

"THE PRACTICE AND PROCEDURE OF THE
HUMAN RIGHTS COMMITTEE UNDER THE
INTERNATIONAL COVENANT ON CIVIL
AND POLITICAL RIGHTS".

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CHAPTER 6. ARTICLE 2.¹6.1 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

¹ For similar provisions see UDHR art.8; ECHR arts.1,13 and 14; AMR arts.1, 2 and 25; ADRD art.XVIII; AFR arts.7 and 26; Human Rights International Instruments, Part.D, (1983). For a summary of the drafting of Article 2 see U.N.Docs.A/2929, Ch.V, and A/5655 prs.6-36; Bossuyt, 'Guide', pp.49-73. On Article 2 ICCPR in particular see T.Buergenthal, To Respect And To Ensure: State Obligation And Permissible Derogations, in L.Henkin, (ed.), The International Bill Of Rights - The ICCPR, pp.72-78, (1981); B.Graefrath, How Different Countries Implement International Standards On Human Rights, (1984-85) C.H.R.Y.B. pp.3-30; F.Jhabvala, The Practice Of The Covenant's Human Rights Committee, 1976-82: Review Of State Party Reports, 6 HRQ (1984) pp.81-106 at 95-106; F.Jhabvala, On Human Rights And The Socio-Economic Context, 31 NILR (1984) pp.149-182; F.Jhabvala, Domestic Implementation of the Covenant on Civil and Political Rights, 32 NILR (1985) pp.461-486; R.B.Lillich, Civil Rights, in T. Meron, (ed.), Human Rights in International Law-Legal And Policy Issues, vol.I, p.115 at 132-136, (1984); T.Meron, Human Rights Law Making In The United Nations, pp.119-123, (1986); T.Opsahl, Human Rights Today: International Obligations And National Implementation, 23 Scandinavian Studies in International Law (1979) pp.149-176; O.Schachter, The Obligation Of Parties To Give Effect To The Covenant on Civil and Political Rights, 73 AJIL (1979) pp.462-465, (1979); O.Schachter, The Obligation To Implement The Covenant In Domestic Law, in L.Henkin, (ed.), above, (Footnote Continued)

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;

(Footnote Continued)

pp.311-331 (1981); E.Schwelb, The Nature Of The Obligations Of The States Parties In The ICCPR, in Rene Cassin *Amicorum Discipulorumque Liber*, pp.311-331, (1969); E.Schwelb, Some Aspects Of The International Covenants On Human Rights Of December 1966, in A.Eide and A.Schou, (eds.), *International Protection Of Human Rights*, p.103 at 107-110, (1968); B.G. Ramcharan, Equality And Non-Discrimination, in Henkin, (ed.), above, pp.246-269 (1981); C.Tomuschat, Equality And Non-Discrimination Under The International Covenant On Civil and Political Rights, in von Ingo von Munch, (ed.), *Staatsrecht - Volkerrecht - Europarecht*, Festschrift fur Hans-Jurgen Schlochauer, pp.691-716 (1981); C.Tomuschat, National Implementation Of International Standards On Human Rights, (1984-85) C.H.R.Y.B. pp.31-61. More generally on Equality and Non-Discrimination see Brownlie, *Principles Of Public International Law*, pp.596-598, (1979); J.Greenberg, Race, Sex and Religious Discrimination In International law, in T.Meron, (ed.), above, vol.II, ch.8, (1984); W.McKean, Equality And Non-Discrimination Under International Law, (1983); J.F.Partsch, Fundamental Principles Of Human Rights: Self-Determination, Equality and Non-Discrimination, in K.Vasak, (Gen.Ed.), P.Alston (Eng.Ed.), *The International Dimensions of Human Rights*, vol.I, p.61 at pp.68-86, (1982); P.Sieghart, *The International Law Of Human Rights*, pp.56-59, 67-71, 72-84, (1983); United Nations Action In The Field Of Human Rights, ch.IV, (1983); E.W.Vierdag, (Footnote Continued)

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

Introduction.

6.2 Article 2 is critically important as it contains the key general undertakings to "respect and ensure" the rights in the ICCPR, to adopt the legislative and other measures necessary to "give effect" to those rights, and to ensure an "effective remedy" in the event of a violation. These general undertakings would seem to apply with respect to all of the rights recognized in the ICCPR (articles 1-27). Article 2 has been the subject of a general comment by the HRC.²

ARTICLE 2 UNDER THE REPORTING PROCEDURE.

Article 2(1).

6.3 The starting point in the consideration of every State report under Article 40 has been an attempt by the HRC to discern the precise effect that ratification of the Covenant has had on the State's legal and constitutional order.³ The fundamental point here, following from the universality of the Covenant and its non-assumption of a single socio-political order,⁴ is that Article 2 leaves it to the discretion of each State party as exactly how, "To give effect to the rights recognized". In its general comment on article 2 the HRC noted,

(Footnote Continued)

The Concept Of Discrimination In International Law, (1973).

² G.C.3(13), Doc.A/36/40, p.108.

³ "The Committee should therefore focus its attention primarily on the reality of human rights practices. One of the basic factors on which the effectiveness of the Covenant depended was its position in the legal order of the State", SR 128 pr.16a (Tomuschat).

⁴ See ch.1, pr.1.34 above.

"that Article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article".⁵

To facilitate their understanding of this matter Committee members often request information concerning the circumstances of ratification or accession in terms of whether any body or organ carried out any systematic review of the compatibility of the State's laws regulations and practices with the Covenant⁶ and, if so, whether any divergencies or inconsistencies were revealed and action taken or proposed thereon, for example, constitutional, legal or administrative

⁵ G.C.3(13), n.2 above, pr.1; Doc.A/36/40, p.109; also in Doc. CCPR/C/21. The corollary of this is the customary international law rule that a State may not invoke the provisions of its internal law as justification for its failure to perform a treaty, see Article 27 V.C.L.T. 1969. See also the exchange between Mr. Movchan (SR 69 pr.68) and the U.K. representative (SR 70 pr.12) concerning the obligation under Article 2(2). The ICCPR parallels the ECHR in not requiring States parties to formally incorporate it into domestic law, see ch.1, pr.1.18-1.21 above and A.Drzemczewski, European Human Rights Convention In Domestic Law, ch.1, (1983).

⁶ A good example of such a body is the Interministerial Committee on human rights established by the Italian government in 1977. The Committee prepared the initial Italian report, Doc.CCPR/C/6/Add.4. See also the reports of Australia, Doc.CCPR/C/14/ Add.1, p.16 (1981) and Canada, Doc.CCPR/C/Add.43, vol.1, pp.6-7 (1979). Note also the case of Suriname. After being informed that following the coup d'etat of February 1980 a Committee would be appointed to study the amendments to be made to the Constitution the Human Rights Committee thought that the best role that it could play would be to highlight some of the matters to be taken into account to ensure compatibility with its obligations under the Covenant. See SR 223, 224 and 227.

changes.⁷ If reservations or declarations had been made on ratification or accession the typical approach of members of the HRC has been to ask for clarification of their precise scope, an explanation as to why they had been made and whether their withdrawal was being considered.⁸

6.4 A consistent theme of the HRC's considerations then has been its insistence upon a clear and detailed exposition of the exact status of the Covenant within the respective constitutional and legal regimes of the State's parties.⁹ At times very technical attention has thus been concentrated on the relationship between the covenant and the Constitution and the internal laws of the State party enacted prior to and subsequent upon ratification or accession. States are requested to explain how their respective legal regimes would resolve

⁷ For an account of some such changes see SR 416 pr.4 (Austrian State representative); SR 481 pr.4 (New Zealand State representative).

⁸ See e.g., SR 69 prs.13 (Graefrath), 44 (Prado-Vallejo) and 65 (Movchan) concerning the U.K. reservation to Article 12(4) so as to preserve immigration controls. For reply see SR 70 pr.43. A number of States have made reservations to or deposited interpretative declarations on the Covenant, see Human Rights - Status Of International Instruments, (1987); 'Reservations, Declarations, Notifications And Objections Relating To The International Covenant On Civil Rights And The Optional Protocol Thereto', Doc.CCPR/C/2/Rev.1, (11 May 1987). No formal decision has been taken by the HRC concerning their competence with respect to reservations, see D.Shelton, State Practice On Reservations To Human Rights Treaties, (1983) Can.HRYB. p.204 at pp.230-231.

⁹ See e.g., SR 345 pr.33 (Opsahl on Rwanda). "[T]he Covenant requires both respect for its rights and their ensurance. And the incorporation of the Covenant into domestic law, per se, will achieve neither of these objectives although it may clear away some of the obstacles to their achievement", Jhabvala, n.1 above, p.483 (1985). See also Tomuschat, text to n.86 below (on U.K.).

the problems of conflict between the provisions of the Covenant and those of its Constitution and internal laws including the role of customary laws, traditional institutions and tribal traditions.¹⁰ Details are sought of the account taken of the Covenant for the purpose of interpreting provisions of domestic legislation and as a standard for the administrative authorities in the exercise of discretionary powers.¹¹ If State representatives are unable to give a definitive exposition of the relationship between the State's international obligations and its municipal law because of uncertainty they often give the latest theoretical conceptions as advanced by its academics and jurists and the principles of interpretation applied by its courts.¹²

6.5 From the questions put by HRC members and its general comment noted above¹³ a number of points seem clear. Firstly, States are not obliged by the terms of the ICCPR to formally incorporate the terms of the ICCPR into its domestic law. The vast majority of States parties have not incorporated the ICCPR and have not

¹⁰ See e.g., SR 345 prs.24 (Tomuschat) and 40 (Graefrath) on Rwanda; SR 365 pr.39 (Hanga on Iran), SR 402 pr.40 (Ermacora on Australia), SR 481 pr.20 (Movchan on New Zealand).

¹¹ See e.g., SR 77 pr.9 (Vincent-Evans on Norway). Interesting examples of rules of presumption and interpretation are those applied by Denmark, see Doc.CCPR/C/Add.4 and 19; SR 54 prs.11 (Hanga), 40 (Opsahl) and 53 (State representative). The ECHR is increasingly referred to by U.K. courts. For a notable example, see *Attorney-General v. Guardian Newspapers Ltd.*, [1987] 3 All ER 316.

¹² See e.g., the report of Portugal, Doc.CCPR/C/6/Add.6, pp.9-22.

