence of certain inherent limitations to the rights of all persons which are a normal consequence of life in society.

56. Article 32.2 reads:

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.

57. In examining this article, the Inter-American Court of Human Rights has stated that the impositions of limitations should always be employed strictly. The Court declared that:

In this respect the Court wishes to emphasize that “public order” or “general welfare” may under no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content (See Article 29(a) of the Convention). Those concepts, when they are invoked as a ground for limiting human rights, must be subjected to an interpretation that is strictly limited to the “just demands” of “a democratic society,” which takes account of the need to balance the competing interests involved and the need to preserve the object and purpose of the Convention.

58. The Court’s jurisprudence establishes that, in order to be compatible with the Convention, restrictions must be justified by collective objectives that are so important that they clearly outweigh the social need to guarantee the full exercise of rights guaranteed in the Convention

and are not more limiting than strictly necessary. It is not enough to demonstrate, for example, that the law fulfills a useful and timely purpose.

59. A state does not have absolute discretion to decide what means are adopted to protect the “general welfare” or “public order”. Measures that may in any way condition the rights protected by the Convention must always obey certain requirements. In this regard, the Inter-American Court of Human Rights has said that restrictions on the rights protected in the Convention “must meet certain requirements of form which depend upon the manner in which they are expressed. They must also meet certain substantive conditions which depend upon the legitimacy of the ends that such restrictions are designed to accomplish.”

60. The Commission considers that in order to be considered in compliance with the Convention such measures should meet three specific conditions. A measure that in any way affects the rights protected by the Convention should necessarily: 1) be prescribed by law; 2) be necessary for the security of all and in accordance with the just demands of a democratic society; 3) and its application must be strictly confined to the specific circumstances present in Article 32.2 and be proportionate and reasonable in order to accomplish those objectives.

1. *the lawfulness of the measure*

61. The Inter-American Court has stated that:

In order to guarantee human rights, it is 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. 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.

62. Any action that affects basic rights must therefore be prescribed by a law passed by the Legislature and in compliance with the internal legal order. The Government claims that vaginal inspections on visitors to prisons in Argentina are authorized by the law and internal regulations.

63. Articles 91 and 92 of Decree law 412/58 (National Penitentiary Law) of Argentina establish a number of conditions to which visits are subjected. Similarly, Article 28 of the SPF Public Bulletin No. 1266 stipulates that: “Visitors shall be subjected to the search requirements in force in the Unit if they do not wish to forgo the visit. In any event, the search shall be conducted by staff of the same sex as the person searched.” In this regard, Article 325 regulates search teams through Public Bulletin No. 1294, authorizing a thorough and detailed control. However, Public Bulletin No. 1625 provides that “humanitarian treatment should be paramount in searches, avoiding any procedure that might be humiliating to the inmates...,” “the same treatment should be applied in searching inmates’ visitors...”

64. By not specifying the conditions or the types of visits applicable, these regulations give

prison authorities a very wide latitude for discretion. It is doubtful that such legislation possesses the necessary degree of precision which is essential to determine if an action is prescribed by law. Unquestionably, deference to the authorities in matters of internal security of prisons is in accordance with their experience and knowledge of the specific needs of each penitentiary and the particular case of each inmate. However, 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 a 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.

2. *necessity in a democratic society for the security of all*

65. The Government contends that restrictions on protected rights are necessary given the nature of the problems that may arise in a complex prison situation. Regarding the instant case, the Government affirms that the measure in question was a necessary restriction of rights in a democratic society adopted in the interest of public safety.

66. The Commission is aware that all countries have rules regarding the treatment of prisoners and detainees, which also regulate their visitation rights as to time, place, manner, type of contact, etc. It is also recognized that corporal searches, and even corporal probing, of detainees and prisoners may sometimes be necessary.

67. The present case, however, entails the rights of visitors whose rights are not automatically limited by virtue of their contact with the inmates.

68. The Commission does not question the need for general searches prior to entry into prisons. Vaginal searches or inspections are nevertheless an exceptional and very intrusive type of search. The Commission would like to underline the fact that a visitor or a family member who seeks to exercise his or her rights to family life should not be automatically suspected of committing an illegal act and cannot be considered, on principle, to pose a grave threat to security. 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.

3. *reasonableness and proportionality of the measure*

69. The Government affirms that the measure is a reasonable restriction of the visitor's rights in order to protect security. The Government further asserts that it was not a compulsory procedure and it was only applied to those persons who desired to have personal contact visits, therefore, anyone was free to reject it.

70. Any restriction to human rights must be proportional and closely tailored to the legitimate

governmental objective necessitating it. To justify restricting visitors' rights, it is not sufficient to invoke security reasons. After all, the issue entails balancing the interests on the one hand of family members and prisoners to enjoy visitation rights free from arbitrary and abusive interference, and on the other the state's interest in guaranteeing the security within prisons.

71. The reasonableness and proportionality of a measure can only be ascertained through the examination of a specific case. The Commission notes that a vaginal search is more than a restrictive measure as it involves the invasion of a woman's body. Consequently, the balancing of interests involved in an analysis of the measure's lawfulness, must necessarily hold the government's interest to a higher standard in the case of vaginal inspections or any corporal probing.

72. The Commission considers that the lawfulness of a vaginal search or inspection, in a particular case, must meet a four-part test: 1) it must be absolutely necessary to achieve the security objective in the particular case; 2) there must not exist an alternative option; 3) it should be determined by judicial order; and 4) it must be carried out by an appropriate health professional.

*a. absolute necessity*

73. The Commission believes that such a procedure must not be carried out unless it is absolutely necessary to achieve the security objective in the particular case. The requirement of necessity implies that inspections and searches of this kind should only be applied in specific cases where there is reason to believe either in the existence of a real threat to security or that the person in question may be carrying illegal substances. The Government argued that the exceptional circumstances surrounding Mr. X's case justified measures that severely restricted personal liberties, because they were taken for the common good, i.e. preserving security for the prisoners as well as the prison personnel. Nevertheless, according to the Chief of Security the measure was consistently applied to all visitors of Unit 1. Arguably the measure may have been justifiable immediately after Mr. X was found to be in possession of explosives, but the same cannot be said of the numerous times the measure was applied prior to that occasion.

*b. non-existence of an alternative option*

74. The Commission considers that the practice of vaginal inspections and searches, and the consequent interference with visits, must not only satisfy an imperative public interest, but also that "if there are various options to achieve this objective, that which least restricts the right protected must be selected."

75. The facts of the case suggest that the measure was not the sole and perhaps not even the most efficient means of controlling the entrance of narcotics and/or other dangerous substances to prisons. Ms. X and her daughter were admittedly submitted to this procedure each time they visited Mr. X and, in spite of this fact 400 grams of explosives were found in his possession

during a routine search of his cell.

76. It would seem that other and less restrictive procedures, such as the search of inmates and their cells, are a more efficient and reasonable means of guaranteeing internal security. In addition, it should not be ignored that the special legal position of prisoners, by its very nature, results in a number of limitations to the exercise of their rights. The state, which has custody of all of those persons in detention and is responsible for their well-being and safety, has a greater latitude to apply what measures may be necessary to ensure security in the case of inmates. By definition, a detainee's personal liberties are restricted and it may therefore occur that corporal searches, and even corporal probing, of detainees and prisoners are sometimes justifiable, using methods compatible with their human dignity. It would have obviously been a more reasonable and simpler measure to search the inmates after a personal contact visit, than submit all of the women visitors to the prisons to such an extreme procedure. Searches of visitors should be carried out only in very specific circumstances and when there is reasonable cause to believe that they pose a real threat to security or are carrying illegal substances.

77. The Government also contends that the procedure was not obligatory and was only carried out with the consent of the visitors. It would thus appear that because an alternative to the procedure was proposed by the state and the petitioners decided not to avail themselves to it, they could not complain of undue state interference. The Commission would like to note that a state cannot propose or request the consent of persons under its jurisdiction to conditions or procedures that may constitute an infringement to the rights protected by the Convention. A state's authorities cannot, for example, propose to a person a choice between an arbitrary detention and another more restrictive, if legal, measure because all of a state's actions must observe basic principles of legality and due process.

78. The performance of vaginal searches or inspections may be acceptable under certain circumstances as long as its application is guided by principles of due process and safeguards the rights protected by the Convention. If conditions such as legality, necessity, and proportionality are not observed, however, and the procedure is carried out without respect for certain minimum standards that safeguard the legality of the action and the physical integrity of those persons submitted to it, the procedure cannot be considered to be in compliance with the rights and guarantees of the Convention.

79. Moreover, the Commission would also like to note that in the case of Y no real consent was possible. At the time of the facts Ms. Y was a 13-year-old child who was thus entirely dependent on the decision taken by her mother, Ms. X, and on the protection afforded to her by the state. Because of the child's age, it is evident that the vaginal inspection was an absolutely inadequate and unreasonable method.

80. The Commission thus concludes that in the case under examination, other more reasonable options were available to the authorities in order to ensure security in the prison.

*c. existence of a judicial order*

81. Even assuming that no other less intrusive means exist, the Commission considers that intrusive corporal probing, that was discontinued because of danger of infection to prison personnel, requires a judicial order. In principle, a judge should evaluate the need of such searches as a necessary requirement for a personal visit without infringing upon the individual's personal dignity and integrity. The Commission considers that exceptions to this rule should be expressly stated in the law.

82. The requirement that of a judicial order authorizing police agents or security personnel to take certain kinds of action, considered to be especially intrusive or potentially liable to abuse, exists in most of the internal legal systems of the continent. A clear example of this is the practice which determines that a person's home is under special protection and cannot be searched without a warrant. By its very nature, a vaginal inspection is such an intimate intrusion into a person's body that it demands special protection. When there is no control and the decision of subjecting a person to this kind of intimate search is left at the entire discretion of police or security personnel, without the existence of any kind of control, this practice is liable to being employed in circumstances when it would be unnecessary, used as a form of intimidation, and/or otherwise abused. The determination that this type of search is a necessary requirement for the personal contact visit ideally should be made by a judicial authority.

83. Even though, in the present case, material explosives were found in Mr. X's cell and his visitors were reasonably suspected, the state had an obligation, derived from its duty under the Convention to organize its internal apparatus so as to guarantee human rights, to request a judicial order to execute the search.

*d. the procedure must be carried out by qualified medical personnel*

84. In addition, the Commission insists that any type of corporal probing, such as was practiced when the authorities still applied this kind of search, 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.

85. By conditioning the visit with an intrusive measure but not providing appropriate guarantees, the prison officials unduly interfered with Ms. X's and her daughter's rights.

*C. The rights protected by the Convention*

*1. The right to physical integrity: Article 5*

86. The petitioners alleged a violation of Article 5, in particular, of its paragraphs 2 and 3, which read:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment...
3. Punishment shall not be extended to any person other than the criminal.

87. The procedure in question is not per se illegal. Nevertheless, when the state performs any kind of physical intervention in individuals, it must observe certain conditions in order to ensure that such treatment does not generate a greater degree of anguish and humiliation than that which is inevitable. Such a measure should always be the consequence of a judicial order which assures some control over the decision as to the necessity of its application and that the person subjected to it does not feel defenseless before the authorities. Moreover, the measure should always be performed by qualified personnel exercising the necessary care to ensure that no physical harm results from the procedure and conducting the examination in such manner so as to ensure that those persons submitted to it do not feel that their mental and moral integrity has been affected.

88. Regarding Article 5.3 of the Convention, the Commission does not have any evidence that the vaginal inspection was intended to extend Mr. X's punishment onto his family. Moreover, the Commission has no reason to assume official motives that are not objectively verified.

89. In conclusion, the Commission finds that when the prison authorities of the State of Argentina systematically performed vaginal inspections on Ms. X and Y they violated their rights to physical and moral integrity, in contravention of Article 5 of the Convention.

## 2. *Right to Privacy: Article 11*

90. Article 11 of the Convention stipulates that:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

91. The right to privacy guaranteed by this provision covers, in addition to the protection against publicity, the physical and moral integrity of the person. The object of Article 11, as well as of the entire Convention, is essentially to protect the individual against arbitrary interference by public officials. Nevertheless, it also requires the state to adopt all necessary legislation in order

to ensure this provision's effectiveness. The right to privacy guarantees that each individual has a sphere into which no one can intrude, a zone of activity which is wholly one's own. In this sense, various guarantees throughout the Convention which protect the sanctity of the person create zones of privacy.

92. Article 11.2 specifically prohibits "arbitrary or abusive" interference with this right. This provision indicates that in addition to the condition of legality, which should always be observed when a restriction is imposed on the rights of the Convention, the state has a special obligation to prevent "arbitrary or abusive" interferences. The notion of "arbitrary interference" refers to elements of injustice, unpredictability and unreasonableness which were already considered by this Commission when it addressed the issues of the necessity, reasonableness, and proportionality of the searches and inspections.

93. Nevertheless, the Commission would like to underscore that the present case involves a particularly intimate aspect of a woman's private life and that the procedure in question, whether its application is justifiable or not, is likely to provoke intense feelings of shame and anguish in almost all persons who are submitted to it. In addition, subjecting a 13 year old child to such a procedure could result in serious psychological damage that is difficult to evaluate. Ms. X and her daughter had a right to have their privacy, dignity and honor respected when they sought to exercise their rights to family, even if a family member was in detention. These rights should have been restricted only in the presence of a particularly serious situation and in very specific circumstances, and then only, with the strict compliance by the authorities with the standards which were outlined above in order to guarantee the legality of the practice.

94. The Commission thus concludes that when the prison authorities of Argentina subjected Ms. X and her daughter to vaginal searches and inspections each time they desired to have a personal contact visit with Mr. X, they acted in violation of the petitioners' rights to honor and dignity, protected by Article 11 of the Convention.

....

### ***Questions***

1. What is the test the Inter-American Commission used to establish whether a specific State practice that limits certain human rights of women is permissible under the American Convention on Human Rights? Do you agree with this test?
2. Is a domestic judge compelled to apply this test in order to determine if such an action in a specific test is allowed under domestic law? Is the legislative or executive body of a State compelled to consult this test when drafting regulations regarding body searches?
3. Do you think that the Inter-American Commission or Court could review the way in which a domestic tribunal applied this test in a specific case?

4. Do you think that the practice of vaginal inspections discussed in *X and Y v. Argentina* could be allowed under other circumstances? In what situation do you think there would be “no other alternative option” and it “would be absolutely necessary to achieve the security objective?”

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**B. THE RIGHTS OF INDIGENOUS PEOPLES AND ENVIRONMENTAL RIGHTS**

**1. THE RIGHTS OF INDIGENOUS COMMUNITIES**

*Comment*

The Inter-American System has no international treaties regarding the rights of indigenous communities. However, the Inter-American Commission and to a certain extent the Inter-American Court have taken into account other international provisions on indigenous rights, as well as certain domestic norms and practices of indigenous communities in the hemisphere. Furthermore, in 1997 the Commission adopted the Proposed American Declaration on the Rights of Indigenous Peoples. Although not a treaty, this Declaration, once adopted by the General Assembly of the OAS, will constitute an important source of interpretation of the American Convention.

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**Report on the Situation of Human Rights of a Segment of the  
Nicaraguan Population of Miskito Origin**

*Inter-Am. C.H.R., OEA/Ser.L/V/II.62, doc. 10 rev. 3, November 29, 1983 (1983)*

*[Footnotes omitted]*

*B. Special protection of the Miskitos as an ethnic group*

1. There are a number of international instruments that uphold special rights for certain ethnic and racial groups.

Nevertheless, the American Convention on Human Rights only guarantees individual rights, “...without any discrimination for reasons of race, color, sex, language, status, birth, or any other social condition” (Article 1). However, the same Convention indicates that the provisions of the Convention cannot be interpreted as “restricting the enjoyment or exercise of any right or

freedom recognized by virtue of the laws of any State party or by virtue of another convention to which one of the said states is a party” (Article 29, subparagraph b).

2. Nicaragua, in addition to being a party to the American Convention on Human Rights, is also a party to the International Covenant on Civil and Political Rights, which expressly sets forth certain rights with respect to ethnic groups. In effect, Article 27 of the Covenant states:

In those States in which ethnic, religious or linguistic minorities exist, 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.

3. That article of the International Covenant on Civil and Political Rights reaffirmed the need to protect ethnic groups, since it was important to establish additional protection for them beyond that granted to the nationals of a state, in order to bring about true equality among the nationals of that state.

4. In a UN debate on Article 27 of the Covenant, the difference between the concepts of “equality and nondiscrimination” and “protection of minorities”, was emphasized, and the following distinction was made:

The prevention of discrimination means impeding any conduct which denies or restricts the rights of a person to equality.

The protection of minorities, on the other hand, although also based on the principles of equal treatment of all peoples, requires a positive action: a concrete service is offered to a minority group, such as the establishment of schools in which education is given in the native language of the members of the group. Such measures, clearly, are also based on the principle of equality: for example, if a child is educated in a language which is not his native language, this can mean that the child is treated on an equal basis with other children who are educated in their native language. The protection of minorities, therefore, requires affirmative action to safeguard the rights of minorities whenever the people in question (the parents in the case of minors) wish to maintain their distinction of language and culture.

At this time, Article 27 is interpreted to mean that the States Parties are obligated to allow persons who belong to those groups to enjoy their own culture, to profess and practice their own religion, and to use their own language.

5. In addition to the above-mentioned Article 27 of the International Covenant on Civil and Political Rights, other UN General Assembly resolutions and other international instruments have also granted special protection to ethnic groups.

6. With specific reference to Indian populations, on the other hand, the codification and progressive development of international law has been relatively scant.

7. It should also be considered whether or not ethnic groups also have additional rights, particularly the rights to self-determination or political autonomy.

8. In his presentation to the Commission, Mr. Armstrong Wiggins stated that the Indian peoples of Nicaragua had the right to full self-determination. In part of his statement, Mr. Wiggins stated the following:

The right to self-determination applies to all peoples, including the Indian population of Nicaragua, which possesses territory with defined borders, a permanent population, a government and the capacity to establish external relations.

Mr. Armstrong Wiggins also stated this viewpoint in his article titled "Nicaragua; A Perspective" (Akwesasne Notes, Spring, 1982). A similar view was set forth by the Coordinator General of Misurasata, Mr. Brooklyn Rivera, in a document of April 8, 1982, submitted to the Commission, although Mr. Rivera expressly denies a secessionist intent on the part of the Indian peoples of the Atlantic region of Nicaragua.

Messrs. Wiggins and Rivera claim that if the territorial and political autonomy of the Indian population is not recognized, their traditional way of life and their cultural identity would be destroyed, since the exercise and enjoyment of the right to a language, culture and religion are meaningless without the right to self-determination.

9. The present status of international law does recognize observance of the principle of self-determination of peoples, which it considers to be the right of a people to independently choose their form of political organization and to freely establish the means it deems appropriate to bring about their economic, social and cultural development. This does not mean, however, that it recognizes the right to self determination of any ethnic group as such.

10. In the debates of the Third Committee of the General Assembly of the United Nations on the scope of the right to self-determination, some delegates argued that the broadest interpretation should be adopted to prevent domination of weak peoples by powerful nations.

However, the Delegate of New Zealand reflected the majority viewpoint when he indicated that the principle of self-determination was:

Opposed to the idea of colonialism, and related to the wishes of the majority occupying an area or territory, and should not be confused with the rights of minorities scattered within a territory who could be seeking equal treatment with the majority, but not political separation. The Convention on Human Rights

would, without doubt, be interested in establishing equal treatment for each person included in those minorities, but this should not be confused with the broader issue of political separation, which involves serious political, constitutional, economic, social and financial considerations, in sum, the capacity for self- government.

Several states held the opinion that recognition of the right to self- determination of minorities would promote subversion and would finally lead to separation. Consequently, it was agreed that self-determination should be harmonized with the other principles of equality under the law, sovereignty, territorial integrity and political independence that are set forth in the Charter of the United Nations.

The Delegate of Iran expressed the prevailing viewpoint that national sovereignty and territorial integrity could not be undermined under the pretext of exercise of the right to self-determination:

If self-determination is abused and considered as an absolute right, the only result is anarchy. The right can only be considered within the limits of national sovereignty. It cannot be used to undermine the sovereignty of a state over its territory or natural resources; recourse to the right of self-determination to incite dissident minorities to rise up against the state or to endanger its stability would be as contrary to the true spirit of the right of self-determination as aggression or subversion itself. Nevertheless, as history has shown, groups with subversive and aggressive objectives have been used by foreign powers to overthrow the governments of countries whose territory they wish to occupy. Many independent countries have been the victims of irresponsible groups that have been incited to destroy the national unity of their own country. Moreover, the right to self-determination should never be confused with the right to secession. Secession is not the result of respect for the right to self-determination, but rather the disregard for fundamental human rights in the absence of free consent of peoples to the exercise of the right of self-determination... [no] country represented on the Committee would exist if every national, religious or linguistic group had the absolute and unlimited right to self-determination.

With the adoption in 1960 of Resolution 1514 (XV) on the Declaration on the Granting of Independence to Colonial Countries and Peoples, the principle of self-determination was identified by the United Nations with the liberation struggle of colonial peoples in non-metropolitan territories.

Resolution 2625 (XXV), titled Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, developed the principle of equal rights and self-determination of peoples, and stated:

That the establishment of a sovereign and independent state, free association or

integration with an independent state or acquisition of any other freely chosen political status by a people constitutes that people's means of exercising the right to self-determination.

At the same time, the above-mentioned statement expressly affirmed that the right to self-determination could never be interpreted

. . . in the sense of authorizing or encouraging any action aimed at breaking up or undermining, totally or partially, the territorial integrity of sovereign and independent states that conduct themselves in conformity with the principle of equal rights and the self-determination of peoples described above, and which are, therefore, possessed of a government that represents the entire people to whom the territory belongs, without discrimination by race, creed or color.

Every state shall abstain from any action aimed at the partial or total breaking up of the national unit and the territorial integrity of any other state or country.

11. The above does not mean, in this case, that the absence of a right to political autonomy or self-determination on the part of the Miskitos, Sumos and Ramas of the Atlantic coast grants the Government of Nicaragua an unrestricted right to impose complete assimilation on those Indians.

12. The Government of Nicaragua itself initially followed a policy of preservation of the cultural values of the Indian populations. In effect, the Declaration of the Principles of the Sandinista Peoples' Revolution on Indian communities of the Atlantic coast, of August 12, 1981, establishes in operative paragraph 3:

The Government of National Reconstruction supports the preservation of different cultural forms, and grants the Miskito, Criollo, Sumo and Rama communities of the Atlantic coast the necessary means to promote their own cultures, including the preservation of their language.

Furthermore, in April, 1980, as stated earlier, a position was assigned on the Council of State to the Indian organization of Misurasata.

13. Nevertheless, as was also explained, serious difficulties soon began to arise between the Indian population and the Government, which first took the form of detention of the Misurasata leaders, and then the dissolution of that organization, culminating in the disintegration of the Miskito communities that inhabited the Coco River region.

14. In the view of the Commission, for an ethnic group to be able to preserve its cultural values, it is fundamental that its members be allowed to enjoy all of the right set forth by the American Convention on Human Rights, since this guarantees their effective functioning as a group, which includes preservation of their own cultural identity. Particularly relevant are the rights to

protection of honor and dignity; freedom of thought and expression; the right of assembly and of association; the right to residence and movement and the right to elect their authorities.

15. Although the current status of international law does not allow the view that the ethnic groups of the Atlantic zone of Nicaragua have a right to political autonomy and self-determination, special legal protection is recognized for the use of their language, the observance of their religion, and in general, all those aspects related to the preservation of their cultural identity. To this should be added the aspects linked to productive organization, which includes, among other things, the issue of the ancestral and communal lands. Non-observance of those rights and cultural values leads to a forced assimilation with results that can be disastrous. For that reason, the Commission considers that it is fundamental to establish new conditions for coexistence between the ethnic minorities and the Government of Nicaragua, in order to settle historic antagonisms and the serious difficulties present today. In the opinion of the IACHR, the need to preserve and guarantee the observance of these principles in practice entails the need to establish an adequate institutional order as part of the structure of the Nicaraguan state. Such an institutional organization can only effectively carry out its assigned purposes to the extent that it is designed in the context of broad consultation, and carried out with the direct participation of the ethnic minorities of Nicaragua, through their freely chosen representatives.