¹³ See text to n.5 above.

attracted criticism from HRC members on that basis.¹⁴ States parties that have not incorporated the ICCPR include the Australia, Denmark, the G.D.R., the U.K., the U.S.S.R., and Poland. States parties that have incorporated the ICCPR at some level of domestic law include Colombia, F.R.G., Hungary, Japan, Italy, the Netherlands, Peru and Yugoslavia. Secondly, however, it is open to States to incorporate the ICCPR and if they do so it is possible that at least some of the provisions of the ICCPR could be held to be self-executing. Certainly such a possibility is not precluded by the ICCPR. Moreover, during the drafting of article 2 a U.S. proposal that "[t]he provisions of the Covenant shall not themselves become effective as national law", was decisively rejected.¹⁵ Academic commentators seem in general agreement on these questions of incorporation and self-execution.¹⁶

6.6 Further development of article 2 has prompted requests for specific information on the exercise of governmental and executive powers affecting human rights. For example, explanations have been sought as to the jurisdictional competence on matters affecting human rights in federal States, how the necessary uniformity to comply with international obligations is attained in federal States, and how conflicts would be resolved.¹⁷ We have already noted that the provisions of the

¹⁴ "Subsequent practice has lent further support to the interpretation that incorporation into domestic law is not required by the Covenant", Schachter, n.1 above, p.314 (1981).

¹⁵ Doc.A/2929, pr.12. See also Doc.E/600, ch.1, n.1 above, Report of Working Group on Implementation.

¹⁶ See e.g., Graefrath, n.1 above; Tomuschat, *ibid.*, (1984-85); Schachter, *ibid.*; Jhabvala, n.1 above (1985); Lillich, ch.1, n.231 above (1985); Green, ch.1, n.1 above, p.46.

¹⁷ See e.g., SR 94 pr.16 (Koulishev on FRG).

Covenant, "Extend to all parts of federal States without limitations or exceptions".¹⁸ Considerable doubts were expressed by HRC members concerning Australia's original, "[g]eneral reservation that article 2, paragraphs 2 and 3, and article 50 shall be given effect consistently with and subject to the provisions in article 2, paragraph 2".¹⁹ The original Australian reservation was withdrawn and replaced with the following Declaration,

"Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, state and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise".²⁰

The HRC have not yet had an opportunity to comment on the new Declaration and its legal effect.²¹

¹⁸ Article 50. See ch.1, pr.1.24 above.

¹⁹ See Human Rights - Status, n.8 above, p.86. For the HRC's consideration see SR 401, 402, 403, 407 and 408. See, for example, SR 402 prs.11 (Prado-Vallejo), 28 (Movchan) and 37 (Ermacora). For academic comment see G.Triggs, Australia's Ratification Of The International Covenant On Civil And Political Rights: Endorsement Or Repudiation?, 31 ICLQ, (1982) pp.278-306; H.Burmeister, Federal Clauses: An Australian Perspective, 34 ICLQ (1985) pp.522-537.

²⁰ Human Rights - Status, n.8 above, p.29.

²¹ See D.McRae, The Legal Effect Of Interpretative Declarations, (1978) 49 BYIL pp.155-173.

Similarly searching questions have been asked concerning the territorial applicability of the Covenant in respect of States with dependant or overseas territories.²²

6.7 A number of States have been questioned concerning the application of Article 2 (1) with respect to situations where the Government may not be in control over the whole of the national territory²³ and or when its armed forces are deployed outside the national territory.²⁴ Such questioning has not been attended by the controversy that has surrounded the Committee On The Elimination Of Racial Discrimination which has adopted formal decision concerning a number of such situations.²⁵

6.8 The HRC has have recognized the need for its considerations to go beyond the realms of constitutional

²² See e.g., SR 69 pr.12 (Graefrath) and SR 70 pr.19 (State representative) concerning the U.K.; SR 439 pr.46 (Vincent-Evans on France). On the territorial application of the Covenant see ch.1, pr.1.24 above.

²³ See e.g., SR 443 prs.2 (Vincent-Evans), 37 (Ermacora), 55 (Tomuschat), SR 444 prs.12 (Opsahl), 27 (Aguilar) and 40 (Bouziri) on Lebanon; reply at SR 446 pr.44; SR 468 pr.23 (Prado-Vallejo on El Salvador); reply at SR 468 prs.36-38, SR 474 pr.15; SR 165 prs 19-21 and SR 166 pr.52 (Prado-Vallejo on Cyprus); reply at SR 165 prs 33-45 and SR 166 prs 57-58.

²⁴ See e.g., SR 160 prs.44 (Opsahl), 62 (reply), 70 (Opsahl), 73 (Chairman) on Syria; See also SR 444 pr.13 as corrected (Opsahl on Lebanon). The EUCM has taken the view that under the ECHR a State is responsible for securing the rights and freedoms in the Convention to all persons under their "[A]ctual authority and responsibility, whether that authority is exercised within the national territory or abroad", Cyprus v. Turkey, 2 D. & R. p.125, Decn.Admiss., (1975).

²⁵ See N.Lerner, The United Nations Convention on the Elimination Of Racial Discrimination, Pt.IV, ch.IV, (2d 1980); N.Lerner, The Golan Heights Case and the U.N. Committee On Racial Discrimination, 3 Isr.Yb.HR. (1973) pp.118-135; T.Meron, The International Convention On The Elimination Of All Forms Of Racial Discrimination And
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theory. In a general comment the HRC stated that it recognised, "[i]n particular, that the implementation [of the ICCPR] does not solely depend on constitutional or legislative enactments, which in themselves are often not per se sufficient".²⁶ Similarly, Mr. Tomuschat has commented that,

"The abstract rules about the settlement of conflicts between different kinds of legal sources needed to be implemented in judicial practice. Were judges competent to give effect to such rules, declaring invalid a legal norm which would be inconsistent with the Covenant? Could they themselves take such decisions concerning inconsistency or would they refer the issue to the Supreme Court? Lastly, since the rights and freedoms enshrined in the Constitution were largely similar to the rights and freedoms enshrined in the Covenant, did Finland have an effective system for controlling the Constitutionality of laws?".²⁷

Article 2(2).

6.9 The second aspect of the HRC's approach to Article 2 has been for it to seek the kind of information which will allow it to review the national implementation of a state's international obligations under the Covenant to, "Respect and ensure to all individuals within its territory and subject to its jurisdiction the right recognized in the present Covenant, without distinction of any kind". It is by now trite comment that rights proclaimed in international instruments may be worthless

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The Golan Heights, 8 Isr.Yb.HR. (1978) pp.222-239; T.Meron, The Meaning And Reach Of The ICERD, 79 AJIL (1985) pp.283-318.

²⁶ G.C.3(13), n.2 above, pr.1.

²⁷ SR 170 pr.38 on Finland's report, Doc.CCPR/C/Add.32.

unless they are effectively implemented through national provisions and by organs operating at the domestic level.²⁸ It is this national dimension which is the supreme aspect of the system of international control and underlies Article 2, paragraph 2 which provides that,

"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".²⁹

6.10 It is evident that any body, such as the HRC, attempting to review the national implementation on international obligations must be prepared to go beyond mere formal legal texts and try to ascertain look at the practical measures taken to "give effect" to and to "respect and ensure" the rights in the ICCPR.³⁰ The diversity of constitutional processes, socio-legal traditions and national implementation techniques necessitates this.³¹ In intensively pursuing this

²⁸ See Opsahl, n.1 above; Jhabvala, n.1 above (1985); K.Vasak, Human Rights: As a Legal Reality, in Vasak/ Alston, (eds.), n.1 above, pp.3-10; M.Sorenson, Report Concerning Obligations Of A State Party To A Treaty As Regards Its Municipal Law, in A.H.Robertson, (ed.), Human Rights in National and International Law, pp.11-46 (1968).

²⁹ My emphasis. See SR 370 prs.20-21 (Vincent-Evans). On the essentially supplementary nature of international human rights protection see the EUCT in The Belgian Linguistics Case, EUCT, Series A, Vol.6. pr.10 (1968), 11 YBECHR p.832.

³⁰ See e.g., Tomuschat, text to n.27 above.

³¹ See Jhabvala, n.1 above, 31 NILR (1985).

objective Committee members have sought substantive factual information on and clarification of, for example, judicial, executive, administrative, and other bodies having jurisdiction affecting human rights or responsibility for ensuring human rights; the legal bases, procedures and practices of any special type of court or organ having exceptional jurisdiction, for example, military tribunals,³² special criminal³³ or economic courts;³⁴ the role of Ombudsmen,³⁵ Mediateurs,³⁶ Civil Liberties Commissioners³⁷ and National Human Rights Commissions;³⁸ executive or administrative measures which more precisely define and delineate Constitutional and legislative norms or the rights in the Covenant;³⁹ the prohibitive effect of unwritten principles such as "the principle of legality"⁴⁰ or "socialist legality";⁴¹ the role of

³² See e.g., SR 357 pr.29 (Opsahl on Uruguay).

³³ See e.g., SR 603 prs.51-52 (Serrano-Caldera on Afghanistan).

³⁴ See e.g., SR 84 pr.4 (Lallah on Madagascar).

³⁵ See e.g., SR 354 pr.2 (Graefrath on Guyana).

³⁶ See e.g., SR 441 pr.42 (Al Douri on France).

³⁷ See e.g., SR 319 pr.12 (Opsahl), ³⁵ (Vincent-Evans on Japan); reply at SR 324 pr.10.

³⁸ See e.g., SR 420 pr.26 (Prado-Vallejo on Nicaragua). See ch.1, n.119 above. The General Assembly has repeatedly called for the establishment of national and private human rights organisations.

³⁹ See e.g., SR 31 pr.38 (Vincent-Evans on Ecuador).

⁴⁰ See e.g., SR 77 pr.9 (Vincent-Evans on Norway). See also O.Garibaldi, General Limitations on Human Rights: The Principle Of Legality, 17 Harv.ILJ. (1976) pp.503-557.

⁴¹ See e.g., SR 108 pr.29 (Mora-Rojas on USSR).

public and social organisations such as trade unions in the protection of human rights; the effects of collectivism on the enjoyment of civil and political rights; general freedoms that play a significant role in the implementation of the Covenant, for example, freedom of the press, association and scientific research;⁴² the existence of limitations and restrictions on the enjoyment of rights.⁴³ Requests for statistical information seem to be becoming a little more frequent.⁴⁴ This pursuit of detailed information on national implementation is obviously more specifically directed with respect to each of the substantive rights in the Covenant. The approach to a selection of rights is illustrated in this thesis.⁴⁵

6.11 We have already noted that during the drafting of the Covenant there was extensive discussion concerning whether the obligation to implement the Civil and Political Covenant would be of an immediate or progressive nature.⁴⁶ That discussion has since been echoed in academic writings.⁴⁷ The HRC have not made any

⁴² Generally see J.Ziman, P.Sieghart and J.P.Humphrey, *The World of Science And The Rule Of Law*, (1986).

⁴³ See ch.11 below on freedom of expression.

⁴⁴ See e.g., SR 628 pr.34 (Movchan on Luxembourg). For an example of the provision of such information see SR 581 pr.31 (Dominican Republic).

⁴⁵ See ch.5 above and chs.7-12 below.

⁴⁶ See ch.1, pr.1.17 above.

⁴⁷ See the articles by Jhabvala, n.1 above HRQ 1984), and subsequent correspondence at 6 HRQ (1984) pp.539-540 (Humphrey) and 7 HRQ (1985) p.565 (Y.Iwasawa); Schwelb, n.1 above; Schachter, n.1 above; Tomuschat, n.1 above, p.694 (1981); SR 206 prs.16-18 (Tomuschat). P.Alston and G.Quinn, n.48 below, p.173, comment, "[I]n practice it can be strongly argued that, in at least some states parties to the Covenant on civil
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clear statement on that question as a Committee in a General Comment but it is fair to note that individual members have generally stressed the immediacy of the obligation and contrasted it with the progressive obligation in Article 2 of the ICESCR.⁴⁸ However, this stress on immediacy has been accompanied by the clear acknowledgement that there are many obstacles to the full achievement of the rights in the Covenant.⁴⁹ A number of specific problems have been discussed including, economic conditions, under-development,

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and Political Rights, certain of those rights are by no means susceptible of immediate realization. Moreover, the standard that is in fact being applied, with the implicit (but certainly unstated) endorsement of the HRC, is one of progressive achievement", p.173.

⁴⁸ See e.g., SR 54 pr.18 (Vincent-Evans on Denmark), SR 402 pr.29 (Movchan on Australia), SR 551 pr.4 (Opsahl on Trinidad and Tobago. Cf.though the comment that, "[i]t was clear that implementation could be gradual", SR 198 pr.35 (Movchan on Mongolia). On article 2 ICESCR see E.W.Vierdag, *The Legal Nature Of The Rights Granted By The International Covenant On Economic, Social and Cultural Rights*, 9 NYIL (1978) pp.69-105; P.Alston and G.Quinn, *The Nature And Scope Of States Parties' Obligations Under The International Covenant On Economic, Social And Cultural Rights*, 9 HRQ (1987) pp.156-229; Y.Klerk, *Working Paper On Article 2(2) and Article 3 of the International Covenant On Economic, Social and Cultural Rights*, 9 HRQ (1987) pp.250-273; Principles 16-34 of the Limburg Principles on the implementation of the ICESCR, *ibid.*, pp.122-135, and accompanying commentary, *ibid.*, pp.136-155; M.K. Addo, *The Justiciability Of Economic, Social And Cultural Rights*, Paper for University of Southampton Centre for International Policy Studies, March, 1988.

⁴⁹ See e.g. SR 284 prs.33-35 (Aguilar on Mali), SR 473 pr.29 (Aguilar on Sri Lanka).

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unemployment, drought, illiteracy.⁵⁰ That sense of realism has persisted throughout the HRC's considerations to date. One can perhaps best summarize the approach that seems to have emerged from individual members by saying that they have generally viewed the obligation in Article 2 as an immediate one but that they are sympathetic to States parties who can point to specific factors and difficulties which prevent or hinder the full and immediate implementation of the rights in the Covenant. In effect the burden of proof is on a State party which is not immediately implementing the Covenant to provide some specific justification or explanation. There has been no suggestion that the HRC would accept any argument to the effect that the obligation in Article 2 is a progressive one in the sense that a State party could that chose not to implement a particular right as a matter of policy and justify this by arguing that Article 2 does not contain an immediate obligation. Mr. Tomuschat has commented,

"The Human Rights Committee has never had any doubts about the true meaning of article 2(2) of the CCPR. No member has ever maintained that States enjoyed a margin of discretion concerning the time limits during which full conformity of their conduct with their international obligations could be brought about. Nor has any government appearing before the Human Rights Committee defended such an understanding of the CCPR. Even more conclusive are the views adopted by the human Rights Committee on the merits of cases brought to its attention under the Optional Protocol. The Human Rights Committee has chosen a format for such views according to which, on an article - by - article basis, findings are made as to violations which have occurred. If

⁵⁰ See e.g. SR 282 pr.2 (Tarnopolsky on Mali); 345 pr.37 (Graefrath on Rwanda).

the CCPR had not intended to impose on States a strict duty of compliance, no such findings could have been made".⁵¹

6.12 What the HRC have chosen to make clear is that the Covenant does place active obligations on States,

"The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. This is obvious in a number of articles (e.g. article 3 {on the equal rights of men and women to the enjoyment of the rights in the ICCPR}), but in principle this undertaking relates to all rights set forth in the Covenant".⁵²

"...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

⁵¹ Tomuschat, n.1 above (1984-85), p.42.

⁵² G.C. 3/13, n.2 above, pr.1. See also SR 109 pr.13 (Opsahl on USSR), SR 440 pr.66 (Opsahl on France).

ascertain what progress is being made in this regard...the positive obligation undertaken by States parties under that article may itself have an inevitable impact on legislation or administrative measures designed to regulate matters other than those dealt with 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".⁵³

6.13 In the Third Committee there had been no objection to the interpretation of draft article 2 under which special measures for the advancement of any socially and educationally backward sections of society should not be construed as "distinction" within the meaning of article 2.⁵⁴ However, the HRC's call for "specific activities" and "affirmative action" seems to go well beyond this

⁵³ G.C. 4(13), prs.2-3; Doc.A/36/40, pp.109-110; also in Doc.CCPR/C/21.

⁵⁴ Tomuschat, n.1 above, (1981), comments that, "...[a]rticles 2(1) and 26 do not prohibit affirmative action designed to further the interests of traditionally disadvantaged minority groups (citing, inter alia, Doc.A/C.3/1259, prs.33, 34) provided that granting such privileges does not amount to overt discrimination of the majority. In the field covered by the CCPR, such instances will rarely happen, civil and political rights being directed against governmental interference in private affairs. Such freedom 'from' the State cannot be enhanced for the benefit solely of specific groups", pp.715-6. In a note to this comment Tomuschat adds, "[I]t would certainly be unwise to contend that the CCPR provides a solution to the issue of 'adverse discrimination' as dealt with by the U.S. Supreme Court in the famous case Bakke case, see Regents of The University of California v. Bakke, 438 U.S. 265 (1978)". See also the important recent decision of the U.S. Supreme Court in Johnson v. Transportation Agency Of Santa Clara County, California, 55 U.S.Law Week 4379 (25/3/87).

context and asserts a more general positive obligation to ensure the rights recognised in the ICCPR.⁵⁵ Unfortunately, the call for "specific activities" and "affirmative action" does not resolve the debate as to whether the obligation under article 2 is immediate or progressive but as noted the HRC has striven for a "[c]onstructive dialogue" with States parties rather than use the article 40 procedure to condemn States for the possible failures to implement the ICCPR when they are faced with genuine difficulties.⁵⁶ In terms of a constructive dialogue between the HRC and the States parties the question of the immediacy or otherwise of the obligation in article 2 has assumed lesser importance than the legal analyst would inevitably attach to it. The General Comments contrast sharply with the passive attitude of many State parties which have argued that their respective systems fully guarantee the rights in the Covenant, for example, the G.D.R.,⁵⁷ the U.K.⁵⁸ and the U.S.S.R.⁵⁹ Doubts have been expressed as

⁵⁵ The jurisprudence on positive obligations under the ECHR has been rather limited to date. See the *Marcxx v. Belgium*, EUCT, Series A, vol.31, (1979); *Airey Case v. Ireland*, EUCT, Series A, vol.32, (1979). Cf. Article 1(4) ICERD and article 4 CEDAW which expressly state that certain special measures shall not be deemed or considered discrimination.

⁵⁶ See pr.6.11 above.

⁵⁷ See Docs.CCPR/C/1/Add.13 and C/28/Add.2; SR 65, 532 (State representatives).

⁵⁸ See Docs.CCPR/C/1/Add.17, and C/32/Add.5; SR 67 and 593 (State representatives).

⁵⁹ See Docs.CCPR/C/1/Add.22 and C/28/Add.3; SR 108 and 564 (State representatives).

to the correctness of such claims both by HRC members⁶⁰ and academic commentators.⁶¹

6.14 With respect to the non-discrimination (or non-distinction)⁶² aspect of Article 2 the general practice of the HRC has been to request detailed information as to the constitutional, legal provisions and administrative measures which embody and give effect to the principle of non-discriminatory accordance, "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 status, national or social origin, property, birth or other status". Attention is usually drawn to and comment requested in respect of non-correlation of the terms of

⁶⁰ See SR 65, 67, 68, 532-534 and 536 (GDR); SR 67, 69, 70, 593-598 (U.K.); SR 108, 109, 112, 564-567 and 570 (USSR).

⁶¹ See Jhabvala (1985), Opsahl and Schachter at n.1 above.