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**Aloeboetoe *et al.* v. Suriname**

*Inter-Am. Ct. H.R., Reparations (Art. 63(1) American Convention on Human Rights),  
Judgment of September 10, 1993, (ser. C) No. 15 (1994)*

*[The Inter-American Commission on Human Rights (the Commission) requested that the Inter-American Court of Human Rights determine whether Suriname had violated the human rights of 20 men belonging to the Saramaka tribe in Suriname. According to the petition, soldiers detained the victims under suspicion that they were members of the Jungle Commando. The petition also stated that all the victims were killed, except for one victim who was found alive and died few days later. Originally, the Commission concluded that Suriname violated the victims' human rights, set forth in Articles 1 (obligation to respect rights), 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty) and 25 (right to judicial protection) of the American Convention of Human Rights. On December 2, 1991, at a preliminary objections hearing before the Court, Suriname, through its agent, accepted responsibility for the violations of which it was accused. Consequently, the Court ordered that compensation be paid to the victims, using, among others, the customs of the Saramaka tribe to determine the manner of compensation and the beneficiaries.]*

55. In the instant case, there is some difference of opinion between the parties as to who the successors of the victims are. The Commission urges that this decision be made with reference to the customs of the Saramaka tribe, whereas Suriname requests that its civil law be applied.

The Court earlier stated that the obligation to make reparation provided in Article 63(1) of the American Convention is governed by international law, which also applies to the determination of the manner of compensation and the beneficiaries thereof (*supra*, para 44). Nevertheless, it is useful to refer to the national family law in force, for certain aspects of it may be relevant.

56. The Saramakas are a tribe that lives in Surinamese territory and was formed by African slaves fleeing from their Dutch owners. The Commission's brief affirms that the Saramakas enjoy internal autonomy by virtue of a treaty dated September 19, 1762, which granted them permission to be governed by their own laws. It also states that these people "acquired their rights on the basis of a treaty entered into with the Netherlands, which recognizes, among other things, the local authority of the Saramaka (*sic*) over their own territory." The text of the treaty is attached to the brief in question, which adds that "the obligations of the treaty are applicable, by succession, to the state (*sic*) of Suriname."

57. The Court does not deem it necessary to investigate whether or not that agreement is an international treaty. Suffice it to say that even if that were the case, the treaty would today be null and void because it contradicts the norms of *jus cogens superveniens*. In point of fact, under that treaty the Saramakas undertake to, among other things, capture any slaves that have deserted, take them prisoner and return them to the Governor of Suriname, who will pay from 10 to 50 florins per slave, depending on the distance of the place where they were apprehended. Another article empowers the Saramakas to sell to the Dutch any other prisoners they might take, as slaves. No treaty of that nature may be invoked before an international human rights tribunal.

58. The Commission has pointed out that it does not seek to portray the Saramakas as a community that currently enjoys international juridical status; rather, the autonomy it claims for the tribe is one governed by domestic public law.

The Court does not deem it necessary to determine whether the Saramakas enjoy legislative and jurisdictional autonomy within the region they occupy. The only question of importance here is whether the laws of Suriname in the area of family law apply to the Saramaka tribe. On this issue, the evidence offered leads to the conclusion that Surinamese family law is not effective insofar as the Saramakas are concerned.

The members of the tribe are unaware of it and adhere to their own rules. The State for its part does not provide the facilities necessary for the registration of births, marriages, and deaths, an essential requirement for the enforcement of Surinamese law. Furthermore, the Saramakas do not bring the conflicts that arise over such matters before the State's tribunals, whose role in these areas is practically non-existent with respect to the Saramakas. It should be pointed out that, in the instant case, Suriname recognized the existence of a Saramaka customary law.

The only evidence produced to the contrary is the statement made by Mr. Ramón de Freitas. However, the manner in which that witness testified, his attitude during the hearing and the personality he revealed led the Court to develop an opinion of the witness that persuaded it to reject his testimony.

59. The Commission has produced information on the social structure of the Saramakas indicating that the tribe displays a strongly matriarchal(\*) familial configuration where polygamy occurs frequently. The principal group of relatives appears to be the “bêè”, composed of all the descendants of one single woman. This group assumes responsibility for the actions of any of its members who, in theory, are each in turn responsible to the group as a whole. This means that the compensation payable to one person would be given to the “bêè”, whose representative would distribute it among its members.

....

61. The I.L.O. Convention NO. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) has not been accepted by Suriname. Furthermore, under international law there is no conventional or customary rule that would indicate who the successors of a person are. Consequently, the Court has no alternative but to apply general principles of law (Art. 38(1)(c) of the Statute of the International Court of Justice).

62. It is a norm common to most legal systems that a person’s successors are his or her children. It is also generally accepted that the spouse has a share in the assets acquired during a marriage; some legal systems also grant the spouse inheritance rights along with the children. If there is no spouse or children, private common law recognizes the ascendants as heirs. It is the Court’s opinion that these rules, generally accepted by the community of nations, should be applied in the instant case, in order to determine the victims’ successors for purposes of compensation.

These general legal principles refer to children, “spouse,” and “ascendants.” Such terms shall be interpreted according to local law. As already stated (*supra*, para. 58 ), here local law is not Surinamese law, for the latter is not effective in the region insofar as family law is concerned. It is necessary, then, to take Saramaka custom into account. That custom will be the basis for the interpretation of those terms, to the degree that it does not contradict the American Convention. Hence, in referring to “ascendants,” the Court shall make no distinction as to sex, even if that might be contrary to Saramaka custom.

....

81. The Commission asks the Court to order Surinam to pay the Saramaka tribe compensation for moral damages and to make certain, non - pecuniary reparations. Surinam objects to this demand on procedural grounds and maintains that the Commission presented this claim during the stage fixed for the determination of compensation. It had not mentioned this issue in its memorial of April 1, 1991.

The Court does not consider the Government's argument to be well founded, for in proceedings before an international court a party may modify its application, provided that the other party has the procedural opportunity to state its views on the subject (cf *Factory at Chorzów*, merits, supra 43, p. 7; *Neuvième rapport annuel de la Cour permanente de Justice internationale*, P.C.I.J., Series E, No. 9, p. 163 ).

82. In its brief, and in some of the evidence presented by the Commission, it is implied that the killings were racially motivated and committed in the context of ongoing conflicts that apparently existed between the Government and the Saramaka tribe.

In the petition dated January 15, 1988, presented to the Commission, it is alleged that: "More than 20 unarmed Bushnegroes were severely beaten and tortured in Atjoni. All were male and they were unarmed, but the soldiers suspected that they were members of the Jungle Commando."

The Commission's memorial of April 1, 1991, took up this petition and included it as an integral part of the document. Throughout the proceedings, the statement that the soldiers acted on suspicion that the Saramakas were members of the Jungle Commando was neither amended nor challenged. Consequently, the origin of the events as described in the memorial of April 1, 1991, lies not in some racial issue but, rather, in a subversive situation that prevailed at the time. Although a certain passage of the brief dated March 31, 1992, and the testimony of an expert both refer to the conflicting relationship that appears to have existed between the Government and the Saramakas, in the instant case it has not been proved that the racial factor was a motive for the killings of December 31, 1987. It is true that the victims of the killings all belonged to the Saramaka tribe, but this circumstance of itself does not lead to the conclusion that there was a racial element to the crime.

83. In its brief, the Commission explains that, in traditional Maroon society, a person is a member not only of his or her own family group, but also of his or her own village community and tribal group. According to the Commission, the villagers make up a family in the broad sense. This is why damages caused to one of its members also represent damages to the community, which would have to be indemnified.

As for the argument linking the claim for moral damages to the unique social structure of the Saramakas who were generally harmed by the killings, the Court believes that all persons, in addition to being members of their own families and citizens of a State, also generally belong to intermediate communities. In practice, the obligation to pay moral compensation does not extend to such communities, nor to the State in which the victim participated; these are redressed by the enforcement of the system of laws. If in some exceptional case such compensation has ever been granted, it would have been to a community that suffered direct damages.

84. According to the Commission, the third ground for payment of moral damages to the Saramakas involves the rights that the tribe apparently have over the territory they occupy and

the violation of such rights by the Army of Suriname when it entered that territory. The Commission has stated that the autonomy acquired by the Saramakas, while originating in a treaty, at the present time is only governed by domestic public law, since no form of international status is sought for the tribe (cf. supra, para. 58 ). The Commission, then, is basing the right to moral compensation on the alleged violation of a domestic legal norm regarding territorial autonomy.

At these proceedings, the Commission has only presented the 1762 treaty. The Court has already expressed its opinion of this so - called international treaty (cf. supra, para. 57). No other provision of domestic law, either written or customary, has been relied upon to establish the autonomy of the Saramakas.

The Court believes that the racial motive put forward by the Commission has not been duly proved and finds the argument of the unique social structure of the Saramaka tribe to be without merit. The assumption that a domestic rule on territorial jurisdiction was transgressed in order to violate the right to life does not of itself establish the right to moral damages claimed on behalf of the tribe. The Saramakas could raise this alleged breach of public domestic law before the competent jurisdiction; however, they may not present it as a factor that justifies the payment of moral damages to the whole tribe.

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**Coulter et al. v. Brazil**  
*Case 7615, Inter-Am. C.H.R. 24,*  
*Annual Report 1984-85, OEA/Ser.L/V/II.66, doc. 10 rev 1 (1985)*

**BACKGROUND**

1. On December 15, 1980, a petition against the Government of Brazil was presented to the Inter-American Commission on Human Rights, in which the petitioners, Tim Coulter (Executive Director, Indian Law Resource Center); Edward J. Lehman (Executive Director, American Anthropological Association); Barbara Bentley (Director, Survival International); Shelton H. Davis (Director, Anthropology Resource Center); Groge Krumbhaar (Acting President, Survival International, U.S.A.); and other persons, allege violations of the human rights of the Yanomami Indians, citing in particular the following articles of the American Declaration of the Rights and Duties of Man: Article I (Right to Life, Liberty, and Personal Security); Article II (Right to Equality before the Law); Article III (Right to Religious Freedom and Worship); Article XI (Right to the Preservation of Health and to Well-being); Article XII (Right to Education); Article

XVII (Right to Recognition of Juridical Personality and of Civil Rights); and Article XXIII (Right to Property).

2. From examination of the documents and testimony submitted to the Commission, the following antecedents of fact and law can be inferred:

a. Between 10,000 and 12,000 Yanomami Indians live in the State of Amazonas and the Territory of Roraima, on the border with Venezuela;

b. The Brazilian Constitution guarantees the right of the Indians to their own territory and stipulates that this constitutes permanent and inalienable ownership (Constitutional Amendment No. 1/69, Article 198). It also establishes the right of the Indians to the exclusive use of the natural resources of their territory;

c. Article 23 of the Estatuto do Índio (Statute of the Indians Law 6,001 of 1973) establishes that “the lands occupied by them in accordance with their tribal usage, customs and tradition, including territories where they carry on activities essential for their subsistence or that are of economic usefulness” constitute territory of the Indians;

d. Article 2 of Law 6,001 also guarantees the right of the Indians and of the Indian communities to “possess permanently the lands they occupy, recognizing to them the right to the exclusive usufruct of the natural resources and all useful things therein existing”;

e. Article 6 of the Brazilian Civil Code establishes that the Indians are considered “relatively incompetent” and are under the “guardianship” of the Fundação Nacional do Índio (FUNAI - National Indian Foundation). That institution is under the Ministry of the Interior and was established for the defense, protection, and preservation of the interest and cultural heritage of the Indians and also to promote programs and projects related to their social and economic development;

f. In the decade of the 1960s the Government of Brazil approved a plan of exploitation of the vast natural resources in and development of the Amazon region. In 1973 construction began on highway BR-210 (the Northern Circumferential Highway), which, when it passed through the territory of the Yanomami Indians, compelled them to abandon their habitat and seek refuge in other places;

g. During the decade of the 1970s, rich mineral deposits were discovered in the zones of Couto de Magalhães, Uraricã, Surucucus, and Santa Rosa --territories of the Yanomamis-- which attracted mining companies and independent prospectors (garimpeiros), thus aggravating the displacement of thousands of Indians;

h. Between 1979 and 1984 various efforts were made and various projects presented aimed at marking the boundaries of a Yanomami Park as Indian territory;

i. In March 1982, after an intensive campaign of protest by national and international human rights and Indian defense organizations, the Government of Brazil, by ministerial decree GM/No. 025, established the interdiction (absolute reservation) of a continuous territory of 7,000,000 hectares in the Federal Territory of Roraima and the State of Amazonas for the Yanomami Indians. Among other provisions, that decree assigned to the FUNAI the responsibility for taking the following five measures for protection of the Yanomami Indians:

i. the interdiction (absolute reservation) of a continuous area of land;

ii. the establishment of an administrative structure with enough control posts to coordinate and implement the assistance to the Yanomamis;

iii. the construction of landing strips at the control posts and various areas for the purposes of attracting isolated groups of Indians as well as establishing an infrastructure for building roads and highways;

iv. the adoption of measures to protect the Indian groups, especially those related to the reserved areas, to protect the natural environment and preserve the existing buildings and equipment; and

v. to coordinate and direct the activities of the religious missions.

j. On September 12, 1984, the then President of the FUNAI, Mr. Jurundy Marcos da Fonseca, submitted a new proposal to the inter ministerial Working Group that had been established in 1983 through Decree 88,118. It aimed at defining the future Yanomami Indian Park with an area of 9,419,108 hectares, which would include practically all the territory and the villages that the Yanomamis inhabit. Up to now, however, that proposal has not been implemented.

3. In the presentation made by the petitioners and in subsequent testimony and reports given to the Commission by them, the following allegations were made:

a. The massive penetration of outsiders into the area has had devastating physical and psychological consequences for the Indians; it has caused the break-up of

their age-old social organization; it has introduced prostitution among the women, something that was unknown; and it has resulted in many deaths, caused by epidemics of influenza, tuberculosis, measles, venereal diseases, and others.

b. Despite repeated interventions in behalf of the Indians by many humanitarian, religious, and pro-Indian organizations, the authorities responsible for the Indians' health and for ensuring the implementation of the provisions of the Constitution and the law have done little.

c. The agricultural development projects carried out by the Instituto Nacional de Colonização e Reforma Agraria (INCRA National Institute for Settlement and Agrarian Reform), established for the benefit of the Indians displaced from their lands, have not produced the desired effects. The result, on the contrary, has been the loss of their lands and their compulsory transfer to agricultural communities that do not correspond to their customs and traditions.

d. The process of integration of the Indians, as it is established in the legislation and as it is applied by the responsible authorities, tends toward the disintegration and destruction of the Indian communities, instead of contributing to their economic and social well-being.

e. The occupation and development of the area of Amazonas and the Territory of Roraima has resulted in the destruction of encampments and the disappearance and death of hundreds of Yanomami Indians and threatens to make them extinct.

f. The proposal for the establishment of the "Yanomami Indian Park," while it has received the support of the Federal Government, on the other hand has been objected to by sectors primarily interested in the economic development of the State and the Territory of Roraima, which have expressed their opposition to the project, and so far this has resulted in noncompliance with Law 6,001, which provided for the reservation of the Indians lands.

4. All the communications from the petitioners have been duly transmitted to the Government of Brazil, from which the Commission has requested the pertinent information. The Government, in its Notes No. 127 of May 13, 1981, and No. 316 of November 3, 1981, No. 101 of April 14, 1982, and No. 38 of February 13, 1985, in response to those requests by the Commission, has commented broadly on the Brazilian legislation in relation to the legal status and the civil and political rights of the Indians, as well as on the main points raised in the petitioners accusations, in terms that are summarized here following:

a. Legal Status of the Indians in Brazil. Civil rights

i. In accordance with Brazilian law, the Indians are considered relatively

incompetent to perform certain acts and are placed under administrative guardianship for their protection. The law provides suitable protection for all “individuals” and “communities of Indians.”

ii. The Federal Constitution guarantees to the Indians the right to movement, the right of assembly, and the right to freedom of expression. The FUNAI does not interfere in any way in the enjoyment of these rights.

iii. Since 1980, the FUNAI has increased the budget for education of the Indians so that they may study in educational centers near their communities.

b. Political rights

i. The Indians are holders of political rights guaranteed by Law 6,001 of 1973. The exercise of these rights depends on verification of the special conditions established in that law and the pertinent legislation.

ii. Emancipation (being freed from guardianship) on a community level is governed by Article 11 of the Statute of the Indians (Law 6,001) and may be declared by the President of the Republic by decree when a majority of the members of a community request it and the individual members full integration into the national society is verified by investigation by the competent federal organ. Emancipation cannot emanate from an initiative of the guardian organ (FUNAI) or be declared independently of the will of the community. As regards the participation of Indians in city or county councils, the Government has pointed out that “there are some Indians on these Councils, particularly in the State of Mato Grosso do Sul.”

c. Protection of the Indians’ health

The Government has informed the Commission that in the last three years, through the FUNAI, with cooperation under an agreement with the French association “Médecins du Monde” (Doctors at the World) and in cooperation with the Committee for the Establishment of the Yanomami Park, it has been concerning itself with health care for the Yanomamis through mass vaccinations and control of epidemics.

d. Protection of the Indians’ lands

The Indians’ lands are protected both by the Federal Constitution and by the Statute of the Indians (Law 6,001, articles 6, 22, 24, 25, and 44). With respect to the establishment of the Yanomami Indian Park, the Government has recognized that the period established by Law 6,001 for the demarcation of the boundaries of the Indian lands has already expired (Note No. 316), and it has informed the Inter-American Commission on Human Rights that “the definition of the

Yanomami area is being carefully considered and is in the final stage of study by representatives of the FUNAI, the General Secretariat of the Ministry of the Interior, the Special Secretariat for the Environment, the Instituto Brasileiro de Desenvolvimento Florestal (Brazilian Institute of Forest Development), and the General Secretariat of the National Security Council”.

The Government has also reported that the FUNAI has been trying hard to complete the withdrawal of all persons who are illegally occupying Indian lands. This task has been accomplished in several zones.

Later, by Note No. 38 of February 13, 1985, the Government informed the Commission that, with respect to the extent of a continuous area for the Yanomamis, the President of the FUNAI, on September 12, 1984, had sent a new proposal for the definition of the future Yanomami Indian Park to the Inter ministerial Working Group established by Decree 88,118/83. Under that proposal, the area of the Park would be 9,419,108 hectares, which would include all the isolated Yanomami areas (Ajarani, Catrimani, and Pacu); and its establishment depends on the determination of the border lines and the establishment of an infrastructure, which is now at an advanced stage.

In that same note in February of this year, the Government informed the Commission that the President of the FUNAI, in response to the request of the chiefs of the control posts in the Yanomami area, by Ministerial Decree No. 1817/E of January 8, 1985, prohibited the transit or stay of non-Indian individuals or groups, mainly mining prospectors, in the area, and that up to the date of that note, no mining company had been permitted to enter Yanomami territory.

e. Possibility of transfer of tribal groups and of intervention by the Government in the Indians' zones

i. Law 6,001 gives the President of the Republic the power and right to intervene in the areas inhabited by Indians, to expropriate property, and to move them for exceptional reasons (Article 20), among them: to carry out public works of interest to national development, for the exploitation of resources of the subsoil belonging to the Federal State that are of great interest for security and national development, and national security requirements. Such transfer of Indians may be done through a decree by the President of the Republic.

Law 6,001 of 1973 provides for conditions under which the government agencies may proceed to transfer groups of Indians to areas equivalent to those to which they are accustomed.

ii. As regards the exploitation of and concession of rights to minerals in Indian lands, Article 168 of the Constitution provides that the resources of the subsoil belong entirely to the Federal State even when they are under private property. In order to protect the heritage of the Indians, Law 6,001 permits exploitation of the subsoil of Indian lands only

in cases of great national interest, by federal public entities, after they have obtained the consent of the FUNAI and only when it is a matter of strategic minerals necessary for national security or development.

**CONSIDERING:**

1. That the petitioners reported to the Commission the violation of the human rights of the Yanomami Indians by the Government of Brazil and by the National Foundation for Indians (FUNAI) the government agency of guardianship of the Indians established to administer the Government's Indian policy and to implement Law 6,001 of December 19, 1973, called the "Statute of the Indians."
2. That the reported violations have their origin in the construction of the trans-Amazonian highway BR-210 that goes through the territory where the Indians live; in the failure to establish the Yanomami Park for the protection of the cultural heritage of this Indian group; in the authorization to exploit the resources of the subsoil of the Indian territories; in permitting the massive penetration into the Indians' territory of outsiders carrying various contagious diseases that have caused many victims within the Indian community and in not providing the essential medical care to the persons affected; and finally, in proceeding to displace the Indians from their ancestral lands, with all the negative consequences for their culture, traditions, and costumes.
3. That the Federal Constitution of the Republic stipulates in Article 4.IV that the patrimony of the Union includes "the lands occupied by forest-dwelling aborigenes," and that, moreover, in Article 198 it states:

Lands inhabited by forest-dwelling aborigenes are inalienable under the terms that federal law may establish; they shall have permanent possession of them, and their right to the exclusive usufruct of the natural resources and of all useful things therein existing is recognized.
4. That for legal purposes, Law 6,001 in its Article 3, established two groups of Indians:
  - a. the "Indians or Forest-dwelling Aborigenes," that is to say, individuals of pre-Colombian origin whose cultural characteristics distinguish them from the national society; and;
  - b. the "Indian Community or Tribal Group," which refers to groups that may live isolated from, or in any case not integrated into, the national community.
5. That, moreover, for the protection of the Indian territory, Law 6,001 (the Statute of the Indians) provides as follows:

## Article 19

On the initiative and under the supervision of the federal organ for assistance to the Indians, the Indian lands shall be administratively demarcated in accordance with the procedure established in a decree of the Executive Branch.

## Article 25

Recognition of the right of the Indians or tribal groups to have permanent possession of the lands they inhabit, under the terms of Article 198 of the Federal Constitution, shall not depend on the demarcation of those lands, and shall be ensured by the federal organ for assistance to the forest-dwelling aborigenes. . .

6. That Article 20 of Law 6,001 stipulates that the Union, by decree of the President of the Republic, may intervene in the areas occupied by Indians in exceptional cases, such as: a) for national security reasons; b) to carry out public works of interest to national development; and c) for the exploitation of resources of the subsoil that are of great interest for security and national development.

7. That international law in its present state, and as it is found clearly expressed in Article 27 of the International Covenant on Civil and Political Rights, recognizes the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity.

8. That on the subject of indigenous populations the Commission, in an earlier recommendation it adopted, has pointed out:

That for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states;

That on various occasions this Commission has had to take cognizance of cases in which it has been verified that abuses of power committed by government officials responsible for administrative work in connection with indigenous communities have caused very serious injury to the human rights of their members;

That these offenses against human rights are all the more reprehensible considering that they are committed by agents of the public power and have as their victims persons or groups for whom the effective exercise of the means of defense established by the laws of the respective states is particularly difficult;. . .

It therefore recommended:

1. That all the states pay very special attention to the suitable training of the officials who are to perform their work in contact with the aforementioned populations, awakening in those officials an awareness rights of indigenous persons, who should not be the object of discrimination of any kind. (OEA/Ser.P.AG/doc. 305/73, rev. 1, March 14, 1973, pp. 90 and 91)

9. That the Organization of American States has established, as an action of priority for the member states, the preservation and strengthening of the cultural heritage of these ethnic groups and the struggle against the discrimination that invalidates their members' potential as human beings through the destruction of their cultural identity and individuality as indigenous peoples.