⁶² HRC members have generally referred to discrimination rather than to distinction. Commentators seem in agreement that there is in this context no difference in substance between the two terms, see e.g., Klerk, n.48 above, The ICESCR uses the term "discrimination" in its article 2. In the Third Committee the suggestion that "distinction" in the draft ICCPR be replaced by "discrimination" was not accepted as some members of the Committee felt that the term "discrimination" had acquired a shade of meaning which rendered it less appropriate in the context of the ICCPR. It was also noted that the term "distinction" had also been used in both the U.N. Charter and the Universal declaration, Doc.A/5655 pr.19. The French expression "sans distinction aucune", appears in both article 2 ICCPR and article 2 ICESCR. The European Court Of Human Rights faced this problem of interpretation in the Belgian Linguistics Case, Series A, 11 YBECHR p.832, pr.10 (1968), where it followed the more restrictive term "discrimination" in the English text.

a State's laws and practices with the series of distinctions set forth in Article 2(1).⁶³

6.15 In particular attention has been drawn to the importance of provisions prohibiting discrimination on the grounds of political opinion. For example, during consideration of the Report of Poland⁶⁴ Mr. Tarnopolsky commented that,

"In connection with Article 2 of the Covenant, the report made no mention of the existence of guarantees of equal rights irrespective of political opinion. Such an omission assumed considerable importance in a country in which a specific ideology was enshrined in the Constitution. While under Article 1 of the Covenant, all peoples were free to opt for such a socio-political system, there remained the question of the protection of the various fundamental freedoms in such a context".⁶⁵

6.16 Questions concerning non-discrimination are often related to other substantive rights, for example, concerning access to the public service under article 25 of the Covenant. Another matter to which HRC members have accorded some significance concerns the issue of the ownership of property in terms of its role both in the realization of rights and more specifically as

⁶³ See e.g., SR 361 pr.24 (Ermacora on Jordan), SR 431 pr.4 (Tarnopolsky on Peru).

⁶⁴ Doc.CCPR/C/4/Add.2.

⁶⁵ SR 187 pr.44. See also SR 108 pr.48 (Vincent-Evans on USSR); SR 483 pr.42 (Tomuschat on Yugoslavia). To the last comment the state representative replied that, "[E]xpert opinion on constitutional law considered that the Constitution prohibited discrimination on grounds of political opinion. That was also the practice of the Constitutional courts", *ibid.*, pr.43. It is understood that this issue had been widely discussed in Yugoslavia over a number of years in the light of the ICCPR.

coming within "other status" in Article 2(1).⁶⁶ Its potential importance was clearly indicated by the HRC's leading proponent of this view Mr.Hanga,

"Everyone knew that equality of rights needed to be buttressed by social and economic structures. What, then, was the role of ownership of property? In what ways did property rights ensure such equality, in view of the fact that in the USSR there was State property, group property, and personal property? In what way did those various forms of ownership contribute to guaranteeing the de jure and de facto equality of citizens in economic, political and social life?"⁶⁷

6.17 Other matters commonly raised have concerned any distinctions made between aliens and citizens other than those provided for in the Covenant⁶⁸ and whether any organ existed which was specifically charged with the task of monitoring or eliminating the existence of discrimination, for example, the Race Relations Board (now the Commission For Racial Equality) in the U.K.⁶⁹ Another matter which has attracted some attention has been the seemingly privileged position of the "working

⁶⁶ We have already noted that no right to property was included in the Covenant, see ch.1, n.200 above.

⁶⁷ SR 109 pr.37.

⁶⁸ See Ch.1, pr.1.35 above. See also the HRC's G.C.15(27) on the "Position of aliens under the Covenant", Doc.A/41/40 pp.117-119.

⁶⁹ See SR 110 pr.5 (Tomuschat on Mauritius).

class"⁷⁰ and the "Communist Party"⁷¹ in some of the Socialist countries, for example, Rumania.⁷²

6.18 Notwithstanding its jurisprudence to the effect that the Covenant assumes no primacy on the part of any one form of legal or political order, Committee members have on occasions raised some doubts as to whether the very nature of a constitutional or political regime or at least certain aspects of it are in compliance with the terms of the Covenant. A few examples will suffice

⁷⁰ See e.g., SR 131 pr.37 (Bouziri on Bulgaria).

⁷¹ See e.g., SR 108 pr.46 (Vincent-Evans on USSR) and SR 109 pr.57 (Tomuschat on USSR). Jhabvala, n.1 above, (1985), comments that, "[I]t would appear that political discrimination in favour of the respective communist parties, and correspondingly against those holding different political views, is given a constitutional foundation in these countries (referring to the Soviet-bloc States). In as much as these constitutional provisions reflect the socio-political philosophies of these States, it would seem to be clear that for these parties to conform, even 'formally', to the norms of the Covenant, they would have to radically revise their social and political philosophy and their constitutions..", pp.473-474. Cf. The comment of Graefrath, n.1 above, "...[a]t times attempts are made to suggest that the covenant was a treaty which made the capitalist model of fundamental freedoms binding on its states parties. Such an interpretation denies the universal character of the Covenant and borders on the absurd assumption that the socialist states agreed to a treaty amounting to the abandonment of the socialist system", p.6. Cf. R. Falk, Comparative Protection Of Human Rights In Capitalist and Socialist Third World Countries, 1 Univ.HR (1979) pp.3-29.

⁷² See the consideration of its report in SR 133, 136, 137 and 140.

to indicate how far HRC members have seen fit to make their views known.⁷³

During consideration of the report of Chile⁷⁴ Mr. Graefrath commented that,

"The report now before the Committee had come from an authority whose very existence was based on the elimination of the democratic rights of the Chilean people".⁷⁵

That attitude was generally echoed by the other members of the HRC, including Mr. Opsahl, who suggested that,

"The Committee should not be too conciliatory when examining dictatorships which on various pretexts declared that they did not accept or restricted fundamental civil and political rights...What was needed was not reports conforming to Article 40 but Governments conforming to Article 25".⁷⁶

6.19 A particularly interesting and pertinent example of the HRC's approach is the case of Iran. Subsequent to the Islamic revolution in February 1979 the Iranian authorities denounced the reports⁷⁷ submitted to the HRC by the Shah's regime as, "[F]ailing to reflect the reality of the situation in Iran regarding the status of civil and political rights" and, "[C]onstituted an (sic) conscious attempt to cover up the gross and widespread violations of fundamental human rights and individual

⁷³ See e.g., SR 283 pr.25 (Sadi on Mali) and SR 345 pr.19 (Tomuschat on Rwanda) concerning one party States.

⁷⁴ Docs.CCPR/C/1/Add.25 and 40.

⁷⁵ SR 128 pr.2.

⁷⁶ SR 129 pr.51. "[T]he burden was on States parties to show that the form of government they adopted was not an obstacle to the enforcement of those important provisions [of the covenant]", SR 283 pr.25 (Opsahl on Mali).

⁷⁷ See Docs.CCPR/C/Add.16 and 26 and Corr.1.

freedoms".⁷⁸ The new authorities promised that once a new Constitution had been drafted and elections for a constituent assembly held a new report would be submitted in conformity with Article 40. In introducing that new report the Iranian representatives made statements indicating the general principles of the Iranian Islamic State and referring extensively to the provisions of the new Constitution.⁷⁹ One representative then stated that,

"He felt bound to emphasize that although many of the articles of the Covenant were in conformity with the teachings of Islam, there could be no doubt that the tenets of Islam would prevail whenever the two sets of law were in conflict".⁸⁰

While a number of HRC members expressed the view that they believed that there was no inherent contradiction between the teachings of the Koran and the principles of the Covenant, there was some concern expressed at this statement and it was suggested that if there was any presumption it should be to the effect that the Covenant should prevail in the event of conflict.⁸¹ More generally a number of members raised question as to the difficulties encountered by a theocracy in ensuring conformity with the rule of law and with its modern international obligations.⁸² These questions are of the greatest importance for the implementation of the Covenant as up to thirty countries are either totally or partially

⁷⁸ SR 149 prs.26-28.

⁷⁹ See SR 368.

⁸⁰ SR 364 pr.4.

⁸¹ See SR 366 pr.10.

⁸² See SR 364 pr.55 (Opsahl), SR 366 pr.10 (Tomuschat). For reply see SR 368.

Islamic⁸³ and it has been reported that Iran has become the first country to question the philosophical basis of the Universal Declaration Of Human Rights (1948).⁸⁴ Moreover, international concern over the human rights situation in Iran might suggest that there are a number of issues as to which the "teachings of Islam", as interpreted and applied by Iran, and the provisions of the ICCPR may be in conflict, for example, as regards the status of women, religious tolerance and the punishment of criminals.⁸⁵

6.20 The United Kingdom constitutional system has not escaped criticism,

"In view of the rather fragmentary character of the case law, he concluded that it was highly probable that the substance of the Covenant was not entirely protected by the domestic legal rules of the United Kingdom. It would therefore have been advisable to confer upon the Covenant the legal force of statutory law. He agreed in principle that States were free to decide how they would discharge their international obligations. However, as States parties had undertaken, in Article 2, to respect all the rights recognized in the Covenant, he considered that it should be possible, even in the United Kingdom, to invoke the provisions of the Covenant before tribunals and administrative agencies. In the absence of any constitutional provisions under which an Act of Parliament designed to curtail such rights could be opposed,

⁸³ C.Humana, World Human Rights Guide, p.5 (2d, 1986).

⁸⁴ See ch.1, pr.1.34 above. Generally see International Commission of Jurists, Human Rights In Islam (1982).

⁸⁵ Ibid.; Humana, n.83 above, p.131.

it would appear that machinery should be introduced to prevent their curtailment".⁸⁶

Similarly, during consideration of the periodic reports of the U.K. a number of members expressed severe doubts as to the compatibility of the hereditary element of the membership of the House Of Lords with the terms of Articles 2 (1) and 25 of the Covenant on the basis that it constituted a distinction on the grounds of birth.⁸⁷

Article 2 (3).

6.21 In practical terms whatever the nature of the situation with respect to the theoretical existence of the rights and freedoms recognised in the Covenant their true enjoyment ultimately depends on securing the existence of an "effective remedy" for anyone who claims that there has been a violation of his rights and freedoms. Commensurate with this importance members have devoted considerable and painstaking attention to paragraph 3 of article 2. The breadth of their considerations can vividly be illustrated in a schematic outline of the aspects of remedies dealt with: was there a specific remedy for violation of the rights in the Covenant or did a person have to initiate a civil action and claim damages;⁸⁸ was there any kind actio popularis;⁸⁹ the difference between ordinary and special

⁸⁶ SR 69 pr.83. See generally, S.H.Bailey, D.J.Harris and B.Jones, *Civil Liberties - Cases and Materials*, ch.1, (2d., 1985). See also the comments at SR 93 pr.66 (Lallah on FRG).

⁸⁷ See e.g., SR 69 pr.3 (Lallah); reply in Doc.CCPR/C/1/Add.35, pr.2; SR 147 prs.6 (Lallah), 22 (Tomuschat), 23 (Graefrath) and 25 (Sadi); replies at prs.15 and 35.