10. That from the careful examination made by the Commission of the facts, including the replies from the Government of Brazil, it finds the following:

- a. That on account of the beginning, in 1973, of the construction of highway BR-210 (the Northern Circumferential Highway), the territory occupied for ages beyond memory by the Yanomami Indians was invaded by highway construction workers, geologists, mining prospectors, and farm workers desiring to settle in that territory;
- b. That those invasions were carried out without prior and adequate protection for the safety and health of the Yanomami Indians, which resulted in a considerable number of deaths caused by epidemics of influenza, tuberculosis, measles, venereal diseases, and others;
- c. That Indian inhabitants of various villages near the route of highway BR-210 (the Northern Circumferential Highway) abandoned their villages and were changed into beggars or prostitutes, without the Government of Brazil's taking the necessary measures to prevent this; and
- d. That after the discovery in 1976 of ores of tin and other metals in the region where the Yanomamis live, serious conflicts arose that led to acts of violence between prospectors and miners of those minerals, on one side, and the Indians, on the other. Such conflicts, which occurred especially in the areas of the Serra dos Surucucus, Couto de Magalhães, and Furo de Santa Rosa, affected the lives, security, health, and cultural integrity of the Yanomamis.

11. That from the facts set forth above a liability of the Brazilian Government arises for having failed to take timely and effective measures to protect the human rights of the Yanomamis.

12. That the Government of Brazil, in the last few years, has taken various measures to overcome or alleviate the problems that have come up with the Yanomami Indians. In that direction, the Government of Brazil has reported, through a note from its Permanent Representative to the

Organization of American States dated February 13, 1985, that it has taken the following measures to protect the security, health, and integrity of the Yanomamis:

- a. The President of the FUNAI sent a proposal to the inter ministerial working group on September 12, 1984, requesting the definition and demarcation of the boundaries of the future Yanomami Park, which would have an area of 9,419,108 hectares;
- b. The area proposed for that Park would cover the isolated areas of Ajarani, Catrimani, and Pacu, as well as four control posts, three surveillance posts, and a number of religious missions that would be able to provide medical and other services to the Indians;
- c. The FUNAI, with the cooperation of the French association “Médecins du Monde” and the Committee for the Establishment of the Yanomami Park, is carrying out a health program among the Yanomamis, which especially includes mass vaccinations and control of epidemics;
- d. The President of the FUNAI has prohibited the transits or stay of non-Indian individual or groups, especially mining prospectors, in the area proposed for the establishment of the Yanomami Park;
- e. Up to now, no mining company has entered the Yanomami’s region; and
- f. The plan for aid and assistance to the Yanomamis continues being carried out by Regional Delegation No. 10 of the FUANI, which has its headquarters in Boa Vista, Roraima.

## **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,**

### **RESOLVES:**

1. To declare that there is sufficient background information and evidence to conclude that, by reason of the failure of the Government of Brazil to take timely and effective measures in behalf of the Yanomami Indians, a situation has been produced that has resulted in the violation, injury to them, of the following rights recognized in the American Declaration of the Rights and Duties of Man: the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI).
2. To recognize the important measures that the Government of Brazil has taken in the last few

years, particularly since 1983, to protect the security, health, and integrity of the Yanomami Indians.

3. To recommend:

a. That the Government of Brazil continue to take preventive and curative health measures to protect the lives and health of Indians exposed to infectious or contagious diseases;

b. That the Government of Brazil, through the FUNAI and in conformity with its laws, proceed to set and demarcate the boundaries of the Yanomami Park, in the manner that the FUNAI proposed to the inter ministerial working group on September 12, 1984;

c. That the programs of education, medical protection, and social integration of the Yanomamis be carried out in consultation with the indigenous population affected and with the advisory service of competent scientific, medical, and anthropological personnel; and

d. That the Government of Brazil inform the Commission of the measures taken to implement these recommendations.

4. To include this resolution in its Annual Report to the General Assembly of the Organization of American States.

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***Comment***

Article 27 of the International Covenant on Civil and Political Rights recognizes specific rights of indigenous peoples that, by virtue of the Optional Protocol to the International Covenant on Civil and Political Rights, offer the possibility of being protected by the Human Rights Committee through its individual complaint procedure. Article 27 states:

In those States in which ethnic, religious or linguistic minorities exist, 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 practise their own religion, or to use their own language.

Similarly, the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169) recognizes specific obligations of States Parties to protect these rights. According

to Article 29 of the American Convention, these treaties are relevant when interpreting certain provisions of the Convention, such as Article 12 (Freedom of Conscience and Religion) and Article 23 (Right to Participate in Government).

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**Sandra Lovelace v. Canada**

*Communication No. 24/1977, U.N. Doc. CCPR/C/OP/1 (July 30, 1981)*

*<<http://sim.law.uu.nl>; <http://www.unhchr.ch>>*

1. The author of the communication dated 29 December 1977 and supplemented by letters of 17 April 1978, 28 November 1979 and 20 June 1980, is a 32-year-old woman, living in Canada. She was born and registered as "Maliseet Indian" but has lost her rights and status as an Indian in accordance with section 12(1)(b) of the Indian Act, after having married a non-Indian on 23 May 1970. Pointing out that an Indian man who marries a non-Indian woman does not lose his Indian status, she claims that the Act is discriminatory on the grounds of sex and contrary to articles 2(1), 3, 23(1) and (4), 26 and 27 of the Covenant. As to the admissibility of the communication, she contends that she was not required to exhaust local remedies since the Supreme Court of Canada, in *The Attorney-General of Canada v. Jeanette Lavell, Richard Isaac et al. v. Yvonne Bddard* [1974] S.C.R. 1349, held that decision 12(1)(b) was fully operative, irrespective of its inconsistency with the Canadian Bill of Rights on account of discrimination based on sex.

. . . .

10. The Human Rights Committee, in the examination of the communication before it, has to proceed from the basic fact that Sandra Lovelace married a non-Indian on 23 May 1970 and consequently lost her status as a Maliseet Indian under section 12(1)(b) of the Indian Act. This provision was--and still is--based on a distinction de jure on the ground of sex. However, neither its application to her marriage as the cause of her loss of Indian status nor its effects could at that time amount to a violation of the Covenant, because this instrument did not come into force for Canada until 19 August 1976. Moreover, the Committee is not competent, as a rule, to examine allegations relating to events having taken place before the entry into force of the Covenant and the Optional Protocol. Therefore as regards Canada it can only consider alleged violations of human rights occurring on or after 19 August 1976. In the case of a particular individual claiming to be a victim of a violation, it cannot express its view on the law in the abstract, without regard to the date on which this law was applied to the alleged victim. In the case of Sandra Lovelace it follows that the Committee is not competent to express any view on the original cause of her loss of Indian status, i.e. the Indian Act as applied to her at the time of her marriage in 1970.

11. The Committee recognizes, however, that the situation may be different if the alleged

violations, although relating to events occurring before 19 August 1976, continue, or have effects which themselves constitute violations, after that date. In examining the situation of Sandra Lovelace in this respect, the Committee must have regard to all relevant provisions of the Covenant. It has considered, in particular, the extent to which the general provisions in articles 2 and 3 as well as the rights in articles 12(1), 17(1), 23(1), 24, 26 and 27, may be applicable to the facts of her present situation.

12. The Committee first observes that from 19 August 1976 Canada had undertaken under article 2(1) and(2) of the Covenant to respect and 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 sex, and to adopt the necessary measures to give effect to these rights. Further, under article 3, Canada undertook to ensure the equal right of men and women to the enjoyment of these rights. These undertakings apply also to the position of Sandra Lovelace. The Committee considers, however, that it is not necessary for the purposes of her communication to decide their extent in all respects. The full scope of the obligation of Canada to remove the effects or inequalities caused by the application of existing laws to past events, in particular as regards such matters as civil or personal status, does not have to be examined in the present case, for the reasons set out below.

13.1. The Committee considers that the essence of the present complaint concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian, in particular because she cannot for this reason claim a legal right to reside where she wishes to, on the Tobique Reserve. This fact persists after the entry into force of the Covenant, and its effects have to be examined, without regard to their original cause. Among the effects referred to on behalf of the author (see para. 9.9, above), the greater number, ((1) to (8)), relate to the Indian Act and other Canadian rules in fields which do not necessarily adversely affect the enjoyment of rights protected by the Covenant. In this respect the significant matter is her last claim, that “the major loss to a person ceasing to be an Indian is the loss of the cultural benefits of living in an Indian community, the emotional ties to home, family, friends and neighbours, and the loss of identity”.

13.2. Although a number of provisions of the Covenant have been invoked by Sandra Lovelace, the Committee considers that the one which is most directly applicable to this complaint is article 27, which reads as follows:

In those States in which ethnic, religious or linguistic minorities exist, 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 practise their own religion, or to use their own language.

It has to be considered whether Sandra Lovelace, because she is denied the legal right to reside on the Tobique Reserve, has 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.

14. The rights under article 27 of the Covenant have to be secured to “persons belonging” to the minority. At present Sandra Lovelace does not qualify as an Indian under Canadian legislation. However, the Indian Act deals primarily with a number of privileges which, as stated above, do not as such come within the scope of the Covenant. Protection under the Indian Act and protection under article 27 of the Covenant therefore have to be distinguished. Persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant. Since Sandra Lovelace is ethnically a Maliseet Indian and has only been absent from her home reserve for a few years during the existence of her marriage, she is, in the opinion of the Committee, entitled to be regarded as “belonging” to this minority and to claim the benefits of article 27 of the Covenant. The question whether these benefits have been denied to her, depends on how far they extend.

15. The right to live on a reserve is not as such guaranteed by article 27 of the Covenant. Moreover, the Indian Act does not interfere directly with the functions which are expressly mentioned in that article. However, in the opinion of the Committee the right of Sandra Lovelace to access to her native culture and language “in community with the other members” of her group, has in fact been, and continues to be interfered with, because there is no place outside the Tobique Reserve where such a community exists. On the other hand, not every interference can be regarded as a denial of rights within the meaning of article 27. Restrictions on the right to residence, by way of national legislation, cannot be ruled out under article 27 of the Covenant. This also follows from the restrictions to article 12(1) of the Covenant set out in article 12(3). The Committee recognizes the need to define the category of persons entitled to live on a reserve, for such purposes as those explained by the Government regarding protection of its resources and preservation of the identity of its people. However, the obligations which the Government has since undertaken under the Covenant must also be taken into account.

16. In this respect, the Committee is of the view 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 mentioned above, 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. It is not necessary, however, to determine in any general manner which restrictions may be justified under the Covenant, in particular as a result of marriage, because the circumstances are special in the present case.

17. The case of Sandra Lovelace should be considered in the light of the fact that her marriage to a non-Indian has broken up. It is natural that in such a situation she wishes to return to the environment in which she was born, particularly as after the dissolution of her marriage her main cultural attachment again was to the Maliseet band. Whatever may be the merits of the Indian

Act in other respects, it does not seem to the Committee that to deny Sandra Lovelace the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe. The Committee therefore concludes that to prevent her recognition as belonging to the band is an unjustifiable denial of her rights under article 27 of the Covenant, read in the context of the other provisions referred to.

18. In view of this finding, the Committee does not consider it necessary to examine whether the same facts also show separate breaches of the other rights invoked. The specific rights most directly applicable to her situation are those under article 27 of the Covenant. The rights to choose one's residence (article 12), and the rights aimed at protecting family life and children (articles 17, 23 and 24) are only indirectly at stake in the present case. The facts of the case do not seem to require further examination under those articles. The Committee's finding of a lack of a reasonable justification for the interference with Sandra Lovelace's rights under article 27 of the Covenant also makes it unnecessary, as suggested above (para. 12), to examine the general provisions against discrimination (arts. 2, 3 and 26) in the context of the present case, and in particular to determine their bearing upon inequalities predating the coming into force of the Covenant for Canada.

19. Accordingly, the Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts of the present case, which establish that Sandra Lovelace has been denied the legal right to reside on the Tobique Reserve, disclose a breach by Canada of article 27 of the Covenant.

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### ***Comment***

The decisions of domestic tribunals constitute the primary source for protecting the rights of indigenous communities. As we have previously stated, international protection is subsidiary to domestic protection and will only be triggered when the local mechanisms fail to protect those rights recognized in international and/or domestic law. The following decision illustrates how a domestic tribunal deals with these rights. (*See also* Tutela T-405/93).

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**Tutela<sup>1</sup> No. T-254/94**  
**Ananías Narvaez Case**  
*Constitutional Court of Colombia, Judgment No. T-254/94, May 30, 1994 (1994)*  
*[footnotes omitted]*

**Plaintiff: ANANÍAS NARVAEZ**

**Opinion of the Court delivered by Judge Eduardo Cifuentes Muñoz**

1. The petitioner alleges that the indigenous council of El Tambo violated his fundamental right to due process, and failed to recognize the constitutional prohibition against banishment and confiscation of property as forms of punishment, upon his expulsion from the indigenous community. He further alleges that the accusations against him lacked evidentiary support, that the decision of expulsion was made under pressure and threats from the indigenous Governor and that the improvements corresponding to eleven years' worth of work on the plot of land assigned to the plaintiff by the community were not recognized. Additionally, the plaintiff submits that the accusation against him violates his rights to honor, his good name and his right to work, the latter because he lacks the skills to work in the urban area in which he now resides. He maintains that his right to life is also threatened, given that the region is characterized by problems of public order and the presence of persons and groups who take justice into their own hands.

.....

6. The strengthening of national unity is one of the aims proposed in the preamble of the Constitution. The importance of this value, a dominant aspect of the Constitution, is reflected in the establishment of a unified Republic -with autonomous regional entities- as our form of government (Const. art. 1).

The simultaneous recognition in the same constitutional article of contrary -not contradictory- principles such as the unified system of government and regional autonomy, demonstrates the intent of the constitution's framers to establish a political system based on the preservation of diversity in unity.

As to the autonomy of regional entities we must emphasize, and at the same time distinguish, that which concerns the autonomy conferred upon the indigenous territories.

To date, the law which would regulate significant aspects of the country's territorial system has

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<sup>1</sup> *Editor's note:* The *acción de tutela* or *proceso de tutela* is an extraordinary remedy which provides injunctive relief for the protection of fundamental rights established in the Colombian constitution. It is an exceptional remedy that can be used only in cases of urgency when no other remedy is available.

not been issued. Nevertheless, it is possible to distinguish that, unlike the situation in other regional entities, members of the indigenous communities are guaranteed not only administrative, budgetary and financial autonomy within their territories, as can occur with departments, districts and municipalities; they are also guaranteed the exercise, to the degree established by law, of political and legal autonomy, which is translated into the choosing of their own authorities (Const. art. 330) who can exercise jurisdictional functions within their territorial limits (Const. art. 246). This signifies nothing less than the recognition and partial actualization of the principle of pluralistic and participative democracy and respect for the cultural and ethnic diversity of the Colombian nation (Const. art. 7).

The indigenous communities' political and legal autonomy, recognized by the framers of the constitution, must be exercised within the strict parameters indicated by the text of the constitution: in conformance with the communities' customs and practices, provided that they are not contrary to the Constitution and to the law (Const. arts. 246, 330), so as to ensure national unity.

7. The creation of a special indigenous jurisdiction like the one set forth in article 26 of the Constitution presents the problem of determining the existing hierarchy between the law and indigenous customs and practices as sources of law. In effect, the constitutional grant to the indigenous authorities of the power to exercise jurisdictional functions within the limits of their territory, in conformance with their own norms and procedures, is subject to the condition that these norms and procedures not be contrary to the Constitution or contrary to law. The conceptual differences and the conflicts of values that might arise in the practical application of different legal systems must be overcome while also respecting, at a minimum, the following rules of interpretation:

7.1 The degree of preservation of the customs and practices of indigenous communities is directly related to their degree of autonomy. Colombian reality shows that the nation's numerous indigenous communities have suffered greater or lesser cultural destruction according to their subjection to the colonial order and later integration into "civilized life" (Law 89 of 1890), which weakened the capacity for social coercion on the part of the authorities of some indigenous villages over their members. The need for an objective normative framework which guarantees legal certainty and social stability within these collective societies makes it essential to distinguish between those groups which maintain their customs and practices -which should, in principle, be respected- from those which have not preserved them, and which should consequently be regulated to a greater degree by the laws of the Republic. This is because it is repugnant to constitutional and legal order that a person should be relegated to the margins of the law because of an imprecise or nonexistent delimitation of legal standards to regulate his rights and obligations.

7.2 The fundamental constitutional rights constitute the obligatory minimum for the coexistence of all individuals. Subjection to the Constitution and the law is a duty of all citizens in general (Const. arts. 4, 6 and 95), including indigenous people. Nevertheless, it is worth emphasizing that

the axiological system of rights and duties (particularly fundamental rights) contained in the Constitution, materially limits the principle of ethnic and cultural diversity, as well as the codes of values of the nation's diverse indigenous communities, which, as it happens, were represented in the National Assembly of Constitutional Framers.

7.3 The imperative legal norms (of public order) of the Republic take precedence over the customs and practices of indigenous communities, as long as they directly protect a constitutional value superior to the principle of ethnic and cultural diversity. However, the interpretation of the law as limiting the recognition of customs and practices cannot reach the extreme of rendering nugatory their content because of the simple existence of the legal norm. Rather, the normative character of the Constitution requires a weighing of the relative importance of the values protected by the constitutional norm -diversity, pluralism- and those protected by the imperative legal norms. There is an intangible scope of pluralism and of indigenous peoples' ethnic and cultural diversity which cannot be regulated by the law, since its preservation would be endangered, and its richness, which resides precisely in the maintenance of cultural difference, would be undermined. Consequently, the special jurisdiction (Const. art. 246) and the functions of self-government entrusted to the indigenous councils (Const. art. 330) must be exercised according to their customs and practices, but respecting the imperative laws which protect superior constitutional values.

7.4 The customs and practices of an indigenous community take precedence over dispositive legal norms. This rule is consistent with the principles of pluralism and diversity, and does not signify the acceptance of customs *contra legem*<sup>2</sup> as having to do with dispositive norms. The nature of the civil laws, for example, grants a wide margin to the autonomy of private will, which, *mutatis mutandis*, supports the prevalence of customs and practices over norms which should only be applied in the absence of self-regulation on the part of indigenous communities.

The aforementioned premises allow for the identification of the El Tambo indigenous community, located in the Municipality of Coyaima, Tolima Province, as a community in the process of legalizing its reservation land and recovering its cultural identity. The community inhabits a property awarded by INCORA in 1989 to which, for the moment, it does not possess communal property title. As in other communities in Tolima, the members of the community of El Tambo have preserved neither the language spoken by their ancestors, nor a significant part of their customs and traditions. Nevertheless, they elect their authorities represented in the indigenous council, collectively administer land use, and share a common purpose: to identify themselves with their indigenous past and maintain the characteristics and values of their culture, such as their forms of government and social control which distinguish them as a native community.

#### *INDIGENOUS JURISDICTION AND THE IMPOSITION OF PUNISHMENT*

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<sup>2</sup> Editor's note: "*Contra legem*" means "against the law."

8. The exercise of indigenous jurisdiction is not conditioned upon the issuance of a law which authorizes it, as it might be thought at first blush. The Constitution authorizes the authorities of indigenous communities to exercise jurisdictional functions within their territorial limits, according to their own norms and procedures, provided that they are not contrary to the Constitution and the law. On the other hand, the legislature has the obligation to regulate the forms of coordination between this jurisdiction and the national justice system (Const. art. 246).

The precariousness of certain factual assumptions for the adequate exercise of special indigenous jurisdiction -absence of legalization of the indigenous reservation land, absence of proof regarding the existence of customs and practices- are factors which very probably led the judges in the first and second instances to identify the indigenous community's decision to expel the plaintiff with a private act emanating from the right of free association, and not as a jurisdictional act. Nevertheless, the recognition of the existence of an indigenous community with its own authorities, norms and procedures on the part of the judges in the *tutela* proceedings, demanded that the situation proposed by the petitioner be given a juridical treatment from the perspective of constitutional law and not according to the civil community system provided to regulate the relations among indigenous community members.

9. The character of the decision adopted by the El Tambo indigenous community on December 28, 1992, allows the Court to affirm that on that occasion the petitioner's conduct was judged, for having transgressed the parameters of socially permissible behavior in the indigenous community and for having attempted to commit a crime against its property or interests. The petitioner was punished; both he and his family were deprived of certain rights and benefits. Consequently, the decision exhibits the nature of a true judicial act through which a penalty was imposed because of conduct that was contrary to the community's internal norms and damaging to its interests, in exercise of the jurisdictional functions granted by the Constitution to the authorities of indigenous communities, the validity of which depends upon its conformity with the Constitution and the law (Const. art. 246).

#### *PRINCIPLE OF ETHNIC AND CULTURAL DIVERSITY VS. VALIDITY OF FUNDAMENTAL RIGHTS*

10. There exists a tension between the constitutional recognition of ethnic and cultural diversity and the acknowledgment of fundamental rights. While the latter are based on transcultural norms often claimed to be universal, and which would assure a firm base for peaceful coexistence among nations, respect for diversity entails the acceptance of worldviews and value standards which are diverse and even contrary to the values of a universal ethic. This paradox has given rise to a highly charged philosophical debate regarding the validity of the fundamental human rights enshrined in international treaties.

Reflections such as Agnes Heller's lead to the rejection of extreme ethnic relativism. To this author, true respect for cultural diversity imposes absolute respect upon the value parameters of different cultures, and compels a tendency toward a moderate relativism in which the

comparability among cultures is admitted under the formula of tolerance and respect for cultural specificity, except in cases in which this conceals an unacceptable double code of values and a situation of force or coercion liable to affect the life, physical integrity or liberty of the person. The necessity of defending some universal minimum ethical standards which permit transcendence of the specificity of different cultures and build a framework of understanding and dialogue among civilizations justifies the adoption of international human rights instruments which, according to Bobbio, constitute “the greatest ever historical proof of *consensus omnium gentium* as to a determined system of values.”

11. The complete validity of fundamental constitutional rights in the indigenous territories as a limit to the principle of ethnic and constitutional diversity is accepted on the plane of international law, particularly in the area of human rights as a universal code of coexistence and dialogue among cultures and nations, presupposed for the peace, justice, liberty and prosperity of all peoples. In this sense, Convention 169 of the International Labour Organisation (ILO) concerning indigenous and tribal peoples in independent countries, approved by Congress through Law 21 of 1991, establishes:

“Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, wherever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9

1. To the extent compatible with the national legal system and internationally recognized human rights, the methods customarily practiced by the peoples concerned for dealing with offenses committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.”

In light of the above, the Court must examine whether the form and content of the action by which the petitioner and his family were expelled from the El Tambo indigenous community

violated his fundamental constitutional rights.

### *CONSTITUTIONAL ANALYSIS OF THE PUNISHMENT OF EXPULSION*

12. An explicit constitutional limit to the exercise of punitive authority by indigenous peoples is the prohibition against imposing punishments of banishment, life imprisonment and confiscation of property (Const. art. 38). The plaintiff alleges that the community's decision with regard to him violates this prohibition.

From an anthropological perspective, the punishment of banishment involves the estrangement of a member of the collective society who suffers the loss of cultural identity and physical separation from the rest of the community. This practice of condemning to ostracism an individual who commits an infraction against the community's internal norms is common in social organizations in which the defense of the collective overrides individual rights.

The inclusion in human rights instruments of the prohibition against the punishment of exile or banishment is contemporaneous with the rise of the Nation-State, reason for which banishment is identified politically and legally with the deprivation of nationality or country, which is repugnant to the conception of human rights as the birthright of individuals. Article 9 of the Universal Declaration of Human Rights establishes that, "no one shall be subject to arbitrary arrest, detention or exile." For its part, the International Covenant on Civil and Political Rights provides that, "no one shall be arbitrarily deprived of the right to enter his own country" (art. 12(4)). The American Convention on Human Rights stipulates that, "no one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it" (art. 22(5)). Thus, in light of the international human rights treaties ratified by Colombia (Const. art. 93), the punishment of banishment or exile refers only to expulsion from the territory of the State and not to exclusion from the indigenous communities which inhabit a space within this territory but which do not exhibit the characteristics of Nations. Consequently, the expulsion of the petitioner did not violate the prohibition against banishment or exile.

13. It is also alleged that the indigenous community council violated article 38 of the Constitution upon depriving the petitioner of the plot of land where he possessed various crops.

Confiscation entails the taking, as punishment, on the part of the State of part or all of a person's property, without the payment of any compensation. The arbitrary deprivation of private property and its assignment to the public treasury by decision of the State are requisite elements of this constitutionally prohibited penalty. In the National Assembly of the Framers of the Constitution, the following reasons were among those expressed in which the frank repudiation of this form of punishment is clear:

José María Samper, Francisco de Paula Pérez, Alvaro Copete Lizarralde and Luis Carlos SÁCHICA, coincide, in general terms, with the statements of Jorge Enrique Guitérrez Anzola: "through confiscation the property of a prisoner is awarded to the Public Treasury. This is

intended to dissuade individuals from crime, but through the fear of leaving their families indigent.

This would impose a double punishment upon the criminal, extending to his heirs, which is unacceptable because the penalty must be individual. Our constitution rejects such punishment, thus establishing another guarantee of respect for property. The Colombian Criminal Code mandates a whole system of punishments, naturally, without including confiscation.”

The penalty of confiscation cannot be imposed by the State and, even less so, by an indigenous community which, as expressed in the Constitution, is governed by its customs and practices as long as they do not conflict with the Constitution and imperative law (Const. art. 330).

Although the property that an indigenous community might hold is collective in nature, it does not escape this Court that insofar as customs and practices permit the recognition of improvements made by its members, the punitive expulsion of one of its members which, at the same time, means the absolute loss of those improvements, is equivalent to the constitutionally prohibited punishment of confiscation. In truth, the punished individual and his family would be exposed to a situation of indigence and absolute dispossession, motives which led the Framers of the Constitution to indicate that in no case can this punishment be imposed. Independently of the private or collective system by which the production and distribution of goods is organized, the punitive system cannot contain penalties with consequences so extreme for the subject and his immediate family, such as those which would result from the absolute loss of their possibilities for subsistence through forms of private expropriation of the collective wealth or usufruct. In the final analysis, such penalties would materially form a confiscation.

In the instant case, as discussed below, the evidence regarding improvements upon the land made by the petitioner must be examined in ordinary proceedings; therefore, such proceedings must prevent a situation of manifest inequity from being effected in violation of article 38 of the Constitution.

#### *RIGHT TO DUE PROCESS AND EXERCISE OF SPECIAL JURISDICTION*

14. The fundamental right of due process constitutes a juridical-material limit to the special jurisdiction exercised by the authorities of the indigenous communities according to “their own norms and procedures, provided that they are not contrary to the Constitution and the law” (Const. art. 246). Regardless of the content of the internal legal provisions of the indigenous communities, they must respect the rights and principles enshrined in article 29 of the Constitution. In effect, the fundamental right of due process guarantees the principles of legality, impartiality, the competence of judges, the right to a public trial, the presumption of innocence and of proportionality of punishment to the gravity of the crime, as well as the rights to a defense and to an adversarial process. The failure to recognize minimum constitutional guarantees in adjudication and punishment amount to a violation of the fundamental right of due process.

The petitioner affirms that the charges made against him, as well as the subsequent trial by the indigenous council, violated article 29 of the Constitution. He claims that they were not preceded by an investigative procedure, and that they were based on unsubstantiated rumors. He further claims that the indigenous council members threatened the rest of the community's members so that they would vote in favor of his expulsion.

This accusation contrasts with the fact that, before filing the *acción de tutela*, the petitioner limited his claim to demanding payment for the improvements in order to leave the community's territory. He did not claim any arbitrariness in the decision, as can be inferred from the communication initially directed by the plaintiff to the committee of the Regional Indigenous Council of Tolima, in which he requested its mediation of the dispute. Neither does the Court find that the petitioner is able to demonstrate that he was denied the possibility of opposing or contradicting the accusations made against him in the December 28, 1992 session. His version, according to which the decision to expel him was not impartial given the pressures and threats exercised by the governor of the indigenous community, is less credible.

15. The punishable conduct for which the petitioner was sanctioned was related to the theft of crops, animals and agricultural products. The punishment imposed by the indigenous community was to expel him and his family from its territory. According to the petitioner, the council members did not accept his proposal to leave voluntarily provided that his children could stay on the plot of land assigned to him.

This Court has repeatedly sustained that penalties imposed upon the offender must be proportionate to the gravity of the offense. The jurisdictional authorities enjoy a wide margin of discretion in the use of punitive power granted by the Constitution or the law. Nevertheless, this power is not unlimited; it must be reasonable and leave in tact other juridical values protected by the law.

The penalty imposed upon the petitioner involved his and his family's expulsion from the indigenous community's land, placing his family members in a disadvantaged social and economic situation because of their special circumstances. In this manner, the punishment transcended the person of the offender and extended to the members of his family, which is clearly disproportionate and contrary to international human rights treaties. Indeed, article 5(3) of the American Convention on Human Rights establishes that, "punishment shall not be extended to any person other than the criminal," so that the right to personal integrity is preserved with regard to those individuals outside the scope of the judgment of punishable acts committed by another.

Ordinarily the imposition of a punishment, notwithstanding its individualization, may materially affect third parties detached from the offense, and this is not a reason for the penalty to lose its validity. Nevertheless, the expulsion of a member of an indigenous community as a measure of punishment has a peculiarity which requires consideration of its effects upon the family. The consequences of the punishment, in this case, acquire greater severity and easily translate into

punishment for the members of the family. For them, the expulsion causes a complete rupture from their cultural environment and the extinction of their anthropological connections; conversely, the consequent forceful insertion into a different cultural framework entails the radical alteration of their way of life and forces them to interact with the dominant culture in conditions of inferiority. From the point of view of the indigenous community, and given its minority status, the loss of members does not contribute to its objective of self-preservation.

Collective sanctions or punishments are contrary to the principle that “no one shall be judged except according to the laws in force prior to the act imputed to him...” (Const. art. 29). Furthermore, criminal law is based on the principle of individual responsibility, which presupposes the judgment of the accused and respect for the presumption of innocence, essential elements of the punitive power of the State or individuals who exceptionally exercise jurisdictional functions. Consequently, the penalty imposed upon the petitioner is shown to be disproportionate and materially unjust for extending to the family members, a circumstance which violates the fundamental rights of due process and the physical integrity of his children. The refusal of the members of the indigenous council to accept the proposal of assigning the plot of land worked by ANANIAS NARVAEZ to his eldest son has no basis in law, exacerbates the situation of the individual being punished and irrationally deprives his children of their only source of subsistence, as shown by the fact that after his expulsion he was again found on the community’s land, stealing food because his “children were hungry”. This situation is not a consequence, as might be thought simplistically, of the petitioner’s own conduct; rather, it originated with the will of the indigenous authorities to plainly resolve the problem by expelling the family of the offender. As such, the punitive expulsion of the petitioner and his family as a consequence of the father’s acts violated the right of due process, particularly by transcending the person of the offender.

.....

### **Questions**

1. Does the collective nature of indigenous rights create problems for the international protection of those rights? Does the Inter-American system protect collective rights?
2. Does the violation of collective rights automatically imply the violation of the rights of the individual members of such collective?
3. Are collective rights different from the aggregate of the individual members’ rights? Can an individual request for himself specific remedies different to those that were granted to the group?
4. Do you think that the *Ananias Narvaez Case* supports cultural relativism or universalism of human rights? Do you agree with the decision reached in that case? Do you believe that universalism of human rights could affect the survival of certain indigenous traditions and

cultural forms? How would you solve this tension?

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## 2. **THE RIGHT TO A HEALTHY ENVIRONMENT**

### **Rio Declaration on Environment and Development**

*Report of the United Nations Conference on Environment And Development*

*(Rio de Janeiro, June 3-14, 1992)*

*A/CONF.151/26 (Vol. I) August 12, 1992*

#### *Principle 1*

Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

....

#### *Principle 10*

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

....

#### *Principle 14*

States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

#### *Principle 15*

In order to protect the environment, the precautionary approach shall be widely applied by States

according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

....

*Principle 20*

Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.

....

*Principle 22*

Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

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***Tutela No. T-405/93***

**Case of the Indigenous Community of the Middle Amazon**

*Constitutional Court of Colombia, Judgment No. T-405/93, September 23, 1993 (1993)*

*[Footnotes omitted]*

**Plaintiff: THE INDIGENOUS COMMUNITY OF THE MIDDLE AMAZON**

**Opinion of the Court delivered by Judge Hernando Herrera Vergara**

*[The Indigenous Community of the Middle Amazon brought an action before the Constitutional Court of Colombia against the National Defense Ministry of Colombia and the United States' Area Mission in order to assert their collective right to a healthy environment and the fundamental right to life and health. In September of 1992, United States' military personnel arrived, in order to build radar installations for use by the U.S. Drug Enforcement Agency, at the Reservation of Monochoa. The indigenous people hold a collective property right to the reservation land. As part of the Colombian National Defense Ministry's efforts to strengthen their presence in the area, a radar array was installed, occupying approximately 1000 square*

*meters and causing uncustomarily intensive use of airport runways and roads in Arracuara. As a result, the springs and streams of water in the area were contaminated causing an epidemic of diarrhea primarily among the indigenous children. When the Indigenous Community requested that the U.S. Military repair the damage it had caused, they were told that any agreement would be reached with the Arracuara Corporation and not with the Indigenous Community. Essentially, the U.S. considered the zone of Arracuara and the Indigenous Community Resguardos as the same legal entity. Thus, the Indigenous Community brought action claiming deprivation of their constitutionally guaranteed collective rights to property and their rights to cultural and ethnic diversity.]*

The right to a healthy environment is protected, as already indicated, through the *acciones populares*,<sup>3</sup> applicable in cases in which there is a violation of a constitutional or legal right.

As this Court has repeatedly stated, this general rule should be complemented with a specific rule of connection according to which, in cases where the infringement of the right to a healthy environment also violates a fundamental constitutional right, the *acción de tutela*<sup>4</sup> acts as a judicial mechanism of protection of the collective right to the environment. In these cases, the judge, in analyzing the specific case, shall order the effective protection that is being sought.

Thus, when the violation of the right to a healthy environment simultaneously implicates or assists a direct and specific attack on a fundamental right, as occurs in this case, with the life and health of the indigenous community of the Middle Amazon, the *acción de tutela* becomes the instrument of protection for all of the rights involved, by virtue of the higher rank that fundamental rights have within the constitutional framework.

In order to determine the connection between the right to a healthy environment and the fundamental right, the judge must analyze the specific case. It is there where he observes the specific circumstances of the case in order to appreciate the level of the infringement of the fundamental right. In these cases, the constitutional norm acquires legal meaning when it is interpreted through the factual circumstances. Thus, the analysis of the case and the judicial review according to the constitutional values and principles has special relevance.

Consequently, the *acción de tutela* is not suitable for independently obtaining the protection of collective rights, such as the right to a healthy environment, since it is designed for obtaining the

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<sup>3</sup> *Editor's note:* The *acciones populares* are judicial remedies designed to protect collective interests. They are similar to citizen suits and class actions in the U.S. system.

<sup>4</sup> *Editor's note:* The *acción de tutela* is an extraordinary remedy which provides injunctive relief for the protection of fundamental rights established in the Colombian Constitution. It is an exceptional remedy that can only be used in cases of urgency when no other remedy is suitable to redress the situation.

specific protection of the fundamental constitutional rights and not of the other rights that, like collective rights, should be pursued judicially through the exercise of the *acciones populares*, in the terms of their legal regulation, barring the situation of their indirect or consequential protection, as in the threat to the fundamental rights to life and to health of the indigenous community and the dwellers of Araracuara.

The collective constitutional right can, in some cases, be linked with the violation of other constitutional rights of fundamental order such as life and health. Then, the basic task of the judge hearing the *acción de tutela* consists of determining which of both mechanisms of protection— *acción de tutela* or the *acciones populares* —must be applied.

The requirements that have to be met for the protection of the right to a clean environment through the *acción de tutela* are the following:

a) The petitioner of the *acción de tutela* should be the directly or mostly affected person and evidence must exist regarding the violation or the threat. This requirement is double: the fact that the petitioner is affected and that the right has been infringed must be proved. As for the first requirement, the Court believes that the Indigenous Community of the Middle Amazon and the people who inhabit areas nearby are affected, as it is true that there is a “threat on their lives and health” by virtue of those elements contaminating of the fountains of water located where the military bases of the Araracuara are and which nurture the population. As for the second requirement, article 86 of the Constitution establishes that the *acción de tutela* proceeds when there is a breach (which is the real damage that the fundamental right suffers) or threat (which is the real expectation of the occurrence of the harm, and should be analyzed on a case by case basis) of the fundamental right; a threat that in the present matter was verified during the inspection of the zone.

For this Chamber of Review, thus, the threat in this particular case is more than proved and is real. In constitutional matters, the threat is represented by the potential harm the petitioner, namely the Indigenous Community of the Middle Amazon, as well as the population of the Araracuara, may suffer. Thus, this case refers to the imminent threat the inhabitants in the jurisdiction of the Araracuara live with on a daily basis because of the sicknesses they suffer and could come to suffer as a result of the contamination of the fountains and springs of water by the military who operate the Air Force’s radar in the Araracuara airport. Moreover, as already mentioned, during the inspection of the zone it became known that the epidemic of diarrhea, which was suffered mainly by the Araracuara indigenous children, is caused by bacteria and microbes resulting from the pollution of the water.

If the pollution of the environment is analyzed under the constitutional lens, the concept of a threat to the fundamental right to life acquires a different meaning. In constitutional matters, the guarantee of the right to life includes the protection against every action that immediately threatens the said right.

In conclusion, the pollution of the water constitutes a threat to the fundamental right to life and health because it can produce grave illnesses that not only place in danger or gravely affect the health of the area's inhabitants, but also could cause the death of the affected people.

b) The existence of a causal connection between the alleged motive and the injury or threat. The second requirement, referred to the causal connection that should exist between the threat of the fundamental right and its origin, follows from the aforesaid, since there are a higher percentage of probabilities of appearance of fatal sicknesses in the people that inhabit the jurisdiction of the Araracuara.

So, for this Court there is a causal connection or relation of necessity between the contamination of the fountains of water that nourishes the population of the Araracuara and the threat to life and health of the inhabitant of the area.

Finally, the Chamber finds that given the current situation, there is no judicial mean for the protection of the right other than the *acción de tutela*. There are other administrative mechanisms, such as the remedies provided for in the Code of Renewable Natural Resources, but inasmuch as they are not judicial ones, they do not preclude the tutela.

Therefore, in the specific case subject to review, the requirements necessary to consider favorably the *acción de tutela* are present: the threat of the fundamental rights to life and health of the Indigenous Community of the Middle Amazon in the face of the pollution of the waters that in a causal way threatens such right, and there is no other judicial mean of defense.

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### 3. **CONTEMPORARY TRENDS ON THE PROTECTION OF ENVIRONMENTAL RIGHTS**

#### ***Comment***

The following cases illustrate how adjudicatory bodies apply human rights provisions in the protection of environmental rights. It is worth noting that there are no provisions in human rights treaties that directly protect environmental rights. However, the principal universal and regional adjudicatory bodies, as well as domestic tribunals, invoke human rights provisions like the right to life, health and judicial protection to guarantee environmental rights in certain cases.

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**Tutela No. T-380/93**  
**Case of the Indigenous Organization of Antioquia (O.I.A.)**  
*Constitutional Court of Colombia, Judgment No. T-380/93, September 13, 1993 (1993)*  
*[Footnotes omitted]*

**Plaintiff: ORGANIZACION INDIGENA DE ANTIOQUIA (O.I.A.)**

**Opinion of the Court delivered by Judge Eduardo Cifuentes Muñoz delivered the opinion**

*[The Indigenous Organization of Antioquia (O.I.A) brought this action before the Constitutional Court of Colombia in order to assert their fundamental rights as an indigenous community to life, work, property, ethnic, cultural and territorial integrity, and to special protection as an ethnic group and, to particularly assert the rights in International Labour Organisation Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries (1989). Between 1988 and 1990, deforestation occurred in Chajeradó, injuring and threatening the fundamental rights of the O.I.A. This was caused by the timber operations of the Reinerio Palacios Company. These operations began without the prior permission of Codechoco, the official entity charged with the conservation of natural resources, but apparently with the acquiescence of the indigenous authorities for the use of implements such as motorized saws and outdoor motors. During this time, between 3,400 and 4,300 hectares of tropical rainforest, which constituted the natural infrastructure of the subsistence economy and the culture of the indigenous people, were exploited. The O.I.A. alleged that Codechoco had knowledge of the damage caused to the rainforest by Reinerio Palacios and failed to carry out its official mandate in regulating the exploitation of the rainforest.]*

On the other hand, the obligation of the State to conserve areas of special ecological importance involves the management and utilization of natural resources in the zones of tropical rain forest (CP art. 79) and indigenous territories (CP art. 330) that is different from that granted in the exploitation of natural resources in other areas, yet always within the standard of their sustainable development, conservation, restoration or substitution.

11. The importance of the tropical rain forest—the lungs of humanity—for the existence of human kind contrasts with its fragility. This reality has been an international concern for several years. Recently, the United Nations proclaimed the “Earth Charter” or “Rio Declaration on Environment and Development,” whose Article 22 establishes: “Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”

In the same way, the International Convention on Biological Diversity proposes to the Contracting Parties the compromise of establishing protected areas in order to advance the protection of ecosystems—dynamic complexes of community, vegetables, animals, microorganisms and their nonliving environment that interact as functional units—and the natural environment—the place or space in which an organism and a population naturally exist.

The Colombian Constitutional order has fully recognized the concern created by the growing threat that deforestation has on ecosystems. This not only brings about the extinction of numerous species of flora and fauna, altering the hydrological cycles and the climate of vast regions, but it also diminishes opportunities for survival of the tropical rain forest indigenous peoples whose system of life—undervalued by the western culture because of engendering limited surpluses for the economy and operating efficiently only with small concentrations of people—guarantees the preservation of bio-diversity and cultural and natural resources.

12. The recognition of the right to the collective ownership of the reservation in favor of the indigenous communities encompasses the collective ownership of these natural non-renewable resources present in their territory. Far from usurping national resources, the act of disposal of *res nullius* for the constitution of indigenous reservations is compatible with the fundamental role that these groups carry out on the preservation of the environment. The prevalence of the cultural, social and economic integrity of these communities over the exploitation of the natural resources in their territories—which is only possible through the previous authorization of the State (CP art. 80) and of the indigenous community (CP art. 330)—becomes an explicit constitutional limit to the economic activity of forest exploitation.

In this sense, MADARIEN's proxies may not appeal to a partial reading of Article 42 of the National Code of Natural Resources in order to disregard the indigenous communities' right of collective ownership over the renewable natural resources found within their reservations' territory. The collective right should in every case be exercised within the constitutional and legal limits necessary to preserve the environment (CP arts. 8,79,80,333,334) and the renewable natural resources (D. 2811 of 1974, arts. 202 and ss.).

13. The right of collective ownership over renewable natural resources found in their territories does not grant to the representatives of the respective indigenous communities a limitless power to freely dispose of them. The autonomy of the indigenous authorities in the management of their own affairs, especially with regard to the utilization of natural resources (CP art. 330), should be exercised with complete responsibility (CP art. 95-1). In favor of the indigenous community, the *ultra vires* doctrine may always be alleged before actions of authorities that illegally or arbitrarily are disposing of natural riches within their territory, and which, therefore, must be deprived of any binding effect.

....

15. As to the abuse of positions of power by the individuals who took advantage of the inaction

of the public authorities named for the function of conserving and defending the environment, this Court recently pronounced in the following terms:

In dealing with environmental and health rules which imply legal limitations to enterprise and economic initiative for the common good (public health) and the environment (quality of life), the failure to exercise power or its defective discharge by administrative authorities may expose people to an abridgment of their fundamental rights to life, health, and a healthy environment. Certainly, the relinquishing of these administrative powers will mean opening a door for dangers and risks, which by delegation of society should be controlled and managed by the administration in use of their wide spectrum of powers, to loom directly on individuals threatening, in many cases, their constitutional rights. Additionally, the administrative omission or negligence, which breaks the balance that the constituents had wanted to establish through positively setting forth the principles of quality of life and sustainable development, would abandon man and the environment to complete instrumentation and subjugation by limitlessly expansive capital. In these circumstances, the barriers of the administrative authorities and of the correct application of a specific body of protective rules become canceled or weakened. Then the individuals, other than the beneficiary enterprise and its real beneficiaries, which given the absence of limits would increase their power, are left in a material condition of subordination and defenselessness with respect to such power. It is in this situation, of the break of the normal relation of equality and coordination between individuals, that the Constitution and the law (CP art. 86 y D. 2591 of 1991, art. 42, num. 4 and 9), conscious of the danger of abuse by private power, in this case indeed illegitimate, concede to the people who would be affected by such power, the possibility of directly exercising the *acción de tutela* for the defense of their fundamental rights susceptible of being violated by those in a position of supremacy. It is clear to this Chamber that the inaction and negligence of the administration, ordered to apply and administer the legal rules, create and expand private powers and supremacies and increase the defenselessness of large social sectors, among other grave consequences. Definitely, they become an effective means of a perverse distribution of social power.

16. The previous reference also describes the relation of powers existing between the parties in the present case. It corresponds with the destruction of the environment by the work of individuals led by a lucrative plan and favored by the passivity of the public authorities. However, it is worth noting that, although the *tutela* proceeds against the real beneficiary of this situation (D. 2591 of 1991, art. 42-4), the order to be imparted for protecting the fundamental rights necessarily supposes that the particular action continues to be executed.

For this Court it is unquestionable that the devastation of part of the rich forest of the reservation of the indigenous community occurred in the past and, as such, produced consummated damage

to the ecosystem whose effects last over time. That pronouncement, nevertheless, should arise from a judicial sentence expressed after substantiation in the respective proceeding, where all the parties having been heard, the extremes of the responsibility are controverted and the amount of the compensation determined.

17. The situation is different with respect to the public defendant, as omission in the fulfillment of its legal functions can represent a current threat to fundamental rights.

The obligation of the State is to protect the cultural and natural riches of the Nation (CP art.8), including the diversity and integrity of the environment (CP art. 79). With that aim, it adopted as a primary principle of economic policy the planning of the management and use of the natural resources in a way so as to guarantee their sustainable development, conservation, restoration or substitution (CP art. 80) and of the state intervention in the economy in order to support the preservation of a healthy environment (CP art. 334). In the execution of these policies, the State must, among other functions, prevent and control the factors that deteriorate the environment.

The non-fulfillment of the function of environmental vigilance on the part of the official entities who are in charge of the care and preservation of the environment foster private abuses in the exploitation of the natural resources. This situation can be seen as aggravated if, after having caused damage to the forest, the State does not timely act in order to prevent and control the factors deteriorating the environment (CP art. 80). The omission of the state function of restoring the gravely altered environment continues the threat of injuring the fundamental rights, whose protection is the matter of the present acción de tutela.

....