⁸⁸ See e.g., SR 84 pr.6 (Lallah on Madagascar).

⁸⁹ See e.g., SR 349 pr.39 (Vincent-Evans on France).

remedies and the possibilities of appeal;⁹⁰ could an individual initiate proceedings invoking the covenant directly before a court, administrative tribunal or authority and call for the annulment of a law which ran counter to the Covenant, and make the matter one of public debate, without such a claim having a detrimental effect on him;⁹¹ were there any cases in which courts or other authorities had made specific pronouncements in proceedings involving or based on interpretation of the Covenant;⁹² details of the legal bases of the authorities in a State competent to deal with human rights violations and the possibility of conflict between them; could the Covenant be invoked in preventative as well as enforcement proceedings;⁹³ were there any legal doctrines whereby the remedies did not apply and what limitations and restrictions conditioned the exercise of remedies;⁹⁴ in what cases could an appeal be ruled out by statute;⁹⁵ in what circumstances could an individual appeal against an administrative decision and would the appellate body be different from the one whose decision was being challenged;⁹⁶ was there

⁹⁰ See e.g., SR 356 pr.3 (Dieye on Uruguay).

⁹¹ See e.g., SR 64 pr.57 (Prado-Vallejo on Czechoslovakia), SR 67 pr.59 (Tomuschat on G.D.R.).

⁹² See e.g., SR 64 pr.63 (Tomuschat on Czechoslovakia). In reply State representatives often claim that the ICCPR is being invoked but are unable to cite any examples.

⁹³ See Doc.A/35/40 pr.125 (Iraq).

⁹⁴ See e.g., SR 98 pr.26 (Mora-Rojas on Yugoslavia).

⁹⁵ See e.g., SR 99 pr.33 (Koulishev on Czechoslovakia).

⁹⁶ See e.g., SR 187 pr.17 (Tomuschat on Poland).

a system of free legal aid and assistance;⁹⁷ was the legal profession open to everyone, what qualifications were required, how many people used its services and were such services available to persons in prison or held in detention;⁹⁸ how many cases were dealt with by the different authorities and what was the average length of time taken;⁹⁹ were various remedies available and were different types of damages available, for example, indirect, loss of earnings, moral;¹⁰⁰ the effectiveness of a civil remedy against a public official especially in the case of insolvency on the official's part.¹⁰¹ More specific and particular considerations have prompted the raising of matters such as the role of Ombudsmen,¹⁰² the exclusion of illegally obtained evidence,¹⁰³ the formal or substantive nature of the examination of a claim of human rights violation, the general principles concerning the accountability of the police and other State organs, and whether remedies called for in individual cases under the Optional Protocol had been granted to the party or parties concerned.¹⁰⁴

⁹⁷ See e.g., SR 132 pr.30 (Opsahl on Bulgaria).

⁹⁸ See e.g., SR 187 pr.25 (Lallah on Poland).

⁹⁹ See e.g., SR 109 pr.30 (Hanga on USSR).

¹⁰⁰ See e.g., SR 109 pr.30 (Hanga on USSR); SR 430 pr.47 (Tomuschat on Peru).

¹⁰¹ See e.g., SR 205 pr.47 (Hanga on Canada); SR 69 pr.30 (Tarnopolsky on U.K.). See also SR 441 pr.23 (Tomuschat on France concerning the "Act of Government" theory).

¹⁰² See e.g., SR 353 pr.28 (Tomuschat on Guyana).

¹⁰³ See e.g., SR 69 pr.30 (Tarnopolsky on U.K.).

¹⁰⁴ See e.g., SR 355 pr.29 (Prado-Vallejo on Uruguay).

6.22 Considerable importance has been attached to the determination of remedies by, "competent judicial, administrative, legislative or other authorities provided for by the legal system of the State". In assessing the existence of such authorities the matters raised have included, inter alia, provisions for the election of and the terms of tenure of the judiciary particularly when there is an element of popular election, for example, Comrades Courts in the U.S.S.R.,¹⁰⁵ Self-Management Courts in Yugoslavia.¹⁰⁶ It is frequently asked how judicial independence and impartiality are ensured and administrative influence resisted.¹⁰⁷ Similar questions have been raised in the consideration of the provisions of Article 14 ICCPR.¹⁰⁸

6.23 A consistent theme of the HRC's deliberations has been that for people to exercise their rights they must be aware of their existence. Thus States parties have been requested to provide information concerning their efforts to publicize the terms of the Covenant¹⁰⁹ to disseminate human rights information, translate the Covenant into the national and minority languages,¹¹⁰

¹⁰⁵ See SR 109 pr.70 (Lallah). For details see Doc. CCPR/C/1/Add.22.

¹⁰⁶ See SR 99 pr.15 (Hanga). For details see Doc.CCPR/C/1/ Add.23.

¹⁰⁷ See e.g., SR 67 pr.13 (Tarnopolsky on G.D.R.), SR 84 pr.3 (Lallah on Madagascar), SR 109 pr.70 (Lallah on USSR).

¹⁰⁸ See ch.10 below.

¹⁰⁹ See e.g. SR 355 pr.18 (Prado-Vallejo on Uruguay).

¹¹⁰ See e.g., SR 98 pr.46 (Vincent-Evans on Yugoslavia).

improve literacy rates¹¹¹ and encourage the monitoring of the implementation of the Covenant by national human rights groups. In a General Comment the HRC stated that,

"It is very important that individuals should know what their rights under the Covenant (and the Optional Protocol, as the case may be) are and also that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant. To this end, the Covenant should be publicized in all the official languages of the State and steps should be taken to familiarize the authorities concerned with its contents as part of their training. It is desirable also to give publicity to the State party's co-operation with the Committee".¹¹²

Where a State party has publicized its report and made it available to its citizens the HRC has been quick to commend such a practice, for example, by Canada, the FRG and the G.D.R.¹¹³

¹¹¹ See e.g., SR 421 pr.6 (Hanga on Nicaragua), SR 345 pr.37 (Graefrath on Rwanda).

¹¹² G.C. 3(13), n.2 above, pr.2. See also SR 345 pr.27 (Vincent-Evans on Rwanda). The HRCion has repeatedly called on governments to publish the texts of the two Covenants and the O.P. in as many languages as possible and to distribute them as widely as possible in their territories. See e.g., HRCion Resn.1986/17, pr.17, HRCion, Report on 42nd session, ECOSOC, O.R., Supp.2, p.61, (1986).

¹¹³ See Tomuschat, n.1 above, p.60 (1984-85).

Article 2 Under The Optional Protocol.

6.24 Article 2 has been raised in a substantial number of communications under the O.P. Many of those decisions and views noted in the chapter on the Optional Protocol¹¹⁴ or in the chapters dealing with the application of particular rights under the O.P.¹¹⁵ A high proportion of the allegations of violation of article 2 have been declared inadmissible for various reasons and are therefore only briefly noted as indicators of the potential scope of article 2.

Article 2(1).

6.25 We have already noted the HRC's view in Santullo (Valcada) v. Uruguay¹¹⁶ in which after stating that "it could not find that there had not been a violation of article 7", the HRC's view continued,

"In this respect the Committee notes that the State party has failed to show that it had ensured to the person concerned the protection required by article 2 of the Covenant".¹¹⁷

The view suggests a positive obligation on the State party to "ensure" protection.¹¹⁸ In S.S. v. Norway,¹¹⁹ the author argued that Norway had not afforded him sufficient protection against attacks and interference with his person and his property. The author had been found guilty of violations of various provisions of the Penal Code in defending himself against attacks. He claimed that repeated requests for protection and proper investigation had gone unheeded by the police. The

¹¹⁴ See ch.4 above.

¹¹⁵ See ch.5 above and chs.7-12 below.

¹¹⁶ See pr.4.30 above.

¹¹⁷ Ibid., pr.12.

¹¹⁸ See pr.6.12 above and ch.8 below on article 6.

¹¹⁹ S.D. p.30.

communication was declared inadmissible for failure to exhaust domestic remedies. In C.F. v. Canada¹²⁰ the HRC expressed the view that the Covenant, "does not generally prescribe preventative protection...".¹²¹ It has been submitted above that this does mean that the Covenant will never require preventative protection to comply with the obligation to "respect and ensure" the rights protected. The question of positive obligations under the Covenant was also raised by Canada in A.S. v. Canada.¹²² Canada argued, inter alia, that article 17,

"should be interpreted primarily as negative and therefore could not refer to an obligation by the State positively to re-establish conditions of family life already impaired".¹²³

The HRC took the view that article 17 was not applicable on the facts.¹²⁴

In the Mauritian Women Case¹²⁵ the HRC considered the protection to which a "family" was entitled from society and the State under article 23 of the Covenant.¹²⁶ The HRC expressed the opinion that,

"the legal protection or measures a society or a State can afford to the family vary from country to country and depend on different social, economic,

¹²⁰ Doc.A/40/40 p.217. See ch.4, pr.4.103 above.

¹²¹ Ibid., pr.6.2.

¹²² S.D. p.27. See ch.4, pr.4.59 above.

¹²³ Ibid., pr.5.1.

¹²⁴ See ch.4, pr.4.59 above. See also General Comment 16(32) on article 17, Doc.CCPR/C/21/Add.6 (31 March 1988).

¹²⁵ Aumeeruddy-Cziffra And Others v. Mauritius, Doc.A/36/40 p.134. See ch.4, pr.4.75 above.

¹²⁶ For the text of article 23 see Apx.I below.

political and cultural conditions and traditions".¹²⁷

The view would appear to be specific to article 23 rather than a general statement concerning permissible variations in the level of protection demanded by the Covenant.¹²⁸

6.26 For a State party the obligation under article 2 applies to, "to all individuals within its territory and subject to its jurisdiction". Therefore, it is not confined to nationals of the State concerned.¹²⁹ We have also considered the territorial applicability of the Covenant and the O.P.¹³⁰ Similarly we examined the requirement of being "subject to [the] jurisdiction", of the State concerned.¹³¹ The issue of jurisdiction was also raised in H.v.d.P. v. Netherlands.¹³² The author was an international civil servant with the European Patent Office (E.P.O.) based in Munich, West Germany. He claimed to be a victim of discrimination in the promotion practices of the E.P.O. and that the appeals procedures within the E.P.O. did not constitute an effective remedy. The author, a national of the Netherlands, brought the communication against the Netherlands. He claimed that the HRC was competent to consider the case on the basis that five States parties to the E.P.O. (France, Italy, Luxembourg, the Netherlands and Sweden) were also parties to the O.P.

¹²⁷ Doc.A/36/40 p.134, pr.9.2 (b) 2 (ii) 1.

¹²⁸ See ch.6, prs.6.11-6.12 above on the immediacy of the general obligation under article 2 of the Covenant and ch.1, pr.1.34 on the universality of the Covenant.

¹²⁹ See ch.4, pr.4.67 above.

¹³⁰ See ch.4, prs.4.82-4.85 and ch.6, pr.6.7 above.

¹³¹ See ch.4, prs.4.66, 4.82-4.86 above.

¹³² Doc.A/42/40 p.185.

and that the, "E.P.O., through a public body common to the Contracting States, constitutes a body exercising Dutch public authority".¹³³ The HRC took the view that the author had no claim under the O.P. on the basis that,

"The author's grievances...concern the recruitment policies of an international organization, which cannot, in any way, be construed as coming within the jurisdiction of the Netherlands or of any other State party to the International Covenant on Civil and Political Rights and the Optional Protocol thereto".¹³⁴

The approach of the HRC parallels that of the EUCM in an application concerning a decision of the Council of the European Communities.¹³⁵

6.27 A considerable number of communications have raised the non-discrimination (distinction) aspect of article 2(1). Many of those communications raise the question of the relationship between articles 2 and 26 (equality before the law and equal protection of the law). We have already noted the jurisprudence of the HRC to the effect that article 26 does not merely duplicate the guarantees in article 2 but constitutes an independent principle of

¹³³ Ibid., pr.2.3.

¹³⁴ Ibid., pr.3.2.

¹³⁵ C.F.D.T v. European Communities / Their Member States, A.8030/77, 13 D.& R. 231. See also A.235/56, 2 YBECHR 256 at 288-304, concerning the the responsibility of West Germany for the Supreme Restitution Court (an international tribunal) in West Germany. The jurisdiction of a national State over an international organization has recently been considered in the U.K. following the collapse of the International Tin Council. For the most recent decisions see *MacLaine Watson & Co. Ltd v. Department of Trade and Industry*, Times Law Report, 28th April 1988 (C.A.); *In re International Tin Council*, Times Law Report, 29th April 1988 (C.A.); *MacLaine Watson & Co. v. International Tin Council*, Times Law Report, 4th May 1988 (C.A.).

equal protection.¹³⁶ The Covenant therefore represents an important advance on article 14 ECHR which only prohibits discrimination in the enjoyment of the rights and freedoms in the ECHR.¹³⁷

The principles of non-discrimination and equal protection apply both to the securing of rights and in respect of restrictions on rights. In the Mauritian Women Case¹³⁸ the HRC stated that,

"Where the Covenant requires a substantial protection as in article 23, it follows from those provisions that such protection must be equal, that is to say not discriminatory, for example on the basis of sex".¹³⁹

Similarly,

"Where restrictions are placed on a right guaranteed by the Covenant, this has to be done without discrimination on the ground of sex. Whether the restriction in itself would be in breach of that right regarded in isolation, is not decisive in this respect. It is the enjoyment of rights which must be secured without discrimination. Here it is sufficient, therefore, to note that in the present position an adverse distinction based on sex is made, affecting the alleged victims in their enjoyment of one of their rights. No sufficient justification for this difference has been given. The Committee must then find that there is a violation of articles 2(1) and

¹³⁶ See ch.4, prs.4.55-4.58 above.

¹³⁷ See Van Dijk and Van Hoof, pp.386-398; Fawcett, pp.294-306.

¹³⁸ See n.125 above.

¹³⁹ Ibid., pr.9.2(b) 2 (ii) 2.

3 of the Covenant, in conjunction with article 17(1)".¹⁴⁰

6.28 Discrimination on the basis of sex was also alleged in the case of Lovelace v. Canada concerning L's loss of rights and status as an Indian when she married a non-Indian.¹⁴¹ An Indian man who married a non-Indian women did not lose his Indian status. In the light of its finding of a violation of article 27 of the Covenant when read in the context of articles 12, 17 and 23 and 2,3 and 26 of the Covenant the HRC found it unnecessary to examine the general provisions against discrimination in articles 2, 3 and 26.¹⁴² In an individual opinion Mr.Bouziri took the view that articles 2(1), 3, 23 (1) and (4) and 26 of the Covenant had also been breached on the basis that some of the provisions of the Indian Act were discriminatory particularly as between men and women.¹⁴³

6.29 The HRC have indicated when a distinction or differentiation will constitute discrimination,

"A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26".¹⁴⁴

¹⁴⁰ Ibid., pr.9.2 (b) 2 (i) 8. Similarly the HRC found the variation in the protection of the family under article 23 on the basis of sex to be discriminatory with respect to Mauritian women and cannot be justified by security requirements., *ibid.*, pr.9.2 (b) 2 (ii) 3. For the action taken by Mauritius see pr.4.132 above.

¹⁴¹ Doc.A/36/40 p.166.

¹⁴² Ibid., prs.13.2-19.

¹⁴³ Ibid., p.175.

¹⁴⁴ *Broeks v. Netherlands*, Doc.A/42/40 p.139, pr.13. Under the ECHR a distinction is discriminatory if it has no objective and reasonable justification, that
(Footnote Continued)

As we noted in ch.4¹⁴⁵ in two of the cases on Dutch social security law the HRC found the differentiation to be unreasonable and therefore discriminatory on the basis of sex¹⁴⁶ while in the third it found that the differentiation based on marital status did not constitute discrimination in the sense of article 26 of the Covenant because it was based on "objective and reasonable criteria".¹⁴⁷ Presumably the HRC will apply the same criteria in the context of article 2(1).

6.30 Communications have been submitted alleging discrimination on the basis of sex,¹⁴⁸ marital status,¹⁴⁹ political opinion,¹⁵⁰ race,¹⁵¹

(Footnote Continued)

is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought. See Van Dijk and Van Hoof, n.24 above. For a recent decision on article 14 see Rasmussen v. Denmark, 7 E.H.R.R. p.371.

¹⁴⁵ See ch.4, prs.4.55-4.58 above.

¹⁴⁶ Broeks v. Netherlands, Doc.A/42/40 p.139, prs.14-15; Zwaan-de Vries v. Netherlands, Doc.A/42/40 p.160, prs.14-15. See ch.4, prs.4.56-4.58 above.

¹⁴⁷ Danning v. Netherlands, Doc.A.42/40 p.151, pr.14. See ch.4, prs.4.56-4.58 above.

¹⁴⁸ Mauritian Women Case, n.125 above; Broeks v. Netherlands, n.146 above; Zwaan-de Vries v. Netherlands, n.146 above.

¹⁴⁹ Danning v. Netherlands, n.147 above.

¹⁵⁰ Wienberger Weisz v. Uruguay, Doc.A/36/40 p.114. The HRC stated that, "In no case, however, may a person be subjected to sanctions solely because of his or her political opinion (arts.2(1) and 26), *ibid.*, pr.15.

¹⁵¹ Pinkey v. Canada, Doc.A/37/40 p.101, pr.26. The HRC found that it did not have any verifiable information before it to substantiate P's allegations of wrongful treatment.

nationality,¹⁵² age¹⁵³ membership of the Romany minority¹⁵⁴ and because of the authors ethnic, religious and national background and for political reasons.¹⁵⁵

Article 2(2).

6.31 No communications have specifically raised article 2(2). When the HRC expresses the view that there has been a violation of the Covenant it has on a number of occasions stated that the State party should adjust its legislation as well as grating remedies to the

¹⁵² See Wight v. Madagascar, Doc.A/39/40 p.171. The HRC observed that the information available to it was insufficient to show that W was arrested and charged primarily because of his South African nationality and the South African nationality of his aircraft, *ibid.*, pr.16. See also F.G.G. v. Netherlands, Doc.A/42/40 p.180 (alleged discrimination in dismissal of foreign sailors): Inadmissible for failure to exhaust domestic remedies; H.v.d.P. v. Netherlands, Doc.A/42/40 p.185 (alleged discrimination in promotion policies), see pr.6.26 above.

¹⁵³ L.T.K. v. Finland, Doc.A/39/40 p.240, concerning the application of an age limit to alternative service which prevented L.T.K. from substituting military service with alternative service. The communication was declared inadmissible as not raising an issue under the Covenant. No specific reference was made to the alleged discrimination.

¹⁵⁴ E.H. v. Finland, Doc.A/41/40 p.168. E.H. claimed that a heavier sentence had been imposed on her for a criminal offence than on another Finnish woman in a similar case. the communication was held inadmissible as an examination did not reveal any facts in substantiation of the authors claim.

¹⁵⁵ K.L. v. Denmark, S.D. p.24. Declared inadmissible on the ground of non-substantiation of allegations.

individual victims concerned.¹⁵⁶ It is also interesting to note the view of the HRC in Hartikainen v. Finland¹⁵⁷ in which the authors alleged that compulsory classes for children on religion and ethics violated 18(4) of the Covenant.¹⁵⁸ There the HRC took the view that although the State party admitted that difficulties were being experienced in regard to the existing teaching plan the HRC,

"believes that appropriate action is being taken to resolve the difficulties and it sees no reason to conclude that this cannot be accomplished, compatibly with the requirements of article 18(4) of the Covenant, within the framework of existing laws".¹⁵⁹

Here the HRC displays a sensible degree of flexibility in the application of the Covenant and an understanding of the difficulties faced by States parties in giving effect to the Covenant.¹⁶⁰

Article 2(3).

6:32 In its views under the O.P. the HRC have consistently stressed the requirement of an effective remedy in terms of the measures necessary to remedy the

¹⁵⁶ See e.g. *Fals Borda v. Colombia*, Doc.A/37/40 p.193, pr.15; *Mauritian Women case*, Doc.A/36/40 p.134, pr.11.

¹⁵⁷ Doc.A/36/40 p.147; S.D. p.74.

¹⁵⁸ For the text of article 18(4) see Apx.I below.

¹⁵⁹ *Ibid.*, pr.10.5. Cf. the recent decision of the EUCM on religious education in A.10491/83, *Angelini v. Sweden*, 10 E.H.R.R. (1988) p.123-129.