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**López Ostra v. Spain**  
303-C Eur. Ct. H.R. (ser. A) (1994)  
<<http://www.echr.coe.int>>

*[Mrs. López Ostra, a Spanish National and resident of Lorca, filed a petition seeking protection of her fundamental rights. Mrs. Lorca claimed that the local authorities failed to act in respect to hazards caused by a waste-treatment plant. Mrs. Lorca, thus, claims that the authorities violated Article 8 (right to have respect for her home) and Article 3 (right to humane treatment) of the Convention. The government argued that Mrs. López had not exhausted domestic remedies, and that Mrs. López was not a victim because she had been rehoused in an apartment away from the waste-treatment plant. The Court found that environmental pollution may affect an individual's well being to the detriment of his or her private and family life. Therefore, the Court held that the municipality failed to take steps to protect Mrs. López thereby violating Article 8 of the*

*Convention. The Court concluded that there had been no breach of Article 3 (right to humane treatment).]*

*I. The circumstances of the case*

*A. Background to the case*

7. The town of Lorca has a heavy concentration of leather industries. Several tanneries there, all belonging to a limited company called SACURSA, had a plant for the treatment of liquid and solid waste built with a State subsidy on municipal land twelve metres away from the applicant's home.

8. The plant began to operate in July 1988 without the licence (licencia) from the municipal authorities required by Regulation 6 of the 1961 regulations on activities classified as causing nuisance and being unhealthy, noxious and dangerous ("the 1961 regulations"), and without having followed the procedure for obtaining such a licence (see paragraph 28 below).

Owing to a malfunction, its start-up released gas fumes, pestilential smells and contamination, which immediately caused health problems and nuisance to many Lorca people, particularly those living in the applicant's district. The town council evacuated the local residents and rehoused them free of charge in the town centre for the months of July, August and September 1988. In October the applicant and her family returned to their flat and lived there until February 1992 (see paragraph 21 below).

9. On 9 September 1988, following numerous complaints and in the light of reports from the health authorities and the Environment and Nature Agency (Agencia para el Medio Ambiente y la Naturaleza) for the Murcia region, the town council ordered cessation of one of the plant's activities - the settling of chemical and organic residues in water tanks (lagunaje) - while permitting the treatment of waste water contaminated with chromium to continue.

There is disagreement as to what the effects were of this partial shutdown, but it can be seen from the expert opinions and written evidence of 1991, 1992 and 1993, produced before the Commission by the Government and the applicant (see paragraphs 18-20 below), that certain nuisances continue and may endanger the health of those living nearby.

....

*I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS*

*A. The objection based on failure to exhaust domestic remedies*

35. The Government contended, as they had done before the Commission, that Mrs López Ostra had not exhausted domestic remedies. The special application for protection of fundamental rights she had chosen to make (see paragraphs 10-15 and 24-25 above) was not the appropriate means of raising questions of compliance with the ordinary law or disputes of a scientific nature over the effects of a waste-treatment plant. This procedure was a shortened, rapid one intended to remedy overt infringements of fundamental rights, and the taking of evidence under it was curtailed.

The applicant should, on the other hand, have instituted both criminal proceedings and ordinary administrative proceedings, which had proved to be effective under similar circumstances. In respect of the same facts, for instance, her sisters-in-law had brought ordinary administrative proceedings in April 1990 and had then lodged a criminal complaint on 13 November 1991. The relevant judicial authorities had ordered closure of the plant on 18 September and 15 November 1991 respectively, but enforcement of those orders had been stayed on account of appeals lodged by the municipal authorities and Crown Counsel (see paragraphs 16 and 17 above). On 27 October 1993 the plant had been closed by order of the judge in the criminal proceedings but both sets of proceedings were still pending in the Spanish courts. If the Court determined the present case on the basis of the documents produced by the parties relating to those proceedings, as the Commission did in its report, its decision would prejudice their outcome.

36. Like the Commission and the applicant, the Court considers that on the contrary the special application for protection of fundamental rights lodged by the applicant with the Murcia Audiencia Territorial (see paragraph 10 above) was an effective, rapid means of obtaining redress in the case of her complaints relating to her right to respect for her home and for her physical integrity, especially since that application could have had the outcome she desired, namely closure of the waste-treatment plant. Moreover, in both courts that dealt with the merits of the case (the Murcia Audiencia Territorial and the Supreme Court - see paragraphs 11 and 13 above) Crown Counsel had submitted that the application should be allowed.

37. As to the need to wait for the outcome of the two sets of proceedings brought by Mrs López Ostra's sisters-in-law in the ordinary (administrative and criminal) courts, the Court notes, like the Commission, that the applicant is not a party to those proceedings. Their subject-matter is, moreover, not exactly the same as that of the application for protection of fundamental rights, and thus of the application to Strasbourg, even if they might have the desired result. The ordinary administrative proceedings relate in particular to another question, the failure to obtain the municipal authorities' permission to build and operate the plant. The issue of whether SACURSA might be criminally liable for any environmental health offence is likewise different from that of the town's or other competent national authorities' inaction with regard to the nuisance caused by the plant.

38. Lastly, it remains to be determined whether, in order to exhaust domestic remedies, it was necessary for the applicant herself to institute either of the two types of proceedings in question. Here too the Court agrees with the Commission. Having had recourse to a remedy that was

effective and appropriate in relation to the infringement of which she had complained, the applicant was under no obligation also to bring other proceedings that were slower.

The applicant therefore provided the national courts with the opportunity which is in principle intended to be afforded to Contracting States by Article 26 (art. 26) of the Convention, namely the opportunity of putting right the violations alleged against them (see, inter alia, the *De Wilde, Ooms and Versyp v. Belgium* judgment of 18 June 1971, Series A no. 12, p. 29, para. 50, and the *Guzzardi v. Italy* judgment of 6 November 1980, Series A no. 39, p. 27, para. 72).

39. It follows that the objection must be dismissed.

*B. The objection that the applicant was not a victim*

40. The Government raised a second objection already advanced before the Commission. They acknowledged that Mrs López Ostra - like, for that matter, the other residents of Lorca - had been caused serious nuisance by the plant until 9 September 1988, when part of its activities ceased (see paragraph 9 above). However, even supposing that smells or noise - which would not have been excessive - had continued after that date, the applicant had in the meantime ceased to be a victim. From February 1992 the López Ostra family were rehoused in a flat in the town centre at the municipality's expense, and in February 1993 they moved into a house they had purchased (see paragraph 21 above). In any case, the closure of the plant in October 1993 brought all nuisance to an end, with the result that neither the applicant nor her family now suffered the alleged undesirable effects of its operation.

41. At the hearing the Delegate of the Commission pointed out that the investigating judge's decision of 27 October 1993 (see paragraph 22 above) did not mean that someone who had been forced by environmental conditions to abandon her home and subsequently to buy another house had ceased to be a victim.

42. The Court shares this opinion. Neither Mrs. López Ostra's move nor the waste-treatment plant's closure, which was moreover temporary (see paragraph 22 above), alters the fact that the applicant and her family lived for years only twelve metres away from a source of smells, noise and fumes.

At all events, if the applicant could now return to her former home following the decision to close the plant, this would be a factor to be taken into account in assessing the damage she sustained but would not mean that she ceased to be a victim (see, among many other authorities, the *Marckx v. Belgium* judgment of 13 June 1979, Series A no. 31, pp. 13-14, para. 27, and the *Inze v. Austria* judgment of 28 October 1987, Series A no. 126, p. 16, para. 32).

43. The objection is therefore unfounded.

*II. ALLEGED VIOLATION OF ARTICLE 8 (art. 8) OF THE CONVENTION*

44. Mrs López Ostra first contended that there had been a violation of Article 8 (art. 8) of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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.”

The Commission subscribed to this view, while the Government contested it.

45. The Government said that the complaint made to the Commission and declared admissible by it (see paragraphs 30 and 31 above) was not the same as the one that the Spanish courts had considered in the application for protection of fundamental rights since it appeared to be based on statements, medical reports and technical experts' opinions of later date than that application and wholly unconnected with it.

46. This argument does not persuade the Court. The applicant had complained of a situation which had been prolonged by the municipality's and the relevant authorities' failure to act. This inaction was one of the fundamental points both in the complaints made to the Commission and in the application to the Murcia Audiencia Territorial (see paragraph 10 above). The fact that it continued after the application to the Commission and the decision on admissibility cannot be held against the applicant. Where a situation under consideration is a persisting one, the Court may take into account facts occurring after the application has been lodged and even after the decision on admissibility has been adopted (see, as the earliest authority, the *Neumeister v. Austria* judgment of 27 June 1968, Series A no. 8, p. 21, para. 28, and p. 38, para. 7).

47. Mrs. López Ostra maintained that, despite its partial shutdown on 9 September 1988, the plant continued to emit fumes, repetitive noise and strong smells, which made her family's living conditions unbearable and caused both her and them serious health problems. She alleged in this connection that her right to respect for her home had been infringed.

48. The Government disputed that the situation was really as described and as serious (see paragraph 40 above).

49. On the basis of medical reports and expert opinions produced by the Government or the applicant (see paragraphs 18-19 above), the Commission noted, *inter alia*, that hydrogen sulphide emissions from the plant exceeded the permitted limit and could endanger the health of those living nearby and that there could be a causal link between those emissions and the applicant's

daughter's ailments.

50. In the Court's opinion, these findings merely confirm the first expert report submitted to the Audiencia Territorial on 19 January 1989 by the regional Environment and Nature Agency in connection with Mrs. López Ostra's application for protection of fundamental rights. Crown Counsel supported this application both at first instance and on appeal (see paragraphs 11 and 13 above). The Audiencia Territorial itself accepted that, without constituting a grave health risk, the nuisances in issue impaired the quality of life of those living in the plant's vicinity, but it held that this impairment was not serious enough to infringe the fundamental rights recognised in the Constitution (see paragraph 11 above).

51. Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. Whether the question is analysed in terms of a positive duty on the State - to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 (art. 8-1) -, as the applicant wishes in her case, or in terms of an "interference by a public authority" to be justified in accordance with paragraph 2 (art. 8-2), the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8 (art. 8-1), in striking the required balance the aims mentioned in the second paragraph (art. 8-2) may be of a certain relevance (see, in particular, the *Rees v. The United Kingdom* judgment of 17 October 1986, Series A no. 106, p. 15, para. 37, and the *Powell and Rayner v. the United Kingdom* judgment of 21 February 1990, Series A no. 172, p. 18, para. 41).

52. It appears from the evidence that the waste-treatment plant in issue was built by SACURSA in July 1988 to solve a serious pollution problem in Lorca due to the concentration of tanneries. Yet as soon as it started up, the plant caused nuisance and health problems to many local people (see paragraphs 7 and 8 above).

Admittedly, the Spanish authorities, and in particular the Lorca municipality, were theoretically not directly responsible for the emissions in question. However, as the Commission pointed out, the town allowed the plant to be built on its land and the State subsidised the plant's construction (see paragraph 7 above).

53. The town council reacted promptly by rehousing the residents affected, free of charge, in the town centre for the months of July, August and September 1988 and then by stopping one of the plant's activities from 9 September (see paragraphs 8 and 9 above). However, the council's members could not be unaware that the environmental problems continued after this partial shutdown (see paragraphs 9 and 11 above). This was, moreover, confirmed as early as 19 January 1989 by the regional Environment and Nature Agency's report and then by expert opinions in 1991, 1992 and 1993 (see paragraphs 11 and 18 above).

54. Mrs. López Ostra submitted that by virtue of the general supervisory powers conferred on the municipality by the 1961 regulations the municipality had a duty to act. In addition, the plant did not satisfy the legal requirements, in particular as regards its location and the failure to obtain a municipal licence (see paragraphs 8, 27 and 28 above).

55. On this issue the Court points out that the question of the lawfulness of the building and operation of the plant has been pending in the Supreme Court since 1991 (see paragraph 16 above). The Court has consistently held that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, *inter alia*, the *Casado Coca v. Spain* judgment of 24 February 1994, Series A no. 285-A, p. 18, para. 43).

At all events, the Court considers that in the present case, even supposing that the municipality did fulfil the functions assigned to it by domestic law (see paragraphs 27 and 28 above), it need only establish whether the national authorities took the measures necessary for protecting the applicant's right to respect for her home and for her private and family life under Article 8 (art. 8) (see, among other authorities and *mutatis mutandis*, the *X and Y v. the Netherlands* judgment of 26 March 1985, Series A no. 91, p. 11, para. 23).

56. It has to be noted that the municipality not only failed to take steps to that end after 9 September 1988 but also resisted judicial decisions to that effect. In the ordinary administrative proceedings instituted by Mrs. López Ostra's sisters-in-law it appealed against the Murcia High Court's decision of 18 September 1991 ordering temporary closure of the plant, and that measure was suspended as a result (see paragraph 16 above).

Other State authorities also contributed to prolonging the situation. On 19 November 1991 Crown Counsel appealed against the Lorca investigating judge's decision of 15 November temporarily to close the plant in the prosecution for an environmental health offence (see paragraph 17 above), with the result that the order was not enforced until 27 October 1993 (see paragraph 22 above).

57. The Government drew attention to the fact that the town had borne the expense of renting a flat in the centre of Lorca, in which the applicant and her family lived from 1 February 1992 to February 1993 (see paragraph 21 above).

The Court notes, however, that the family had to bear the nuisance caused by the plant for over three years before moving house with all the attendant inconveniences. They moved only when it became apparent that the situation could continue indefinitely and when Mrs López Ostra's daughter's paediatrician recommended that they do so (see paragraphs 16, 17 and 19 above). Under these circumstances, the municipality's offer could not afford complete redress for the nuisance and inconveniences to which they had been subjected.

58. Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the

interest of the town's economic well-being - that of having a waste-treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life.

There has accordingly been a violation of Article 8 (art. 8).

### III. ALLEGED VIOLATION OF ARTICLE 3 (art. 3) OF THE CONVENTION

59. Mrs. López Ostra submitted that the matters for which the respondent State was criticised were of such seriousness and had caused her such distress that they could reasonably be regarded as amounting to degrading treatment prohibited by Article 3 (art. 3) of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The Government and the Commission took the view that there had been no breach of this Article (art. 3).

60. The Court is of the same opinion. The conditions in which the applicant and her family lived for a number of years were certainly very difficult but did not amount to degrading treatment within the meaning of Article 3 (art. 3).

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#### **Guerra and Others v. Italy**

*Eur. Ct. H.R., Judgment of February 19, 1998, Reports 1998 I (1998)*

*<<http://www.echr.coe.int>>*

*[The applicants, Italian residents of the town of Manfredonia (Foggia), stated that the Italian government did not take the necessary measures to reduce pollution levels emanating from the Enicham Agricoltura Factory. Thus, applicants argued that the Italian State violated Article 2 (the right to life and physical integrity) and Article 8 (right to respect for private and family life). Furthermore, the applicants claimed that the authorities failed to inform the public about the hazards and procedures in the event of an accident as required by Italian law. Accordingly, the applicants argued that the authorities violated their right to freedom of information, as set forth in Article 10 of the Convention. The European Court of Human Rights concluded that the Italian Government violated Article 8 of the Convention. Article 8 protects the individuals against arbitrary interference by public authorities. The Court held that even though Italy did not*

*interfere with the public, it failed to act. By failing to take the necessary steps to ensure the protection of the individual, the Italian government violated their rights to have respect of their private and family life. The Court found violations of Article 10 not applicable and did not find it necessary to consider violations of Article 2.]*

A. *The Enichem agricoltura factory*

12. The applicants all live in the town of Manfredonia (Foggia). Approximately one kilometre away is the Enichem agricoltura company's chemical factory, which lies within the municipality of Monte Sant'Angelo.

13. In 1988 the factory, which produced fertilisers and caprolactam (a chemical compound producing, by a process of polycondensation, a polyamide used in the manufacture of synthetic fibres such as nylon), was classified as "high risk" according to the criteria set out in Presidential Decree no. 175 of 18 May 1988 ("DPR 175/88"), which transposed into Italian law Directive 82/501/EEC of the Council of the European Communities (the "Seveso" directive) on the major-accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population.

14. The applicants said that in the course of its production cycle the factory released large quantities of inflammable gas – a process which could have led to explosive chemical reactions, releasing highly toxic substances – and sulphur dioxide, nitric oxide, sodium, ammonia, metal hydrides, benzoic acid and above all, arsenic trioxide. These assertions have not been disputed by the Government.

15. Accidents due to malfunctioning have already occurred in the past, the most serious one on 26 September 1976 when the scrubbing tower for the ammonia synthesis gases exploded, allowing several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, to escape. One hundred and fifty people were admitted to hospital with acute arsenic poisoning.

16. In a report of 8 December 1988 a committee of technical experts appointed by Manfredonia District Council established that because of the factory's geographical position, emissions from it into the atmosphere were often channelled towards Manfredonia. It was noted in the report that the factory had refused to allow the committee to carry out an inspection and that the results of a study by the factory itself showed that the emission treatment equipment was inadequate and the environmental-impact assessment incomplete.

17. In 1989 the factory restricted its activity to the production of fertilisers, and it was accordingly still classified as a dangerous factory covered by DPR 175/88. In 1993 the Ministry for the Environment issued an order jointly with the Ministry of Health prescribing measures to be taken by the factory to improve the safety of the ongoing fertiliser production, and of

caprolactam production if that was resumed (see paragraph 27 below).

18. In 1994 the factory permanently stopped producing fertiliser. Only a thermoelectric power station and plant for the treatment of feed and waste water continued to operate.

....

## II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

47. The applicants alleged that they were the victims of a violation of Article 10 of the Convention, which provides:

“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 alleged breach resulted from the authorities’ failure to take steps to ensure that the public were informed of the risks and of what was to be done in the event of an accident connected with the factory’s operation.

....

### I. scope of the case

39. Before the Commission the applicants made two complaints. Firstly, the authorities had not taken appropriate action to reduce the risk of pollution by the Enichem agricoltura chemical factory at Manfredonia (“the factory”) and to avoid the risk of major accidents; that situation, they asserted, infringed their right to life and physical integrity as guaranteed by Article 2 of the Convention. Secondly, the Italian State had failed to take steps to provide information about the risks and how to proceed in the event of a major accident, as they were required to do by Articles 11 § 3 and 17 § 2 of Presidential Decree no. 175/88 (“DPR 175/88”); as a result the applicants

considered that there had been a breach of their right to freedom of information laid down in Article 10 of the Convention.

....

45. In the instant case the grounds based on Articles 8 and 2 were not expressly set out in the application or the applicants' initial memorials lodged in the proceedings before the Commission. Clearly, however, those grounds were closely connected with the one pleaded, namely that giving information to the applicants, all of whom lived barely a kilometre from the factory, could have had a bearing on their private and family life and their physical integrity.

46. Having regard to the foregoing and to the Commission's decision on admissibility, the Court holds that it has jurisdiction to consider the case under Articles 8 and 2 of the Convention as well as under Article 10.

....

*B. Merits of the complaint*

50. It remains to be determined whether Article 10 of the Convention is applicable and, if so, whether it has been infringed.

51. In the Government's submission, that provision merely guaranteed freedom to receive information without hindrance by States; it did not impose any positive obligation. That was shown by the fact that Resolution 1087 (1996) of the Council of Europe's Parliamentary Assembly and Directive 90/313/EEC of the Council of the European Communities on freedom of access to information on the environment spoke merely of access, not a right, to information. If a positive obligation to provide information existed, it would be "extremely difficult to implement" because of the need to determine how and when the information was to be disclosed, which authorities were responsible for disclosing it and who was to receive it.

52. Like the applicants, the Commission was of the opinion that the provision of information to the public was now one of the essential means of protecting the well-being and health of the local population in situations in which the environment was at risk. Consequently, the words "This right shall include freedom ... to receive ... information..." in paragraph 1 of Article 10 had to be construed as conferring an actual right to receive information, in particular from the relevant authorities, on members of local populations who had been or might be affected by an industrial or other activity representing a threat to the environment.

Article 10 imposed on States not just a duty to make available information to the public on environmental matters, a requirement with which Italian law already appeared to comply, by virtue of section 14(3) of Law no. 349 in particular, but also a positive obligation to collect, process and disseminate such information, which by its nature could not otherwise come to the

knowledge of the public. The protection afforded by Article 10 therefore had a preventive function with respect to potential violations of the Convention in the event of serious damage to the environment and Article 10 came into play even before any direct infringement of other fundamental rights, such as the right to life or to respect for private and family life, occurred.

53. The Court does not subscribe to that view. In cases concerning restrictions on freedom of the press it has on a number of occasions recognised that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest (see, among other authorities, the *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, p. 30, § 59 (b), and the *Thorgeirson v. Iceland* judgment of 25 June 1992, Series A no. 239, p. 27, § 63). The facts of the present case are, however, clearly distinguishable from those of the aforementioned cases since the applicants complained of a failure in the system set up pursuant to DPR 175/88, which had transposed into Italian law Directive 82/501/EEC of the Council of the European Communities (the “Seveso” directive) on the major-accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population. Although the prefect of Foggia prepared the emergency plan on the basis of the report submitted by the factory and the plan was sent to the Civil Defence Department on 3 August 1993, the applicants have yet to receive the relevant information (see paragraphs 26 and 27 above).

The Court reiterates that freedom to receive information, referred to in paragraph 2 of Article 10 of the Convention, “basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him” (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 29, § 74). That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.

54. In conclusion, Article 10 is not applicable in the instant case.

55. In the light of what was said in paragraph 45 above, the case falls to be considered under Article 8 of the Convention.

### *III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION*

56. The applicants, relying on the same facts, maintained before the Court that they had been the victims of a violation of Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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.”

57. The Court’s task is to determine whether Article 8 is applicable and, if so, whether it has been infringed.

The Court notes, firstly, that all the applicants live at Manfredonia, approximately a kilometre away from the factory, which, owing to its production of fertilisers and caprolactam, was classified as being high-risk in 1988, pursuant to the criteria laid down in DPR 175/88.

In the course of its production cycle the factory released large quantities of inflammable gas and other toxic substances, including arsenic trioxide. Moreover, in 1976, following the explosion of the scrubbing tower for the ammonia synthesis gases, several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, escaped and 150 people had to be hospitalised on account of acute arsenic poisoning.

In addition, in its report of 8 December 1988, a committee of technical experts appointed by the Manfredonia District Council said in particular that because of the factory’s geographical position, emissions from it into the atmosphere were often channelled towards Manfredonia (see paragraphs 14–16 above).

The direct effect of the toxic emissions on the applicants’ right to respect for their private and family life means that Article 8 is applicable.

58. The Court considers that Italy cannot be said to have “interfered” with the applicants’ private or family life; they complained not of an act by the State but of its failure to act. However, 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 effective respect for private or family life (see the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, p. 17, § 32).

In the present case it need only be ascertained whether the national authorities took the necessary steps to ensure effective protection of the applicants’ right to respect for their private and family life as guaranteed by Article 8 (see the *Lopez Ostra v. Spain* judgment of 9 December 1994, Series A no. 303-C, p. 55, § 55).

59. On 14 September 1993, pursuant to Article 19 of DPR 175/88, the Ministry for the Environment and the Ministry of Health jointly adopted conclusions on the safety report submitted by the factory in July 1989. Those conclusions prescribed improvements to be made to the installations, both in relation to current fertiliser production and in the event of resumed caprolactam production, and provided the prefect with instructions as to the emergency plan –

that he had drawn up in 1992 –and the measures required for informing the local population under Article 17 of DPR 175/88.

In a letter of 7 December 1995 to the European Commission of Human Rights, however, the mayor of Monte Sant’Angelo indicated that the investigation for the purpose of drawing up conclusions under Article 19 was still continuing and that he had not received any documents relating to them. He pointed out that the District Council was still awaiting direction from the Civil Defence Department before deciding what safety measures should be taken and what procedures should be followed in the event of an accident and communicated to the public. He said that if the factory resumed production, the measures for informing the public would be taken as soon as the conclusions based on the investigation were available (see paragraph 27 above).

60. The Court reiterates that severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely (see, *mutatis mutandis*, the Lopez Ostra judgment cited above, p. 54, § 51). In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.

The Court holds, therefore, that the respondent State did not fulfil its obligation to secure the applicants’ right to respect for their private and family life, in breach of Article 8 of the Convention.

There has consequently been a violation of that provision.