¹⁶⁰ The reports submitted to the HRC under article 40 should cover, inter alia, the "progress made in the enjoyment" of the rights (article 40(1)) and "indicate the factors and difficulties, if any, affecting the implementation of the Covenant", (article 40(2)). See ch.3 above.

violations and to take steps to ensure that similar violations do not occur in the future.¹⁶¹ The approach of the HRC to the exhaustion of domestic remedies and the kind of remedies required in the event of violation have already been examined under in chapter 4.¹⁶² The HRC appears to have followed the jurisprudence under the ECHR in only requiring a person to "claim" that their rights have been violated rather than that they must actually have been violated before article 2 (3) can apply.

6.33 An important question is whether article 2(3) is capable of independent violation. In S.H.B. v. Canada¹⁶³, Canada argued that,

"Articles 2(1-3) and 3 of the Covenant are relevant to a determination of whether other articles of the Covenant have been violated, they are not capable of independent violation in their own right".¹⁶⁴

The HRC did not reply to this submission. However, in Ex-Philibert v. Zaire¹⁶⁵ found a separate violation of article 2(3). P had been arrested and detained for over nine months and had no effective remedy under the

¹⁶¹ See e.g., Mpandanjila et al. v. Zaire, Doc.A/41/40 p.121, pr.11.

¹⁶² See ch.4, prs.4.100-4.116 above. In Boyle and Rice v. U.K., A.9659/82 and A.9658/82, (1986), the EUCM stated that article 13 ECHR (the equivalent of article 2(3) ICCPR) provides the counterpart of the requirement to exhaust domestic remedies under article 26 and reflects the subsidiary character of the Convention system to the national systems safeguarding human rights.

¹⁶³ Doc.A/42/40 p.174.

¹⁶⁴ Ibid., pr.5.3.

¹⁶⁵ Doc.A/38/40 p.197.

domestic law of Zaire in respect of the violations of the law complained of.¹⁶⁶

6.34 Article 2(3) is obviously related to other articles of the covenant which provide for specific remedies. In Baritussio v. Uruguay¹⁶⁷ despite a decision granting her provisional release B remained in detention for another three years. Although her defence lawyer made representations to the military judges concerned he was informed that, if the prison authorities did not comply with the court order, the judges could do no more.¹⁶⁸

The HRC expressed the view that article 2(3) had been violated in conjunction with article 9(4) (right to take proceedings to challenge the lawfulness of detention).¹⁶⁹ A situation in which court orders are ignored represents a serious threat to the enforcement of rights under article 2(3) of the Covenant and must demand immediate action on the part of the authorities of the State. In Hamel v. Madagascar¹⁷⁰ the HRC expressed the view that article 9(4) of the Covenant had been violated but expressed no view on other claims including article 2(3) of the Covenant.¹⁷¹

6.35 A more helpful view of the HRC on the relationship between article 2(3) and other articles providing for remedies is that in Fanali v. Italy.¹⁷² Italy had made a

¹⁶⁶ Ibid., pr.8. The HRC also found violations of articles 9 (1)-(4) and 10(1).

¹⁶⁷ Doc.A/37/40 p.187.

¹⁶⁸ Ibid., pr.12.

¹⁶⁹ Ibid., pr.13. The HRC stated that there was no competent court to which B could have appealed during her arbitrary detention.

¹⁷⁰ Doc.A/42/40 p.130.

¹⁷¹ Ibid., prs.1, 20.

¹⁷² Doc.A/38/40 p.160.

reservation to article 14(5) of the Covenant (right to review of conviction and sentence by a higher tribunal). The author argued, inter alia, that his right of appeal was nonetheless confirmed by article 2(3) to which Italy had made no reservation. The HRC was

"unable to share this view which seems to overlook the nature of the provisions concerned. It is true that article 2(3) provides generally that persons whose rights and freedoms, as recognized in the Covenant, are violated "shall have an effective remedy". But this general right to a remedy is an accessory one, and cannot be invoked when the purported right to which it is linked is excluded by a reservation, as in the present case. Even had this not been so, the purported right, as in the case of article 14(5), consists itself of a remedy (appeal). Thus it is a form of lex specialis besides which it would have no meaning to apply the general right in article 2(3)".¹⁷³

Presumably the same approach could be taken to articles providing specific remedies or procedural guarantees, for example, article 9(4),¹⁷⁴ article 13 (procedure for the expulsion of aliens lawfully in the territory),¹⁷⁵ and, of great importance, the right to a fair and public hearing by a competent, independent and impartial tribunal established by law for the determination of any "criminal charge" or of "rights and obligations in a suit at law" (article 14).¹⁷⁶ The HRC's view does not

¹⁷³ Ibid., pr.13. See ch.10, pr.10.52 below.

¹⁷⁴ See the cases cited in prs.6.33-6.34 above.

¹⁷⁵ For the text of article 13 see Apx.I.

¹⁷⁶ On article 14 see ch.10 below. Cf. the decision of the EUCT in the Airey v. Ireland, Series A, vol.32, p.18 (1979).

answer the question of whether article 2(3) is capable of independent violation.

6.36 In Stalla Costa V. Uruguay¹⁷⁷ the state party that there could be no remedy because S.C. had no right under domestic law to be appointed to a public post. S.C. argued that the relevant Act was discriminatory because its effect was that only former employees were being admitted to the public service. The Act sought to restore the rights of those who had been dismissed on ideological, political or trade union grounds or for purely arbitrary reasons by the previous de facto regime, to be reinstated in their jobs, to resume their careers in the public service and to receive a pension. The HRC took the view that the enactment was a measure of redress for public officials who were victims of violations of article 25 of the Covenant¹⁷⁸ and as such were entitled to have an effective remedy under article 2(3) (a) of the Covenant.

"The Act should be looked upon as such a remedy. The implementation of the Act, therefore, cannot be regarded as incompatible with the reference to "general terms of equality" in article 25 (c) of the Covenant. Neither can the implementation of the Act be regarded as an invidious distinction under article 2, paragraph 1, or as prohibited discrimination within the terms of article 26 of the Covenant".¹⁷⁹

Clearly the communication concerned an exceptional situation where a legitimate aim of providing the only effective remedy for one set of victims involved a limitation on the rights of other individuals. While the view is comprehensible in that light the HRC could

¹⁷⁷ Doc.A/42/40 p.170.

¹⁷⁸ See Apx.I below.

¹⁷⁹ Ibid., pr.11.

usefully have stressed the requirement of proportionality between the means sought and the aim sought to be realised. So, for example, the application of the Act should not be indefinite but only for so long as necessary to afford an adequate opportunity to remedy to the original violations.

APPRAISAL.

6.37 The approach of the HRC to article 2 was always going to be crucial. In the consideration of State reports it has been accorded central importance. Members have acknowledged the discretion States parties have as to how to implement the rights in the Covenant.¹⁸⁰ However, they have generally stressed the immediacy of the obligation while being sympathetic to genuine difficulties in implementing the Covenant.¹⁸¹ In the general comment on article 2 and in other general comments the HRC have clearly established that States parties are obliged to take positive measures to "respect and ensure" the rights in the Covenant.¹⁸² Close and critical attention has been given to the relevant terms of national law and the practices of national organs as HRC members have sought to ascertain the practical implementation of the Covenant on a non-discriminatory basis.¹⁸³ Reservations and interpretations have been considered and commented upon although the HRC has made no formal determination of their competence in respect of them.¹⁸⁴ The HRC has acknowledged the vital function of "effective remedies" in giving effect to the Covenant and its consideration of the range of possible remedies has been most impressive.¹⁸⁵

As regards the HRC's jurisprudence under the O.P. the fundamental determination has concerned not so much article 2 but the relationship between article 2 and

¹⁸⁰ See pr.6.3 above.

¹⁸¹ See pr.6.11 above.

¹⁸² See prs.6.12-6.13 above.

¹⁸³ See prs.6.9-6.10, 6.14-6.17.

¹⁸⁴ See prs.6.3, 6.6 above.

¹⁸⁵ See prs.6.21-6.22.

article 26. The interpretation of article 26 as an independent equal protection guarantee adds considerably to the scope and importance of the Covenant.¹⁸⁶

¹⁸⁶ See prs.6.27, and ch.4, prs.4.56-4.58 above.

Article 4 ICCPR.¹7.1 ARTICLE 4.

(1) In a 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.

¹ For other derogation provisions see art.15 ECHR, art.27 AMR, art.30 ESC. Note that there are no derogation provisions in the ICESCR and the AFR. On the drafting of article 4 see A/2929, ch.V, prs.35-47; A/5655, prs.37-56; Bossuyt, 'Guide', pp.81-102. On derogation and public emergencies see T.Buergenthal, To Respect And To Ensure - State Obligations And Permissible Derogations, in L.Henkin (ed.), The International Bill Of Rights - The Covenant On Civil And Political Rights, p.72 at pp.78-86 (1981); B.Buzan, People, States And Fear - The National Security Problem In International Relations, (1983); A.Carty, Human Rights In A State Of Exception: The I.L.A. Approach And The Third World, in T.Campbell et al (eds.), Human Rights - From Rhetoric To Reality, pp.60-79, (1986); E.I.Daes, The Individual's Duties To The Community And The Limitations On Human Rights And Fundamental Freedoms Under Article 29 Of The U.D.H.R., Part.3, Doc.E/CN.4./Sub.2/432.Rev.2, (1983); L.C.Green, Derogations Of Human Rights In Emergency Situations, 16 Can.YIL (1978) pp.92-115; J.Hartman, Derogations From Human Rights Treaties In Public Emergencies, 22 Harv.ILJ (1981) pp.1-52; J.Hartman, Working Paper For The Committee Of Experts On Article 4, 7 HRQ (1985) pp.89-131; R.Higgins, Derogations Under Human Rights Treaties, 48 BYIL (1978) pp.281-320; International Commission Of Jurists, States Of Emergency - Their Impact On Human Rights, (1983); International Law Association, Human Rights In A State Of Emergency: (Footnote Continued)

(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.

Introduction.