#### *IV. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION*

61. Referring to the fact that workers from the factory had died of cancer, the applicants also argued that the failure to provide the information in issue had infringed their right to life as guaranteed by Article 2 of the Convention . . . .

. . . .

62. Having regard to its conclusion that there has been a violation of Article 8, the Court finds it unnecessary to consider the case under Article 2 also.

\* \* \* \* \*

# APPENDIX

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## **HUMAN RIGHTS TREATIES**

### **AMERICAN CONVENTION ON HUMAN RIGHTS**

**ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS “PROTOCOL OF SAN SALVADOR”**

**INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE**

**INTER-AMERICAN CONVENTION ON THE FORCED DISAPPEARANCE OF PERSONS**

**INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN “CONVENTION OF BELEM DO PARÁ”**

**INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

**OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**

**INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

**CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT**

**CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**

**OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**

**[EUROPEAN] CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

**PROTOCOL TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

**PROTOCOL No. 4 TO THE 1950 CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, SECURING CERTAIN RIGHTS AND FREEDOMS OTHER THAN THOSE INCLUDED IN THE CONVENTION AND IN PROTOCOL No. 1**

**PROTOCOL No. 6 TO THE 1950 EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS CONCERNING THE ABOLITION OF THE DEATH PENALTY**

**PROTOCOL No. 7 TO THE 1950 EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

**PROTOCOL No. 12 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

**AMERICAN CONVENTION ON HUMAN RIGHTS**  
*opened for signature November 22, 1969, entered into force July 18, 1978*  
<[www.cidh.oas.org](http://www.cidh.oas.org)>

*Preamble*

The American states signatory to the present Convention,

Reaffirming their intention 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;

Recognizing 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, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters,

Have agreed upon the following:

**PART I - STATE OBLIGATIONS AND RIGHTS PROTECTED**

**CHAPTER I - GENERAL OBLIGATIONS**

## **Article 1. Obligation to Respect Rights**

1. The States Parties to this Convention 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 for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, “person” means every human being.

## **Article 2. Domestic Legal Effects**

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

## **CHAPTER II - CIVIL AND POLITICAL RIGHTS**

### **Article 3. Right to Juridical Personality**

Every person has the right to recognition as a person before the law.

### **Article 4. Right to Life**

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant

women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

### **Article 5. Right to Humane Treatment**

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. 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.
5. 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.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

### **Article 6. Freedom from Slavery**

1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.
2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.
3. For the purposes of this article, the following do not constitute forced or compulsory labor:
  - a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons

performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;

b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;

c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or

d. work or service that forms part of normal civic obligations.

### **Article 7. Right to Personal Liberty**

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.

4. 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.

5. Any person 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 a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

6. 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.

7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

### **Article 8. Right to a Fair Trial**

1. 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.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- a. 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;
- b. prior notification in detail to the accused of the charges against him;
- c. adequate time and means for the preparation of his defense;
- d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
- f. the right of the defense 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;
- g. the right not to be compelled to be a witness against himself or to plead guilty; and
- h. the right to appeal the judgment to a higher court.

3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.

4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

### **Article 9. Freedom from Ex Post Facto Laws**

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty

person shall benefit therefrom.

### **Article 10. Right to Compensation**

Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

### **Article 11. Right to Privacy**

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

### **Article 12. Freedom of Conscience and Religion**

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change ones religion or beliefs, and freedom to profess or disseminate ones 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 ones 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 and moral education of their children or wards that is in accord with their own convictions.

### **Article 13. Freedom of Thought and Expression**

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 ones 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 opinions.
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 offenses punishable by law.

#### **Article 14. Right of Reply**

1. 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.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. 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 15. Right of 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 freedom of others.

#### **Article 16. 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 right 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 17. Rights of the Family**

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. 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. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.
5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

#### **Article 18. Right to a Name**

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.

#### **Article 19. Rights of the Child**

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.

#### **Article 20. Right to Nationality**

1. Every person has the right to a nationality.
2. 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.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

### **Article 21. Right to Property**

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

### **Article 22. Freedom of Movement and Residence**

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
2. Every person has the right to leave any country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
8. In no case may an alien be deported or returned to a country, regardless of whether or not it is

his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.

9. The collective expulsion of aliens is prohibited.

### **Article 23. Right to Participate in Government**

1. Every citizen shall enjoy the following rights and opportunities:

- a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. 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; and
- c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

### **Article 24. Right to Equal Protection**

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

### **Article 25. Right to Judicial Protection**

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.

## CHAPTER III - ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

### Article 26. Progressive Development

The States Parties undertake to adopt measures, both internally and through international cooperation, 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.

## CHAPTER IV - SUSPENSION OF GUARANTEES, INTERPRETATION, AND APPLICATION

### Article 27. Suspension of Guarantees

1. 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.
2. 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 Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.
3. 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.

### Article 28. Federal Clause

1. Where a State Party is constituted as a federal state, the national government of such State

Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.

2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.

3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized.

### **Article 29. Restrictions Regarding Interpretation**

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

### **Article 30. Scope of Restrictions**

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

### **Article 31. Recognition of Other Rights**

Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.

## **CHAPTER V - PERSONAL RESPONSIBILITIES**

### **Article 32. Relationship between Duties and Rights**

1. Every person has responsibilities to his family, his community, and mankind.
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.

## **PART II - MEANS OF PROTECTION**

### **CHAPTER VI - COMPETENT ORGANS**

#### **Article 33**

The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

- a. the Inter-American Commission on Human Rights, referred to as The Commission; and
- b. the Inter-American Court of Human Rights, referred to as The Court.

### **CHAPTER VII - INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

#### **SECTION 1. ORGANIZATION**

#### **Article 34**

The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights.

#### **Article 35**

The Commission shall represent all the member countries of the Organization of American

States.

### **Article 36**

1. The members of the Commission shall be elected in a personal capacity by the General Assembly of the Organization from a list of candidates proposed by the governments of the member states.
2. Each of those governments may propose up to three candidates, who may be nationals of the states proposing them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.

### **Article 37**

1. The members of the Commission shall be elected for a term of four years and may be reelected only once, but the terms of three of the members chosen in the first election shall expire at the end of two years. Immediately following that election the General Assembly shall determine the names of those three members by lot.
2. No two nationals of the same state may be members of the Commission.

### **Article 38**

Vacancies that may occur on the Commission for reasons other than the normal expiration of a term shall be filled by the Permanent Council of the Organization in accordance with the provisions of the Statute of the Commission.

### **Article 39**

The Commission shall prepare its Statute, which it shall submit to the General Assembly for approval. It shall establish its own Regulations.

### **Article 40**

Secretariat services for the Commission shall be furnished by the appropriate specialized unit of the General Secretariat of the Organization. This unit shall be provided with the resources required to accomplish the tasks assigned to it by the Commission.

## **SECTION 2. FUNCTIONS**

## **Article 41**

The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- a. to develop an awareness of human rights among the peoples of America;
- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c. to prepare such studies or reports as it considers advisable in the performance of its duties;
- d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- g. to submit an annual report to the General Assembly of the Organization of American States.

## **Article 42**

The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may watch over the promotion 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.

## **Article 43**

The States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention.

### **SECTION 3. COMPETENCE**

#### **Article 44**

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

#### **Article 45**

1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.

3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.

4. Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization.

#### **Article 46**

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:

a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;

b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;

c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and

d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity

lodging the petition.

2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:

- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
- b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

#### **Article 47**

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

- a. any of the requirements indicated in Article 46 has not been met;
- b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;
- c. the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or
- d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

#### **SECTION 4. PROCEDURE**

#### **Article 48**

1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:

- a. If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.

b. After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed.

c. The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.

d. If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities.

e. The Commission may request the states concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned.

f. The Commission shall 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.

2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed.

#### **Article 49**

If a friendly settlement has been reached in accordance with paragraph 1.f of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to this Convention, and shall then be communicated to the Secretary General of the Organization of American States for publication. This report shall contain a brief statement of the facts and of the solution reached. If any party in the case so requests, the fullest possible information shall be provided to it.

#### **Article 50**

1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties

in accordance with paragraph 1.e of Article 48 shall also be attached to the report.

2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.

3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.

### **Article 51**

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

## **CHAPTER VIII - INTER-AMERICAN COURT OF HUMAN RIGHTS**

### **SECTION 1. ORGANIZATION**

#### **Article 52**

1. The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.

2. No two judges may be nationals of the same state.

#### **Article 53**

1. The judges of the Court shall be elected by secret ballot by an absolute majority vote of the States Parties to the Convention, in the General Assembly of the Organization, from a panel of candidates proposed by those states.

2. Each of the States Parties may propose up to three candidates, nationals of the state that proposes them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.

#### **Article 54**

1. The judges of the Court shall be elected for a term of six years and may be reelected only once. The term of three of the judges chosen in the first election shall expire at the end of three years. Immediately after the election, the names of the three judges shall be determined by lot in the General Assembly.

2. A judge elected to replace a judge whose term has not expired shall complete the term of the latter.

3. The judges shall continue in office until the expiration of their term. However, they shall continue to serve with regard to cases that they have begun to hear and that are still pending, for which purposes they shall not be replaced by the newly elected judges.

#### **Article 55**

1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.

2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an ad hoc judge.

3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an ad hoc judge.

4. An ad hoc judge shall possess the qualifications indicated in Article 52.

5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

#### **Article 56**

Five judges shall constitute a quorum for the transaction of business by the Court.

#### **Article 57**

The Commission shall appear in all cases before the Court.

#### **Article 58**

1. The Court shall have its seat at the place determined by the States Parties to the Convention in the General Assembly of the Organization; however, it may convene in the territory of any member state of the Organization of American States when a majority of the Court considers it desirable, and with the prior consent of the state concerned. The seat of the Court may be changed by the States Parties to the Convention in the General Assembly by a two-thirds vote.

2. The Court shall appoint its own Secretary.

3. The Secretary shall have his office at the place where the Court has its seat and shall attend the meetings that the Court may hold away from its seat.

#### **Article 59**

The Court shall establish its Secretariat, which shall function under the direction of the Secretary of the Court, in accordance with the administrative standards of the General Secretariat of the Organization in all respects not incompatible with the independence of the Court. The staff of the Courts Secretariat shall be appointed by the Secretary General of the Organization, in consultation with the Secretary of the Court.

#### **Article 60**

The Court shall draw up its Statute which it shall submit to the General Assembly for approval. It shall adopt its own Rules of Procedure.

### **SECTION 2. JURISDICTION AND FUNCTIONS**

#### **Article 61**

1. Only the States Parties and the Commission shall have the right to submit a case to the Court.

2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed.

## **Article 62**

1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.
3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

## **Article 63**

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

## **Article 64**

1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

## **Article 65**

To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.

### **SECTION 3. PROCEDURE**

#### **Article 66**

1. Reasons shall be given for the judgment of the Court.
2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.

#### **Article 67**

The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

#### **Article 68**

1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.
2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

#### **Article 69**

The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Parties to the Convention.

### **CHAPTER IX - COMMON PROVISIONS**

#### **Article 70**

1. The judges of the Court and the members of the Commission shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law. During the exercise of their official function they shall, in addition, enjoy the diplomatic privileges necessary for the performance of their duties.

2. At no time shall the judges of the Court or the members of the Commission be held liable for any decisions or opinions issued in the exercise of their functions.

### **Article 71**

The position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of such judge or member, as determined in the respective statutes.

### **Article 72**

The judges of the Court and the members of the Commission shall receive emoluments and travel allowances in the form and under the conditions set forth in their statutes, with due regard for the importance and independence of their office. Such emoluments and travel allowances shall be determined in the budget of the Organization of American States, which shall also include the expenses of the Court and its Secretariat. To this end, the Court shall draw up its own budget and submit it for approval to the General Assembly through the General Secretariat. The latter may not introduce any changes in it.

### **Article 73**

The General Assembly may, only at the request of the Commission or the Court, as the case may be, determine sanctions to be applied against members of the Commission or judges of the Court when there are justifiable grounds for such action as set forth in the respective statutes. A vote of a two-thirds majority of the member states of the Organization shall be required for a decision in the case of members of the Commission and, in the case of judges of the Court, a two-thirds majority vote of the States Parties to the Convention shall also be required.

## **PART III - GENERAL AND TRANSITORY PROVISIONS**

### **CHAPTER X - SIGNATURE, RATIFICATION, RESERVATIONS, AMENDMENTS, PROTOCOLS, AND DENUNCIATION**

### **Article 74**

1. This Convention shall be open for signature and ratification by or adherence of any member

state of the Organization of American States.

2. Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.

3. The Secretary General shall inform all member states of the Organization of the entry into force of the Convention.

#### **Article 75**

This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on May 23, 1969.

#### **Article 76**

1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.

2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

#### **Article 77**

1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.

2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it.

#### **Article 78**

1. The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties.

2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.

## **CHAPTER XI - TRANSITORY PROVISIONS**

### **SECTION 1. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

#### **Article 79**

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each member state of the Organization to present, within ninety days, its candidates for membership on the Inter-American Commission on Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented, and transmit it to the member states of the Organization at least thirty days prior to the next session of the General Assembly.

#### **Article 80**

The members of the Commission shall be elected by secret ballot of the General Assembly from the list of candidates referred to in Article 79. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the member states shall be declared elected. Should it become necessary to have several ballots in order to elect all the members of the Commission, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the General Assembly.

### **SECTION 2. INTER-AMERICAN COURT OF HUMAN RIGHTS**

#### **Article 81**

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each State Party to present, within ninety days, its candidates for membership on the Inter-American Court of Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented and transmit it to the States Parties at least thirty days prior to the next session of the General Assembly.

#### **Article 82**

The judges of the Court shall be elected from the list of candidates referred to in Article 81, by secret ballot of the States Parties to the Convention in the General Assembly. The candidates

who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties shall be declared elected. Should it become necessary to have several ballots in order to elect all the judges of the Court, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the States Parties.

**ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS  
IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS  
“PROTOCOL OF SAN SALVADOR”**  
*opened for signature on November 17, 1988, entered into force November 16, 1999*  
<[www.cidh.oas.org](http://www.cidh.oas.org)>

*Preamble*

The States Parties to the American Convention on Human Rights “Pact San José, Costa Rica,”

Reaffirming their intention 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;

Recognizing 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 person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States;

Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified;

Recognizing the benefits that stem from the promotion and development of cooperation among States and international relations;

Recalling that, in accordance with the Universal Declaration of Human Rights and the American Convention on 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;

Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources; and

Considering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting

together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof, Have agreed upon the following Additional Protocol to the American Convention on Human Rights “Protocol of San Salvador:”

### **Article 1. Obligation to Adopt Measures**

The States Parties to this Additional Protocol to the American Convention on Human Rights 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 into 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.

### **Article 2. Obligation to Enact Domestic Legislation**

If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality.

### **Article 3. Obligation of nondiscrimination**

The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein 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.

### **Article 4. Inadmissibility of Restrictions**

A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.

### **Article 5. Scope of Restrictions and Limitations**

The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.

### **Article 6. Right to Work**

1. Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.

2. The State Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled. The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.

### **Article 7. Just, Equitable, and Satisfactory Conditions of Work**

The States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to:

a. Remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction;

b. The right of every worker to follow his vocation and to devote himself to the activity that best fulfills his expectations and to change employment in accordance with the pertinent national regulations;

c. The right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority;

d. Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation;

e. Safety and hygiene at work;

f. The prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety, or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefitting from education received;

g. A reasonable limitation of working hours, both daily and weekly. The days shall be shorter in the case of dangerous or unhealthy work or of night work;

h. Rest, leisure and paid vacations as well as remuneration for national holidays.

### **Article 8. Trade Union Rights**

1. The States Parties shall ensure:

a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;

b. The right to strike.

2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.

3. No one may be compelled to belong to a trade union.

### **Article 9. Right to Social Security**

1. Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents.

2. In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.

### **Article 10. Right to Health**

1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.

2. In order to ensure the exercise of the right to health, the States Parties agree to recognize

health as a public good and, particularly, to adopt the following measures to ensure that right:

- a. Primary health care, that is, essential health care made available to all individuals and families in the community;
- b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction;
- c. Universal immunization against the principal infectious diseases;
- d. Prevention and treatment of endemic, occupational and other diseases;
- e. Education of the population on the prevention and treatment of health problems, and
- f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

#### **Article 11. Right to a Healthy Environment**

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment.

#### **Article 12. Right to Food**

1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.
2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.

#### **Article 13. Right to Education**

1. Everyone has the right to education.
2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship

among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.

3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:

- a. Primary education should be compulsory and accessible to all without cost;
- b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
- c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;
- d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;
- e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.

5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.

#### **Article 14. Right to the Benefits of Culture**

1. The States Parties to this Protocol recognize the right of everyone:

- a. To take part in the cultural and artistic life of the community;
- b. To enjoy the benefits of scientific and technological progress;
- c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this

right shall include those necessary for the conservation, development and dissemination of science, culture and art.

3. The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to this Protocol recognize the benefits to be derived from the encouragement and development of international cooperation and relations in the fields of science, arts and culture, and accordingly agree to foster greater international cooperation in these fields.

#### **Article 15. Right to the Formation and the Protection of Families**

1. The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions.

2. Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation.

3. The States Parties hereby undertake to accord adequate protection to the family unit and in particular:

a. To provide special care and assistance to mothers during a reasonable period before and after childbirth;

b. To guarantee adequate nutrition for children at the nursing stage and during school attendance years;

c. To adopt special measures for the protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities;

d. To undertake special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility.

#### **Article 16. Rights of Children**

Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

### **Article 17. Protection of the Elderly**

Everyone has the right to special protection in old age. With this in view the States Parties agree to take progressively the necessary steps to make this right a reality and, particularly, to:

- a. Provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves;
- b. Undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires;
- c. Foster the establishment of social organizations aimed at improving the quality of life for the elderly.

### **Article 18. Protection of the Handicapped**

Everyone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality. The States Parties agree to adopt such measures as may be necessary for this purpose and, especially, to:

- a. Undertake programs specifically aimed at providing the handicapped with the resources and environment needed for attaining this goal, including work programs consistent with their possibilities and freely accepted by them or their legal representatives, as the case may be;
- b. Provide special training to the families of the handicapped in order to help them solve the problems of coexistence and convert them into active agents in the physical, mental and emotional development of the latter;
- c. Include the consideration of solutions to specific requirements arising from needs of this group as a priority component of their urban development plans;
- d. Encourage the establishment of social groups in which the handicapped can be helped to enjoy a fuller life.

### **Article 19. Means of Protection**

1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol.

2. All reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.

3. The Secretary General of the Organization of American States shall also transmit to the specialized organizations of the inter-American system of which the States Parties to the present Protocol are members, copies or pertinent portions of the reports submitted, insofar as they relate to matters within the purview of those organizations, as established by their constituent instruments.

4. The specialized organizations of the inter-American system may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity.

5. The annual reports submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture shall contain a summary of the information received from the States Parties to the present Protocol and the specialized organizations concerning the progressive measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.

6. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.

7. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.

8. The Councils and the Inter-American Commission on Human Rights, in discharging the functions conferred upon them in this article, shall take into account the progressive nature of the observance of the rights subject to protection by this Protocol.

## **Article 20. Reservations**

The States Parties may, at the time of approval, signature, ratification or accession, make reservations to one or more specific provisions of this Protocol, provided that such reservations are not incompatible with the object and purpose of the Protocol.

**Article 21. Signature, Ratification or Accession. Entry into Effect**

1. This Protocol shall remain open to signature and ratification or accession by any State Party to the American Convention on Human Rights.
2. Ratification of or accession to this Protocol shall be effected by depositing an instrument of ratification or accession with the General Secretariat of the Organization of American States.
3. The Protocol shall enter into effect when eleven States have deposited their respective instruments of ratification or accession.
4. The Secretary General shall notify all the member states of the Organization of American States of the entry of the Protocol into effect.

**Article 22. Inclusion of other Rights and Expansion of those Recognized**

1. Any State Party and the Inter-American Commission on Human Rights may submit for the consideration of the States Parties meeting on the occasion of the General Assembly proposed amendments to include the recognition of other rights or freedoms or to extend or expand rights or freedoms recognized in this Protocol.
2. Such amendments shall enter into effect for the States that ratify them on the date of deposit of the instrument of ratification corresponding to the number representing two thirds of the States Parties to this Protocol. For all other States Parties they shall enter into effect on the date on which they deposit their respective instrument of ratification.

**INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE**  
*opened for signature on December 9, 1985, entered into force on February 28, 1987*  
<[www.cidh.oas.org](http://www.cidh.oas.org)>

The American States signatory to the present Convention,

Aware of the provision of the American Convention on Human Rights that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment;

Reaffirming that all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations and are violations of the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights;

Noting that, in order for the pertinent rules contained in the aforementioned global and regional instruments to take effect, it is necessary to draft an Inter-American Convention that prevents and punishes torture;

Reaffirming their purpose of consolidating in this hemisphere the conditions that make for recognition of and respect for the inherent dignity of man, and ensure the full exercise of his fundamental rights and freedoms,

Have agreed upon the following:

**Article 1**

The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

**Article 2**

For the purposes of this 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.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

### **Article 3**

The following shall be held guilty of the crime of torture:

- a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
- b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

### **Article 4**

The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability.

### **Article 5**

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.

Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.

### **Article 6**

In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

### **Article 7**

The States Parties shall take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their

freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest.

The States Parties likewise shall take similar measures to prevent other cruel, inhuman, or degrading treatment or punishment.

#### **Article 8**

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

#### **Article 9**

The States Parties undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture.

None of the provisions of this article shall affect the right to receive compensation that the victim or other persons may have by virtue of existing national legislation.

#### **Article 10**

No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means.

#### **Article 11**

The States Parties shall take the necessary steps to extradite anyone accused of having committed the crime of torture or sentenced for commission of that crime, in accordance with their respective national laws on extradition and their international commitments on this matter.

#### **Article 12**

Every State Party shall take the necessary measures to establish its jurisdiction over the crime described in this Convention in the following cases:

- a. When torture has been committed within its jurisdiction;
- b. When the alleged criminal is a national of that State; or
- c. When the victim is a national of that State and it so deems appropriate.

Every State Party shall also take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11.

This Convention does not exclude criminal jurisdiction exercised in accordance with domestic law.

### **Article 13**

The crime referred to in Article 2 shall be deemed to be included among the extraditable crimes in every extradition treaty entered into between States Parties. The States Parties undertake to include the crime of torture as an extraditable offence in every extradition treaty to be concluded between them.

Every State Party that makes extradition conditional on the existence of a treaty may, if it receives a request for extradition from another State Party with which it has no extradition treaty, consider this Convention as the legal basis for extradition in respect of the crime of torture. Extradition shall be subject to the other conditions that may be required by the law of the requested State.

States Parties which do not make extradition conditional on the existence of a treaty shall recognize such crimes as extraditable offences between themselves, subject to the conditions required by the law of the requested State.

Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.

### **Article 14**

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested the

extradition.

#### **Article 15**

No provision of this Convention may be interpreted as limiting the right of asylum, when appropriate, nor as altering the obligations of the States Parties in the matter of extradition.

#### **Article 16**

This Convention shall not limit the provisions of the American Convention on Human Rights, other conventions on the subject, or the Statutes of the Inter-American Commission on Human Rights, with respect to the crime of torture.

#### **Article 17**

The States Parties undertake to inform the Inter-American Commission on Human Rights of any legislative, judicial, administrative, or other measures they adopt in application of this Convention.

In keeping with its duties and responsibilities, the Inter-American Commission on Human Rights will endeavor 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.

#### **Article 18**

This Convention is open to signature by the member states of the Organization of American States.

#### **Article 19**

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

#### **Article 20**

This Convention is open to accession by any other American state. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

#### **Article 21**

The States Parties may, at the time of approval, signature, ratification, or accession, make reservations to this Convention, provided that such reservations are not incompatible with the object and purpose of the Convention and concern one or more specific provisions.

## **Article 22**

This Convention shall enter into force on the thirtieth day following the date on which the second instrument of ratification is deposited. For each State ratifying or acceding to the Convention after the second instrument of ratification has been deposited, the Convention shall enter into force on the thirtieth day following the date on which that State deposits its instrument of ratification or accession.

## **Article 23**

This Convention shall remain in force indefinitely, but may be denounced by any State Party. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, this Convention shall cease to be in effect for the denouncing State but shall remain in force for the remaining States Parties.

## **Article 24**

The original instrument of this Convention, the English, French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall send a certified copy to the Secretariat of the United Nations for registration and publication, in accordance with the provisions of Article 102 of the United Nations Charter. The General Secretariat of the Organization of American States shall notify the member states of the Organization and the States that have acceded to the Convention of signatures and of deposits of instruments of ratification, accession, and denunciation, as well as reservations, if any.

**INTER-AMERICAN CONVENTION ON THE FORCED DISAPPEARANCE OF PERSONS**

*opened for signature on June 9, 1994, entered into force March 28, 1996*

*<[www.cidh.oas.org](http://www.cidh.oas.org)>*

*Preamble*

The member states of the Organization of American States signatory to the present Convention,  
DISTURBED by the persistence of the forced disappearance of persons;

REAFFIRMING that the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in this Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights;

CONSIDERING that the forced disappearance of persons is an affront to the conscience of the Hemisphere and a grave and abominable offense against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States;

CONSIDERING that the forced disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights;

RECALLING that the international protection of human rights is in the form of a convention reinforcing or complementing the protection provided by domestic law and is based upon the attributes of the human personality;

REAFFIRMING that the systematic practice of the forced disappearance of persons constitutes a crime against humanity;

HOPING that this Convention may help to prevent, punish, and eliminate the forced disappearance of persons in the Hemisphere and make a decisive contribution to the protection of human rights and the rule of law,

RESOLVE to adopt the following Inter-American Convention on Forced Disappearance of Persons:

**Article I**

The States Parties to this Convention undertake:

- a. Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees;
- b. 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;
- c. To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons;
- d. To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.

## **Article II**

For the purposes of this 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 information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

## **Article III**

The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.

The States Parties may establish mitigating circumstances for persons who have participated in acts constituting forced disappearance when they help to cause the victim to reappear alive or provide information that sheds light on the forced disappearance of a person.

## **Article IV**

The acts constituting the forced disappearance of persons shall be considered offenses in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases in the following instances:

- a. When the forced disappearance of persons or any act constituting such offense was committed within its jurisdiction;

- b. When the accused is a national of that state;
- c. When the victim is a national of that state and that state sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.

This Convention does not authorize any State Party to undertake, in the territory of another State Party, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of that other Party by its domestic law.

### **Article V**

The forced disappearance of persons shall not be considered a political offense for purposes of extradition.

The forced disappearance of persons shall be deemed to be included among the extraditable offenses in every extradition treaty entered into between States Parties.

The States Parties undertake to include the offense of forced disappearance as one which is extraditable in every extradition treaty to be concluded between them in the future.

Every State Party that makes extradition conditional on the existence of a treaty and receives a request for extradition from another State Party with which it has no extradition treaty may consider this Convention as the necessary legal basis for extradition with respect to the offense of forced disappearance.

States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offense as extraditable, subject to the conditions imposed by the law of the requested state.

Extradition shall be subject to the provisions set forth in the constitution and other laws of the request state.

### **Article VI**

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offense had been committed within its jurisdiction, for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the state that has requested the extradition.

## **Article VII**

Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.

However, if there should be a norm of a fundamental character preventing application of the stipulation contained in the previous paragraph, the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the corresponding State Party.

## **Article VIII**

The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them.

The States Parties shall ensure that the training of public law-enforcement personnel or officials includes the necessary education on the offense of forced disappearance of persons.

## **Article IX**

Persons alleged to be responsible for the acts constituting the offense 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.

The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties.

Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations.

## **Article X**

In no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency 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 pursuing such procedures or recourse, and in keeping with applicable domestic law, the competent judicial authorities shall have free and immediate access to all detention centers 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.

## **Article XI**

Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay, in accordance with applicable domestic law.

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.

## **Article XII**

The States Parties shall give each other mutual assistance in the search for, identification, location, and return of minors who have been removed to another state or detained therein as a consequence of the forced disappearance of their parents or guardians.

## **Article XIII**

For the purposes of this Convention, 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 Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures.

## **Article XIV**

Without prejudice to the provisions of the preceding article, when the Inter-American Commission on Human Rights receives a petition or communication regarding an alleged forced disappearance, its Executive Secretariat shall urgently and confidentially address the respective government, and shall request that government to provide as soon as possible information as to the whereabouts of the allegedly disappeared person together with any other information it considers pertinent, and such request shall be without prejudice as to the admissibility of the petition.

## **Article XV**

None of the provisions of this Convention shall be interpreted as limiting other bilateral or multilateral treaties or other agreements signed by the Parties.

This Convention shall not apply to the international armed conflicts governed by the 1949 Geneva Conventions and their Protocols, concerning protection of wounded, sick, and

shipwrecked members of the armed forces; and prisoners of war and civilians in time of war.

#### **Article XVI**

This Convention is open for signature by the member states of the Organization of American States.

#### **Article XVII**

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

#### **Article XVIII**

This Convention shall be open to accession by any other state. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

#### **Article XIX**

The states may express reservations with respect to this Convention when adopting, signing, ratifying or acceding to it, unless such reservations are incompatible with the object and purpose of the Convention and as long as they refer to one or more specific provisions.

#### **Article XX**

This Convention shall enter into force for the ratifying states on the thirtieth day from the date of deposit of the second instrument of ratification.

For each state ratifying or acceding to the Convention after the second instrument of ratification has been deposited, the Convention shall enter into force on the thirtieth day from the date on which that state deposited its instrument of ratification or accession.

#### **Article XXI**

This Convention shall remain in force indefinitely, but may be denounced by any State Party. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. The Convention shall cease to be in effect for the denouncing state and shall remain in force for the other States Parties one year from the date of deposit of the instrument of denunciation.

#### **Article XXII**

The original instrument of this Convention, the Spanish, English, Portuguese, and French texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall forward certified copies thereof to the United Nations Secretariat, for registration and publication, in accordance with Article 102 of the Charter of the United Nations. The General Secretariat of the Organization of American States shall notify member states of the Organization and states acceding to the Convention of the signatures and deposit of instruments of ratification, accession or denunciation, as well as of any reservations that may be expressed.

**INTER-AMERICAN CONVENTION ON THE PREVENTION, PUNISHMENT  
AND ERADICATION OF VIOLENCE AGAINST WOMEN**  
**“CONVENTION OF BELEM DO PARÁ”**  
*opened for signature on June 9, 1994, entered into force on March 5, 1995*  
<[www.cidh.oas.org](http://www.cidh.oas.org)>

THE STATES PARTIES TO THIS CONVENTION,

RECOGNIZING that full respect for human rights has been enshrined in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights, and reaffirmed in other international and regional instruments;

AFFIRMING that violence against women constitutes a violation of their human rights and fundamental freedoms, and impairs or nullifies the observance, enjoyment and exercise of such rights and freedoms;

CONCERNED that violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men;

RECALLING the Declaration on the Elimination of Violence against Women, adopted by the Twenty-fifth Assembly of Delegates of the Inter-American Commission of Women, and affirming that violence against women pervades every sector of society regardless of class, race or ethnic group, income, culture, level of education, age or religion and strikes at its very foundations:

CONVINCED that the elimination of violence against women is essential for their individual and social development and their full and equal participation in all walks of life; and

CONVINCED that the adoption of a convention on the prevention, punishment and eradication of all forms of violence against women within the framework of the Organization of American States is a positive contribution to protecting the rights of women and eliminating violence against them,

HAVE AGREED to the following:

## CHAPTER I

### DEFINITION AND SCOPE OF APPLICATION

## **Article 1**

For the purposes of this 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.

## **Article 2**

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 woman, including, among others, rape, battery and sexual abuse;
- b. that occurs in the community and is perpetrated by any 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.

## **CHAPTER II**

### **RIGHTS PROTECTED**

#### **Article 3**

Every woman has the right to be free from violence in both the public and private spheres.

#### **Article 4**

Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others:

- a. The right to have her life respected;
- b. The right to have her physical, mental and moral integrity respected;

- c. The right to personal liberty and security;
- d. The right not to be subjected to torture;
- e. The rights to have the inherent dignity of her person respected and her family protected;
- f. The right to equal protection before the law and of the law;
- g. The right to simple and prompt recourse to a competent court for protection against acts that violate her rights;
- h. The right to associate freely;
- i. The right of freedom to profess her religion and beliefs within the law; and
- j. The right to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making.

#### **Article 5**

Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognize that violence against women prevents and nullifies the exercise of these rights.

#### **Article 6**

The right of every woman to be free from violence includes, among others:

- a. The right of women to be free from all forms of discrimination; and
- b. The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.

### **CHAPTER III**

#### **DUTIES OF THE STATES**

#### **Article 7**

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

- a. 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 this obligation;
- b. apply due diligence to prevent, investigate and impose penalties for violence against women;
- c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
- d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
- e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
- f. establish 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;
- g. 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; and
- h. adopt such legislative or other measures as may be necessary to give effect to this Convention.

### **Article 8**

The States Parties agree to undertake progressively specific measures, including programs:

- a. to promote awareness and observance of the right of women to be free from violence, and the right of women to have their human rights respected and protected;
- b. to modify social and cultural patterns of conduct of men and women, including the

development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women;

c. to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women;

d. to provide appropriate specialized services for women who have been subjected to violence, through public and private sector agencies, including shelters, counseling services for all family members where appropriate, and care and custody of the affected children;

e. to promote and support governmental and private sector education designed to raise the awareness of the public with respect to the problems of and remedies for violence against women;

f. to provide women who are subjected to violence access to effective readjustment and training programs to enable them to fully participate in public, private and social life;

g. to encourage the communications media to develop appropriate media guidelines in order to contribute to the eradication of violence against women in all its forms, and to enhance respect for the dignity of women;

h. to ensure research and the gathering of statistics and other relevant information relating to the causes, consequences and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement the necessary changes; and

i. to foster international cooperation for the exchange of ideas and experiences and the execution of programs aimed at protecting women who are subjected to violence.

### **Article 9**

With respect to the adoption of the measures in this Chapter, 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.

## **CHAPTER IV**

### **INTER-AMERICAN MECHANISMS OF PROTECTION**

#### **Article 10**

In order to protect the rights of every woman to be free from violence, the States Parties shall include in their national reports to the Inter-American Commission of Women information on measures adopted to prevent and prohibit violence against women, and to assist women affected by violence, as well as on any difficulties they observe in applying those measures, and the factors that contribute to violence against women.

#### **Article 11**

The States Parties to this Convention and the Inter-American Commission of Women may request of the Inter-American Court of Human Rights advisory opinions on the interpretation of this Convention.

#### **Article 12**

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, 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, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.

## **CHAPTER V**

### **GENERAL PROVISIONS**

#### **Article 13**

No part of this Convention shall be understood to restrict or limit the domestic law of any State Party that affords equal or greater protection and guarantees of the rights of women and appropriate safeguards to prevent and eradicate violence against women.

#### **Article 14**

No part of this Convention shall be understood to restrict or limit the American Convention on Human Rights or any other international convention on the subject that provides for equal or greater protection in this area.

#### **Article 15**

This Convention is open to signature by all the member states of the Organization of American States.

#### **Article 16**

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

#### **Article 17**

This Convention is open to accession by any other state. Instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

#### **Article 18**

Any State may, at the time of approval, signature, ratification, or accession, make reservations to this Convention provided that such reservations are:

- a. not incompatible with the object and purpose of the Convention, and
- b. not of a general nature and relate to one or more specific provisions.

#### **Article 19**

Any State Party may submit to the General Assembly, through the Inter-American Commission of Women, proposals for the amendment of this Convention.

Amendments shall enter into force for the states ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

#### **Article 20**

If a State Party has two or more territorial units in which the matters dealt with in this Convention are governed by different systems of law, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or to only one or more of them.

Such a declaration may be amended at any time by subsequent declarations, which shall expressly specify the territorial unit or units to which this Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall enter into force thirty days after the date of their receipt.

#### **Article 21**

This Convention shall enter into force on the thirtieth day after the date of deposit of the second instrument of ratification. For each State that ratifies or accedes to the Convention after the second instrument of ratification is deposited, it shall enter into force thirty days after the date on which that State deposited its instrument of ratification or accession.

#### **Article 22**

The Secretary General shall inform all member states of the Organization of American States of the entry into force of this Convention.

#### **Article 23**

The Secretary General of the Organization of American States shall present an annual report to the member states of the Organization on the status of this Convention, including the signatures, deposits of instruments of ratification and accession, and declarations, and any reservations that may have been presented by the States Parties, accompanied by a report thereon if needed.

#### **Article 24**

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it by depositing an instrument to that effect with the General Secretariat of the Organization of American States. One year after the date of deposit of the instrument of denunciation, this Convention shall cease to be in effect for the denouncing State but shall remain in force for the remaining States Parties.

#### **Article 25**

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall send a certified copy to the Secretariat of the United Nations for registration and publication in accordance with the provisions of Article 102 of the United

Nations Charter.

In witness whereof the undersigned Plenipotentiaries, being duly authorized thereto by their respective governments, have signed this Convention, which shall be called the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belem do Para”.

Done in the city of Belem do Para, Brazil, the ninth of June in the year one thousand nine hundred ninety-four.

**INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS**  
*opened for signature on December 16, 1966, entered into force March 23, 1976*  
<[www.unhchr.ch](http://www.unhchr.ch)>

*Preamble*

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing 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,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

**PART I**

**Article 1**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## **PART II**

### **Article 2**

1. Each State Party to the present Covenant 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.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present 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.

### **Article 3**

The States Parties to the present Covenant 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.

### **Article 4**

1. 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.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. 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.

### **Article 5**

1. Nothing in the present Covenant 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 recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

## **PART III**

### **Article 6**

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any

obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

#### **Article 7**

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

#### **Article 8**

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term “forced or compulsory labour” shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

### **Article 9**

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. 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 and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

### **Article 10**

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2.
  - (a) 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;
  - (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

### **Article 11**

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

## **Article 12**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.

## **Article 13**

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

## **Article 14**

1. All persons shall be equal before the courts and tribunals. 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. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but 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.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the

nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and 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;

(e) 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;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. 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.

7. 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 15**

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was

committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice 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 16**

Everyone shall have the right to recognition everywhere as a person before the law.

#### **Article 17**

1. 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.

2. Everyone has the right to the protection of the law against such interference or attacks.

#### **Article 18**

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 19**

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 or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

### **Article 20**

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

### **Article 21**

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 22**

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 Organisation 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 23**

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

### **Article 24**

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

### **Article 25**

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (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 26**

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.

#### **Article 27**

In those States in which ethnic, religious or linguistic minorities exist, 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 practise their own religion, or to use their own language.

### **PART IV**

#### **Article 28**

1. There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee). It shall consist of eighteen members and shall carry out the functions hereinafter provided.
2. The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience.
3. The members of the Committee shall be elected and shall serve in their personal capacity.

#### **Article 29**

1. The members of the Committee shall be elected by secret ballot from a list of persons possessing the qualifications prescribed in article 28 and nominated for the purpose by the States Parties to the present Covenant.
2. Each State Party to the present Covenant may nominate not more than two persons. These persons shall be nationals of the nominating State.
3. A person shall be eligible for renomination.

#### **Article 30**

1. The initial election shall be held no later than six months after the date of the entry into force of the present Covenant.
2. At least four months before the date of each election to the Committee, other than an election

to fill a vacancy declared in accordance with article 34, the Secretary-General of the United Nations shall address a written invitation to the States Parties to the present Covenant to submit their nominations for membership of the Committee within three months.

3. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, with an indication of the States Parties which have nominated them, and shall submit it to the States Parties to the present Covenant no later than one month before the date of each election.

4. Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations. At that meeting, for which two thirds of the States Parties to the present Covenant shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

#### **Article 31**

1. The Committee may not include more than one national of the same State.

2. In the election of the Committee, consideration shall be given to equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.

#### **Article 32**

1. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the Chairman of the meeting referred to in article 30, paragraph 4.

2. Elections at the expiry of office shall be held in accordance with the preceding articles of this part of the present Covenant.

#### **Article 33**

1. If, in the unanimous opinion of the other members, a member of the Committee has ceased to carry out his functions for any cause other than absence of a temporary character, the Chairman of the Committee shall notify the Secretary-General of the United Nations, who shall then declare the seat of that member to be vacant.

2. In the event of the death or the resignation of a member of the Committee, the Chairman shall

immediately notify the Secretary-General of the United Nations, who shall declare the seat vacant from the date of death or the date on which the resignation takes effect.

#### **Article 34**

1. When a vacancy is declared in accordance with article 33 and if the term of office of the member to be replaced does not expire within six months of the declaration of the vacancy, the Secretary-General of the United Nations shall notify each of the States Parties to the present Covenant, which may within two months submit nominations in accordance with article 29 for the purpose of filling the vacancy.
2. The Secretary-General of the United Nations shall prepare a list in alphabetical order of the persons thus nominated and shall submit it to the States Parties to the present Covenant. The election to fill the vacancy shall then take place in accordance with the relevant provisions of this part of the present Covenant.
3. A member of the Committee elected to fill a vacancy declared in accordance with article 33 shall hold office for the remainder of the term of the member who vacated the seat on the Committee under the provisions of that article.

#### **Article 35**

The members of the Committee shall, with the approval of the General Assembly of the United Nations, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide, having regard to the importance of the Committee's responsibilities.

#### **Article 36**

The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Covenant.

#### **Article 37**

1. The Secretary-General of the United Nations shall convene the initial meeting of the Committee at the Headquarters of the United Nations.
2. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
3. The Committee shall normally meet at the Headquarters of the United Nations or at the United Nations Office at Geneva.

### **Article 38**

Every member of the Committee shall, before taking up his duties, make a solemn declaration in open committee that he will perform his functions impartially and conscientiously.

### **Article 39**

1. The Committee shall elect its officers for a term of two years. They may be re-elected.
2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:
  - (a) Twelve members shall constitute a quorum;
  - (b) Decisions of the Committee shall be made by a majority vote of the members present.

### **Article 40**

1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
  - (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
  - (b) Thereafter whenever the Committee so requests.
2. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit them to the Committee for consideration. Reports shall indicate the factors and difficulties, if any, affecting the implementation of the present Covenant.
3. The Secretary-General of the United Nations may, after consultation with the Committee, transmit to the specialized agencies concerned copies of such parts of the reports as may fall within their field of competence.
4. The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties. The Committee may also transmit to the Economic and Social Council these comments along with the copies of the reports it has received from States Parties to the present Covenant.
5. The States Parties to the present Covenant may submit to the Committee observations on any comments that may be made in accordance with paragraph 4 of this article.

## Article 41

1. A State Party to the present Covenant may at any time declare under this article that it recognizes 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. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Covenant considers that another State Party is not giving effect to the provisions of the present Covenant, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), 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 human rights and fundamental freedoms as recognized in the present Covenant;

(f) In any matter referred to it, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered in the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Covenant have made declarations under paragraph I of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned had made a new declaration.

## Article 42

1. (a) If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with a view to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five persons acceptable to the States Parties concerned. If the States Parties concerned fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not Party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United

Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of subparagraph (b) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

### **Article 43**

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 42, shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

### **Article 44**

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

### **Article 45**

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

## **PART V**

### **Article 46**

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

### **Article 47**

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

## **PART VI**

### **Article 48**

1. The present Covenant is open for signature by any State Member of the United Nations or

member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to the present Covenant.

2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed this Covenant or acceded to it of the deposit of each instrument of ratification or accession.

#### **Article 49**

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

#### **Article 50**

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

#### **Article 51**

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General of the United Nations shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

#### **Article 52**

Irrespective of the notifications made under article 48, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

(a) Signatures, ratifications and accessions under article 48;

(b) The date of the entry into force of the present Covenant under article 49 and the date of the entry into force of any amendments under article 51.

#### **Article 53**

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 48.

In faith whereof the undersigned, being duly authorized thereto by their respective Governments, have signed the present Covenant, opened for signature at New York, on the nineteenth day of December, one thousand nine hundred and sixty-six.

**OPTIONAL PROTOCOL TO THE INTERNATIONAL  
COVENANT ON CIVIL AND POLITICAL RIGHTS**

*opened for signature December 16, 1966, entered into force March 23, 1976*

*<www.unhchr.ch>*

The States Parties to the present Protocol,

Considering that in order further to achieve the purposes of the International Covenant on Civil and Political Rights (hereinafter referred to as the Covenant) and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant (hereinafter referred to as the Committee) to receive and consider, as provided in the present Protocol, communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

Have agreed as follows:

**Article 1**

A State Party to the Covenant that becomes a Party to the present Protocol 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. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

**Article 2**

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

**Article 3**

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

**Article 4**

1. Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.

2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

#### **Article 5**

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.

2. The Committee shall not consider any communication from an individual unless it has ascertained that:

(a) The same matter is not being examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

3. The Committee shall hold closed meetings when examining communications under the present Protocol.

4. The Committee shall forward its views to the State Party concerned and to the individual.

#### **Article 6**

The Committee shall include in its annual report under article 45 of the Covenant a summary of its activities under the present Protocol.

#### **Article 7**

Pending the achievement of the objectives of resolution 1514(XV) adopted by the General Assembly of the United Nations on 14 December 1960 concerning the Declaration on the Granting of Independence to Colonial Countries and Peoples, the provisions of the present Protocol shall in no way limit the right of petition granted to these peoples by the Charter of the United Nations and other international conventions and instruments under the United Nations and its specialized agencies.

#### **Article 8**

1. The present Protocol is open for signature by any State which has signed the Covenant.

2. The present Protocol is subject to ratification by any State which has ratified or acceded to the Covenant. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Protocol shall be open to accession by any State which has ratified or acceded to the Covenant.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

#### **Article 9**

1. Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.

2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or instrument of accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

#### **Article 10**

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

#### **Article 11**

1. Any State Party to the present Protocol may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Protocol with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendment which they have accepted.

## **Article 12**

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General.
2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation.

## **Article 13**

Irrespective of the notifications made under article 8, paragraph 5, of the present Protocol, the Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph I, of the Covenant of the following particulars:

- (a) Signatures, ratifications and accessions under article 8;
- (b) The date of the entry into force of the present Protocol under article 9 and the date of the entry into force of any amendments under article 11;
- (c) Denunciations under article 12.

## **Article 14**

1. The present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

**INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**  
*opened for signature on December 16, 1966, entered into force Jan. 3, 1976*  
<[www.unhchr.ch](http://www.unhchr.ch)>

*Preamble*

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing 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,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

**PART I**

**Article 1**

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## **PART II**

### **Article 2**

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.

### **Article 3**

The States Parties to the present Covenant undertake 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.

### **Article 4**

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights 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.

### **Article 5**

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for

in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

### **PART III**

#### **Article 6**

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

#### **Article 7**

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) remuneration which provides all workers, as a minimum, with:

(i) 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;

(ii) a decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) safe and healthy working conditions;

(c) 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;

(d) rest, leisure and reasonable limitation of working hours and periodic holidays with

pay, as well as remuneration for public holidays

### **Article 8**

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right 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;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations 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;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

### **Article 9**

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

### **Article 10**

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with

the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

### **Article 11**

1. 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 and 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.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

### **Article 12**

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.

### **Article 13**

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right

- (a) primary education shall be compulsory and available free to all;
- (b) secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as

may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

#### **Article 14**

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

#### **Article 15**

1. The States Parties to the present Covenant recognize the right of everyone:

(a) to take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

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 the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

### **PART IV**

#### **Article 16**

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.
2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;  
  
(b) The Secretary-General of the United Nations shall also transmit to the specialized agencies copies of the reports, or any relevant parts thereof, from States Parties to the present Covenant which are also members of these specialized agencies in so far as these reports, or parts thereof, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

### **Article 17**

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialized agencies concerned.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.
3. Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

### **Article 18**

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialized agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

### **Article 19**

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human

rights submitted by the specialized agencies in accordance with article 18.

#### **Article 20**

The States Parties to the present Covenant and the specialized agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

#### **Article 21**

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

#### **Article 22**

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

#### **Article 23**

The States Parties to the present Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned.

#### **Article 24**

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant.

## **Article 25**

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

## **PART V**

## **Article 26**

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

## **Article 27**

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

## **Article 28**

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

## **Article 29**

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.
3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

## **Article 30**

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

- (a) Signatures, ratifications and accessions under article 26;
- (b) The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

## **Article 31**

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

**CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN  
OR DEGRADING TREATMENT OR PUNISHMENT**  
*opened for signature on December 10, 1984, entered into force June 26, 1987*  
<[www.unhchr.ch](http://www.unhchr.ch)>

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,

Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,

Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

**PART I**

**Article 1**

1. For the purposes of this 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. It does not include pain or suffering arising

only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

### **Article 2**

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. 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.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

### **Article 3**

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.

### **Article 4**

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

### **Article 5**

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
  - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) When the alleged offender is a national of that State;

(c) When the victim is a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

### **Article 6**

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

### **Article 7**

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be

less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

### **Article 8**

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

### **Article 9**

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

### **Article 10**

1. Each State Party shall 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.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

### **Article 11**

Each State Party 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 arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

### **Article 12**

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.

### **Article 13**

Each State Party shall 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.

### **Article 14**

1. 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. In the event of the death of the victim as a result of an act of torture, his dependants [sic] shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

### **Article 15**

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.

### **Article 16**

1. Each State Party shall undertake 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, 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. In particular, the

obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

## **PART II**

### **Article 17**

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in

paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

### **Article 18**

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:

(a) Six members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

### **Article 19**

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.
3. Each report shall be considered by the Committee which may make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph I of this article.

### **Article 20**

1. 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, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2 of this article, the Commission shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs I to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, 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 made in accordance with article 24.

### **Article 21**

1. A State Party to this Convention may at any time declare under this article that it recognizes

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 this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure;

(a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

(d) The Committee shall hold closed meetings when examining communications under this article;

(e) Subject to the provisions of subparagraph (c), 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. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;

(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b), submit a report:

(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

## **Article 22**

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary General, unless the State Party has made a new declaration.

### **Article 23**

The members of the Committee and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph I (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

### **Article 24**

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

## **PART III**

### **Article 25**

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### **Article 26**

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

#### **Article 27**

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

#### **Article 28**

1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.
2. Any State Party having made a reservation in accordance with paragraph I of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

#### **Article 29**

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
2. An amendment adopted in accordance with paragraph I of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

### **Article 30**

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by paragraph I of this article with respect to any State Party having made such a reservation.

3. Any State Party having made a reservation in accordance with paragraph 2 of this article may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

### **Article 31**

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective, nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

### **Article 32**

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications and accessions under articles 25 and 26;

(b) The date of entry into force of this Convention under article 27 and the date of the entry into force of any amendments under article 29;

(c) Denunciations under article 31.

### **Article 33**

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

**CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**  
*opened for signature* December 18, 1979, *entry into force* September 3, 1981  
<[www.unhchr.ch](http://www.unhchr.ch)>

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,

Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women,

Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs,

Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of *apartheid*, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, the relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole,

Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

## **PART I**

### **Article 1**

For the purposes of the present Convention, 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.

### **Article 2**

States Parties condemn discrimination against women in all its forms, agree to pursue by all

appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) 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;
- (d) 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;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

### **Article 3**

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

### **Article 4**

1. Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
2. Adoption by States Parties of special measures, including those measures contained in the

present Convention, aimed at protecting maternity shall not be considered discriminatory.

#### **Article 5**

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices 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;
- (b) 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.

#### **Article 6**

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

### **PART II**

#### **Article 7**

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**

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

#### **Article 9**

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.

### **PART III**

#### **Article 10**

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

- (a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;

- (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
- (g) The same opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

### **Article 11**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss

of former employment, seniority or social allowances;

(c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

### **Article 12**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

### **Article 13**

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits;

(b) The right to bank loans, mortgages and other forms of financial credit;

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

### **Article 14**

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;
- (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
- (c) To benefit directly from social security programmes;
- (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;
- (f) To participate in all community activities;
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

## **PART IV**

### **Article 15**

1. States Parties shall accord to women equality with men before the law.
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.
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.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

### **Article 16**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) 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;
- (e) 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;
- (f) 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;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) 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.

2. The betrothal and the 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.

## **PART V**

## Article 17

1. For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of the present Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5. The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.

6. The election of the five additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the thirty-fifth ratification or accession. The terms of two of the additional members elected on this occasion shall expire at the end of two years, the names of these two members having been chosen by lot by the Chairman of the Committee.

7. For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the

approval of the Committee.

8. The members of the Committee shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide, having regard to the importance of the Committee's responsibilities.

9. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

### **Article 18**

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within one year after the entry into force for the State concerned;

(b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

### **Article 19**

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

### **Article 20**

1. The Committee shall normally meet for a period of not more than two weeks annually in order to consider the reports submitted in accordance with article 18 of the present Convention.

2. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee.

### **Article 21**

1. The Committee shall, through the Economic and Social Council, report annually to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of reports and information received from the States Parties. Such suggestions and general recommendations shall be included in the report of the

Committee together with comments, if any, from States Parties.

2. The Secretary-General of the United Nations shall transmit the reports of the Committee to the Commission on the Status of Women for its information.

#### **Article 22**

The specialized agencies shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their activities. The Committee may invite the specialized agencies to submit reports on the implementation of the Convention in areas falling within the scope of their activities.

### **PART VI**

#### **Article 23**

Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained:

- (a) In the legislation of a State Party; or
- (b) In any other international convention, treaty or agreement in force for that State.

#### **Article 24**

States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.

#### **Article 25**

1. The present Convention shall be open for signature by all States.
2. The Secretary-General of the United Nations is designated as the depositary of the present Convention.
3. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. The present Convention shall be open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

## **Article 26**

1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

## **Article 27**

1. The present Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

## **Article 28**

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

## **Article 29**

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph I of this article. The other States Parties shall not be bound by that paragraph with respect to any State Party which has made such a reservation.

3. Any State Party which has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

### **Article 30**

The present Convention, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations. In witness whereof the undersigned, duly authorized, have signed the present Convention.

**OPTIONAL PROTOCOL TO THE CONVENTION ON THE ELIMINATION  
OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**  
*opened for signature on December 10, 1999, entry into force December 22, 2000*  
<[www.unhchr.ch](http://www.unhchr.ch)>

**PREAMBLE**

The States Parties to the present Protocol,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Also noting that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Recalling that the International Covenants on Human Rights and other international human rights instruments prohibit discrimination on the basis of sex,

Also recalling the Convention on the Elimination of All Forms of Discrimination against Women (“the Convention”), in which the States Parties thereto condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women,

Reaffirming their determination to ensure the full and equal enjoyment by women of all human rights and fundamental freedoms and to take effective action to prevent violations of these rights and freedoms,

Have agreed as follows:

**Article 1**

A State Party to the present Protocol (“State Party”) recognizes the competence of the Committee on the Elimination of Discrimination against Women (“the Committee”) to receive and consider communications submitted in accordance with article 2.

**Article 2**

Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of

individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.

### **Article 3**

Communications shall be in writing and shall not be anonymous. No communication shall be received by the Committee if it concerns a State Party to the Convention that is not a party to the present Protocol.

### **Article 4**

1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.

2. The Committee shall declare a communication inadmissible where:

- (a) The same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement;
- (b) It is incompatible with the provisions of the Convention;
- (c) It is manifestly ill-founded or not sufficiently substantiated;
- (d) It is an abuse of the right to submit a communication;
- (e) The facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date.

### **Article 5**

1. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

2. Where the Committee exercises its discretion under paragraph 1 of the present article, this does not imply a determination on admissibility or on the merits of the communication.

### **Article 6**

1. Unless the Committee considers a communication inadmissible without reference to the State Party concerned, and provided that the individual or individuals consent to the disclosure of their identity to that State Party, the Committee shall bring any communication submitted to it under the present Protocol confidentially to the attention of the State Party concerned.

2. Within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party.

#### **Article 7**

1. The Committee shall consider communications received under the present Protocol in the light of all information made available to it by or on behalf of individuals or groups of individuals and by the State Party concerned, provided that this information is transmitted to the parties concerned.

2. The Committee shall hold closed meetings when examining communications under the present Protocol.

3. After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned.

4. The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.

5. The Committee may invite the State Party to submit further information about any measures the State Party has taken in response to its views or recommendations, if any, including as deemed appropriate by the Committee, in the State Party's subsequent reports under article 18 of the Convention.

#### **Article 8**

1. If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations that may have been submitted by the State Party concerned as well as any other reliable information available to it, the Committee may designate one or more of its members to conduct an inquiry and to report urgently to the Committee.

Where warranted and with the consent of the State Party, the inquiry may include a visit to its territory.

3. After examining the findings of such an inquiry, the Committee shall transmit these findings to the State Party concerned together with any comments and recommendations.

4. The State Party concerned shall, within six months of receiving the findings, comments and recommendations transmitted by the Committee, submit its observations to the Committee.

5. Such an inquiry shall be conducted confidentially and the cooperation of the State Party shall be sought at all stages of the proceedings.

#### **Article 9**

1. The Committee may invite the State Party concerned to include in its report under article 18 of the Convention details of any measures taken in response to an inquiry conducted under article 8 of the present Protocol.

2. The Committee may, if necessary, after the end of the period of six months referred to in article 8.4, invite the State Party concerned to inform it of the measures taken in response to such an inquiry.

#### **Article 10**

1. Each State Party may, at the time of signature or ratification of the present Protocol or accession thereto, declare that it does not recognize the competence of the Committee provided for in articles 8 and 9.

2. Any State Party having made a declaration in accordance with paragraph 1 of the present article may, at any time, withdraw this declaration by notification to the Secretary-General.

#### **Article 11**

A State Party shall take all appropriate steps to ensure that individuals under its jurisdiction are not subjected to ill treatment or intimidation as a consequence of communicating with the Committee pursuant to the present Protocol.

#### **Article 12**

The Committee shall include in its annual report under article 21 of the Convention a summary of its activities under the present Protocol.

#### **Article 13**

Each State Party undertakes to make widely known and to give publicity to the Convention and the present Protocol and to facilitate access to information about the views and recommendations of the Committee, in particular, on matters involving that State Party.

#### **Article 14**

The Committee shall develop its own rules of procedure to be followed when exercising the functions conferred on it by the present Protocol.

#### **Article 15**

1. The present Protocol shall be open for signature by any State that has signed, ratified or acceded to the Convention.
2. The present Protocol shall be subject to ratification by any State that has ratified or acceded to the Convention. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified or acceded to the Convention.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

#### **Article 16**

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

#### **Article 17**

No reservations to the present Protocol shall be permitted.

#### **Article 18**

1. Any State Party may propose an amendment to the present Protocol and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify her or him whether

they favour a conference of States Parties for the purpose of considering and voting on the proposal. In the event that at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Protocol in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

#### **Article 19**

1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect six months after the date of receipt of the notification by the Secretary-General.

2. Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 or any inquiry initiated under article 8 before the effective date of denunciation.

#### **Article 20**

The Secretary-General of the United Nations shall inform all States of:

- (a) Signatures, ratifications and accessions under the present Protocol;
- (b) The date of entry into force of the present Protocol and of any amendment under article 18;
- (c) Any denunciation under article 19.

#### **Article 21**

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 25 of the Convention.

**CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

*[as amended by Protocol No. 11]*

opened for signature on November 4, 1950

<[www.echr.coe.int](http://www.echr.coe.int)>

*The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed and Protocol No. 10 (ETS No. 146) has lost its purpose.*

The Governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

**Article 1 – Obligation to respect human rights**

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

## **Section I – Rights and freedoms**

### **Article 2 – Right to life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article 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.

### **Article 3 – Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### **Article 4 – Prohibition of slavery and forced labour**

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term "forced or compulsory labour" shall not include:
  - a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
  - c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - d. any work or service which forms part of normal civic obligations.

### **Article 5 – Right to liberty and security**

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 unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. 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.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. 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.

5. 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.

#### **Article 6 – Right to a fair trial**

1. 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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, 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.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b. to have adequate time and facilities for the preparation of his defence;
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d. 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;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

#### **Article 7 – No punishment without law**

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

2. This article shall not prejudice 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 recognised by civilised nations.

#### **Article 8 – Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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.

### **Article 9 – Freedom of thought, conscience and religion**

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.

### **Article 10 – Freedom of expression**

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.

### **Article 11 – Freedom of assembly and association**

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.

### **Article 12 – Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

### **Article 13 – Right to an effective remedy**

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.

### **Article 14 – Prohibition of discrimination**

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.

### **Article 15 – Derogation in time of emergency**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under 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.

2. 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.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

### **Article 16 – Restrictions on political activity of aliens**

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

### **Article 17 – Prohibition of abuse of rights**

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.

### **Article 18 – Limitation on use of restrictions on rights**

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

## **Section II – European Court of Human Rights**

### **Article 19 – Establishment of the Court**

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as “the Court”. It shall function on a permanent basis.

### **Article 20 – Number of judges**

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

### **Article 21 – Criteria for office**

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

### **Article 22 – Election of judges**

1. The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.
2. The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

### **Article 23 – Terms of office**

1. The judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.
2. The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election.
3. In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.
4. In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.
5. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.
6. The terms of office of judges shall expire when they reach the age of 70.
7. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

#### **Article 24 – Dismissal**

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

#### **Article 25 – Registry and legal secretaries**

The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.

#### **Article 26 – Plenary Court**

The plenary Court shall:

- a. elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- b. set up Chambers, constituted for a fixed period of time;

- c. elect the Presidents of the Chambers of the Court; they may be re-elected;
- d. adopt the rules of the Court, and
- e. elect the Registrar and one or more Deputy Registrars.

### **Article 27 – Committees, Chambers and Grand Chamber**

1. To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
2. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.
3. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.

### **Article 28 – Declarations of inadmissibility by committees**

A committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an application submitted under Article 34 where such a decision can be taken without further examination. The decision shall be final.

### **Article 29 – Decisions by Chambers on admissibility and merits**

1. If no decision is taken under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34.
2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33.
3. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

### **Article 30 – Relinquishment of jurisdiction to the Grand Chamber**

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the

Grand Chamber, unless one of the parties to the case objects.

### **Article 31 – Powers of the Grand Chamber**

The Grand Chamber shall:

- a. determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43; and
- b. consider requests for advisory opinions submitted under Article 47.

### **Article 32 – Jurisdiction of the Court**

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.
2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

### **Article 33 – Inter-State cases**

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

### **Article 34 – Individual applications**

The Court may receive applications from any person, non-governmental organisation 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 thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

### **Article 35 – Admissibility criteria**

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that:

- a. is anonymous; or

b. is 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.

3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.

4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

#### **Article 36 – Third party intervention**

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

#### **Article 37 – Striking out applications**

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that:

- a. the applicant does not intend to pursue his application; or
- b. the matter has been resolved; or
- c. for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

#### **Article 38 – Examination of the case and friendly settlement proceedings**

1. If the Court declares the application admissible, it shall:

- a. pursue the examination of the case, together with the representatives of the parties, and if need

be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;

b. place 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.

2. Proceedings conducted under paragraph 1.b shall be confidential.

#### **Article 39 – Finding of a friendly settlement**

If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

#### **Article 40 – Public hearings and access to documents**

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

#### **Article 41 – Just satisfaction**

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

#### **Article 42 – Judgments of Chambers**

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

#### **Article 43 – Referral to the Grand Chamber**

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

#### **Article 44 – Final judgments**

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final:
  - a. when the parties declare that they will not request that the case be referred to the Grand Chamber; or
  - b. three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
  - c. when the panel of the Grand Chamber rejects the request to refer under Article 43.
3. The final judgment shall be published.

#### **Article 45 – Reasons for judgments and decisions**

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

#### **Article 46 – Binding force and execution of judgments**

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

#### **Article 47 – Advisory opinions**

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

#### **Article 48 – Advisory jurisdiction of the Court**

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

#### **Article 49 – Reasons for advisory opinions**

1. Reasons shall be given for advisory opinions of the Court.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

#### **Article 50 – Expenditure on the Court**

The expenditure on the Court shall be borne by the Council of Europe.

#### **Article 51 – Privileges and immunities of judges**

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

### **Section III – Miscellaneous provisions**

#### **Article 52 – Inquiries by the Secretary General**

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

#### **Article 53 – Safeguard for existing human rights**

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

### **Article 54 – Powers of the Committee of Ministers**

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

### **Article 55 – Exclusion of other means of dispute settlement**

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

### **Article 56 – Territorial application**

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

### **Article 57 – Reservations**

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
2. Any reservation made under this article shall contain a brief statement of the law concerned.

### **Article 58 – Denunciation**

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.

2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

#### **Article 59 – Signature and ratification**

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.

2. The present Convention shall come into force after the deposit of ten instruments of ratification.

3. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.

4. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently. Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

**PROTOCOL TO THE CONVENTION FOR THE PROTECTION  
OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

*[as amended by Protocol No. 11]  
opened for signature on March 20, 1952  
<www.echr.coe.int>*

*Headings of articles added and text amended according to the provisions of Protocol No. 11  
(ETS No. 155) as of its entry into force on May 18, 1954.*

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”),

Have agreed as follows:

**Article 1 – Protection of property**

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

**Article 2 – Right to education**

No person shall be denied the right to education. 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.

**Article 3 – Right to free elections**

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 4 – Territorial application**

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

### **Article 5 – Relationship to the Convention**

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

### **Article 6 – Signature and ratification**

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

**PROTOCOL NO. 4 TO THE 1950 CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND  
FUNDAMENTAL FREEDOMS, SECURING CERTAIN RIGHTS AND FREEDOMS OTHER THAN THOSE  
INCLUDED IN THE CONVENTION AND IN PROTOCOL NO. 1**

*[as amended by Protocol No. 11]*  
*opened for signature on September 16, 1963*  
<[www.echr.coe.int](http://www.echr.coe.int)>

*Headings of articles added and text amended according to the provisions of Protocol No. 11  
(ETS No. 155) as from its entry into force on May 2, 1968.*

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as the "Convention") and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March 1952,

Have agreed as follows:

**Article 1 – Prohibition of imprisonment for debt**

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

**Article 2 – Freedom of movement**

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

**Article 3 – Prohibition of expulsion of nationals**

1. No one shall be expelled, by means either of an individual or of a collective measure, from the

territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

#### **Article 4 – Prohibition of collective expulsion of aliens**

Collective expulsion of aliens is prohibited.

#### **Article 5 – Territorial application**

1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

3. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of all or any of Articles 1 to 4 of this Protocol.

#### **Article 6 – Relationship to the Convention**

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

#### **Article 7 – Signature and ratification**

1. This Protocol shall be open for signature by the members of the Council of Europe who are the

signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

2. The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all Members of the names of those who have ratified.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 16th day of September 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory states.

**PROTOCOL NO. 6 TO THE 1950 EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS CONCERNING THE ABOLITION OF THE DEATH PENALTY**

*[as amended by Protocol No. 11]  
opened for signature on April 28, 1983  
<www.echr.coe.int>*

*Headings of articles added and text amended according to the provisions of Protocol No. 11 (ETS No. 155) as from its entry into force on 'Mar. 1, 1985.'*

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty,

Have agreed as follows:

**Article 1 – Abolition of the death penalty**

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

**Article 2 – Death penalty in time of war**

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

**Article 3 – Prohibition of derogations**

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

**Article 4 – Prohibition of reservations**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

**Article 5 – Territorial application**

1. Any State may at the time of signature or when depositing its instrument of ratification,

acceptance or approval, specify the territory or territories to which this Protocol shall apply.

2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

#### **Article 6 – Relationship to the Convention**

As between the States Parties the provisions of Articles 1 and 5 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

#### **Article 7 – Signature and ratification**

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

#### **Article 8 – Entry into force**

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

#### **Article 9 – Depositary functions**

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;

- c. any date of entry into force of this Protocol in accordance with Articles 5 and 8;
- d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol. Done at Strasbourg, this 28th day of April 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

**PROTOCOL NO. 7 TO THE 1950 EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**  
*[as amended by Protocol No. 11]*  
*opened for signature on November 22, 1984*  
<[www.echr.coe.int](http://www.echr.coe.int)>

*Headings of articles added and text amended according to the provisions of Protocol No. 11 (ETS No. 155) as from its entry into force on 1 November 1998.*

The member States of the Council of Europe signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”),

Have agreed as follows:

**Article 1 – Procedural safeguards relating to expulsion of aliens**

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

- a. to submit reasons against his expulsion,
- b. to have his case reviewed, and
- c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

**Article 2 – Right of appeal in criminal matters**

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2. This right 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 the first instance by the highest tribunal or was convicted following an appeal against acquittal.

### **Article 3 – Compensation for wrongful conviction**

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 the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

### **Article 4 – Right not to be tried or punished twice**

1. 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.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, 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.
3. No derogation from this Article shall be made under Article 15 of the Convention.

### **Article 5 – Equality between spouses**

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

### **Article 6 – Territorial application**

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the Protocol shall apply and state the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory

specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.

6. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of Articles 1 to 5 of this Protocol.

#### **Article 7 – Relationship to the Convention**

As between the States Parties, the provisions of Articles 1 to 6 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

#### **Article 8 – Signature and ratification**

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

#### **Article 9 – Entry into force**

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 8.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or

approval.

### **Article 10 – Depositary functions**

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. any date of entry into force of this Protocol in accordance with Articles 6 and 9;
- d. any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol. Done at Strasbourg, this 22nd day of November 1984, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

**PROTOCOL NO. 12 TO THE CONVENTION FOR THE PROTECTION OF  
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

*opened for signature on November 4, 2000*

*<www.echr.coe.int>*

The member States of the Council of Europe signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”);

Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures,

Have agreed as follows:

**Article 1 – 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.

**Article 2 – Territorial application**

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the

Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

4. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

### **Article 3 – Relationship to the Convention**

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

### **Article 4 – Signature and ratification**

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

### **Article 5 – Entry into force**

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member states of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.

2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

### **Article 6 – Depositary functions**

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. any date of entry into force of this Protocol in accordance with Articles 2 and 5;
- d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

## LAW

The Inter-American Development Bank and the Academy for Human Rights and Humanitarian Rights of American University, Washington College of Law, are pleased to publish this casebook, which is meant to help members of national judiciaries improve their understanding, analysis and application of international human rights standards. These standards constitute an essential catalogue of the fundamental rights and freedoms that are found in the core principles of all modern democracies. There is no doubt that the effective application of human rights law provides a more favorable environment for poverty reduction, economic growth and legal security.

*The International Dimension of Human Rights* includes extracts of judgments, reports and opinions of international supervisory organs and domestic judicial tribunals, as well as the work of scholars in this subject. The casebook has been divided into seven chapters that deal with the following topics: basic notions of international law; the relationship between international law and domestic law; the right to an effective remedy; the right to liberty and security of persons and the right not to be tortured; the right to a fair trial; economic, social and cultural rights; and other aspects of international protection of human rights, such as the rights of women, the rights of indigenous peoples and environmental rights. The casebook also includes the most relevant international treaties on human rights adopted by the inter-American, universal and European systems.

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