7.2 Article 4 is self-evidently a key provision of the ICCPR. Its terms regulate the measures open to states parties in the most critical of human rights situations, public emergencies. Experience demonstrates that such

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Proclamation Of Emergency, Martial Law, States Of Siege, Report of Sub-Committee On The Study Of Regional Problems In The Implementation Of Human Rights, I.L.A. Report, 59th Conference, pp.89-100 and pp.151-167; Ibid, Regional Problems In The Implementation Of Human Rights: Minimum Standards In A State Of Exception, I.L.A., 60th Conference, pp.88-100 and pp.113-135; I.L.A., Enforcement Of Human Rights Law Committee, Minimum Standards In A State Of Exception, I.L.A. Report, 61st Conference (Paris), pp.56-96, referred to below as the "Paris Standards"; I.L.A., Enforcement Of Human Rights, I.L.A. Report, pp.108-197, 62nd Conference, (Seoul, 1986); T.Meron, Human Rights Law Making In The United Nations, pp.86-100, (1986); T.Meron, Human Rights In Times Of Internal Strife; Their International Protection, (1987); R.Norris, The Suspension Of Guarantees, 30 Am.U.L.R. (1980) pp.189-223; D.O'Donnell, States Of Exception, 21 Rev.I.C.J. (1978) pp.52-60; Ibid., States Of Siege Or Emergency And Their Effects On Human Rights: Observations And Recommendations Of The ICJ, U.N.Doc. E/CN.4/Sub.2/NGO 93 (August 1983); N.Questiaux, Study Of The Implications For Human Rights Of Recent Developments Concerning Situations Known As States Of Siege Or Emergency, Doc.E/CN.4/Sub.2/1982/15 (July 1982); P.Sieghart, The International Law Of Human Rights, pp.110-118 (1983); A.M.Singhvi, The State Of Emergency And The Law Of Nations, 25 Ind.JIL (1985) pp.554-575; P.Stein, Derogations From Guarantees Laid Down In Human Rights Instruments, in I.Maier, (ed.), Protection Of Human Rights In Europe - Limits And Effects, (1982) pp.123-133; Symposium on "Security Of

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situations are commonly characterised by severe human rights violations.² The practice of the HRC is then significant in a number of respects. Firstly, it is an important indicator of how the HRC envisages its role under the reporting procedure because a provision concerning derogation acutely raises the issues of the scope of international implementation procedures and their relationship with the concept of State sovereignty.³ Secondly, the response of a State to a public emergency is an acid test of its commitment to the effective implementation of human rights.⁴ Thirdly, the problems engendered by states of emergency and their effects on human rights have increasingly attracted attention in recent years particularly within the United Nations. There now exists some important international case law, analyses of state practice and academic analysis which have given much greater content to the terms used in article 4.⁵ This jurisprudence can supply

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The Person And Security Of The State: Human Rights And Claims Of National Security", 9 Yale JWPO (1982) part I; Symposium, "Limitation And Derogation Provisions In The ICCPR", 7 HRQ (1985) part I, the set of principles adopted by the Conference are entitled "The Siracusa Principles On The Limitation And Derogation Provisions In The ICCPR" are referred to below as the "Siracusa Principles". They have also been published in U.N.Doc.E/CN.4/1985/4 (Sept.1984); C.Warbrick, The Protection Of Human Rights In National Emergencies, in F.E.Dowrick (ed.), Human Rights - Problems, Perspectives, Texts, pp.89-106, (1979).

² See n.1 above and R.Falk, Responding To Severe Violations, in Jorge.I.Dominguez et al., Enhancing Global Human Rights, pp.207-257, (1979).

³ See ch.1, prs.1.18-1.21; Hartman, n.1 above, (1981), pp.1-4.

⁴ See Hartman, *ibid.*, p.11.

⁵ See n.1 above. The Sub-Commission On The Prevention Of Discrimination And The Protection Of Minorities now prepares an annual report on the respect
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useful guidance to the HRC in its considerations of article 4.

There follows a brief distillation of the practice of the HRC under article 4. That practice includes the adoption of a general comment under article 40(4) of the Covenant.⁶ The considerations of the United Kingdom reports provide an instructive example and so are dealt with more particularly.⁷

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for rules governing the declaration of states of exception. The report is to follow the definition and guidelines in the study by Questiaux, n.1 above and attempt to evaluate the effects of states of emergency on the practical observance of human rights. The first report by Despouy has recently been presented covering twenty eight countries, see 39 Rev.ICJ (1987) p.29.

⁶ G.C.5/13, Doc.A/36/40 p.110, adopted by the HRC at its 311th meeting (July 1981).

⁷ See prs.7.23 et seq.

Article 4 Under The Reporting Procedure.

7.3 When the HRC was preparing guidelines for the submission of reports under article 40 (1)(a) a number of members expressed the view that the subject of derogations should not be mentioned because, in particular, to do so might be misinterpreted as weakening the provision in article 4(3) of the Covenant which requires that notification to the Secretary-General of any derogation and of the reasons therefore be made immediately. Unfortunately, it was decided, therefore, not to expressly refer to derogations in the General Guidelines.⁸ It is submitted that the objecting members confused the two separate obligations to report (article 40 (1)) and to notify (article 4 (3)). It would have been more sensible to indicate clearly to States parties the information the HRC required concerning derogation practice and procedure.

7.4 It appears from the comments of members of the HRC that very few reports have given adequate information on article 4 and in almost all cases members have asked questions, made comments and requested further additional information.⁹ Indeed, at times, the primary emphasis of much of the considerations of the HRC has appeared to be the collection of further detailed information relevant to article 4.

Article 4 (1).

7.5 An interesting feature of the approach of members to article 4 is that they have not strictly confined their considerations to events after the entry into force of

⁸ See the discussion in SR 43 prs.54-57; SR 44 prs.1-9; Doc.A/32/44 pr.138. The guidelines do, however, impliedly cover derogations, see part.II, b, at ch.3, pr.3.3 above.

⁹ See G.C.5/13, pr.2, cited in pr.7.15 below.

the ICCPR for the State concerned.¹⁰ State representatives have frequently been asked for information concerning any state of emergency occurring at any time since the existence of the State or in a more recent period, for example, the last twenty years.¹¹ Members have then used those examples, if any, to determine whether the appropriate national procedures and mechanisms exist to ensure compliance with the terms of article 4 and whether any elements of emergency regimes have subsisted after their termination.¹²

7.6 Members have asked how a public emergency is officially proclaimed, who is entitled to make the proclamation, on what grounds and by what procedures?¹³ Was the official proclamation of a state of emergency a pre-condition to the Constitutionality or legality of the measures taken thereunder?¹⁴ Particular attention has been directed to the circumstances which permit of the proclamation of a public emergency, for example, political, social, economic factors, or natural

¹⁰ See ch.4, prs.4.49-4.52 above on "ratione temporis" under the O.P.

¹¹ See e.g., SR 199 pr.13 (Vincent-Evans on Iraq), SR 200 pr.2 (Lallah on Iraq), SR 222 pr.49 (Koulishev on Colombia), SR 387 pr.11 (Tomuschat on Mexico).

¹² SR 118 pr.13 (Lallah on Ecuador).

¹³ SR 29 pr.6 (Lallah on Tunisia). See Siracusa Principles 42-43, and 62, n.1 above.

¹⁴ SR 170 pr.58 (Hanga on Finland). The requirement of an official proclamation in article 4 ICCPR represents an important advance on article 15 ECHR. In the Lawless Case, EUCT, Series A, Vol.3 (1961), the EUCT noted that, "the Convention does not contain any special provision to the effect that the Contracting State concerned must promulgate in its territory the notice of derogation addressed to the Secretary-General of the Council of Europe", pr.47. The absence of such a requirement has been criticized, e.g., by Fawcett, p.313. See Resolution 56(16) of the Council of Ministers, ECHR - Collected Texts, p.200 (1987).

disasters.¹⁵ This has generally involved a kind of comparative analysis between the terms of the Covenant and the terms of the respective State Constitution and legislative acts.¹⁶ There has been no attempt by the HRC, however, to provide a definition of or criteria for a "public emergency".¹⁷ Members have sought to determine the role and function of national authorities charged with the implementation of the state of emergency.¹⁸ They have expressed concern at the concentration of powers in the hands of a single individual, for example, the President or Prime minister, or in the hands of a single organ of government, for example, the executive or the armed forces, particularly where this has been at the expense of a parliamentary body.¹⁹

¹⁵ See e.g., SR 84 pr.11 (Uribe-Vargas on Madagascar), SR 87 pr.11 (Madagascan State representative); SR 258 pr.48 (Tarnopolsky on Italy), SR 222 pr.3 (Sadi on Colombia). Derogations in the event of natural disasters were envisaged during the drafting, see Doc.A/2929, ch.V, pr.39. Siracusa Principle 41, n.1 above, states that, "Economic difficulties per se cannot justify derogation measures".

¹⁶ For an academic analysis of the AMR on similar lines see Norris, n.1 above.

¹⁷ Cf. The criteria adopted by the EUCT in the Lawless Case, n.14 above, prs.23-30. See Siracusa Principles 39-41, n.1 above. It is interesting to note the following explanation in the second periodic report of Australia concerning whether a state of emergency in Queensland as a result of a strike by electricity supply workers in the south-east of that State should have resulted in a notification of derogation under article 4(3) of the Covenant, "as the Queensland situation was confined to that State, it was not an emergency threatening "the life of the nation" within the terms of article 4, paragraph 3 of the Covenant", Doc.CCPR/C/42/Add.2, p.36.

¹⁸ See e.g., SR 213 pr.11 (Tarnopolsky on Senegal).

¹⁹ See e.g., SR 248 pr.30 (Bouziri on Venezuela),
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7.7 The search for additional information has concentrated on attempting to determine the precise legal effects of the different forms and degrees of public emergency encountered by the HRC, for example, state of siege,²⁰ state of alarm,²¹ economic state of emergency,²² state of war,²³ state of national necessity.²⁴ Members have wanted to know whether constitutional or legislative provisions were partially suspended or abrogated altogether. They have indicated their concern at general restrictions and limitations based on vague and undefined concepts such as public order, public safety, public security, necessity, national security, latent subversion and perverse delinquency, and requested explanations as to the domestic understandings of these concepts.²⁵ In its general comment the HRC stated that it held, "the view that measures taken under article 4 are of an exceptional and temporary nature and may only last as

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SR 265 pr.35 (Ermacora on Barbados), SR 327 pr.40 (Tarnopolsky on Morocco), SR 128 pr.66 (Vincent-Evans on Chile), SR 442 pr.19 (Bouziri on Lebanon).

²⁰ See pr.7.12 below (on France).

²¹ See SR 142 pr.5 (Tarnopolsky on Spain).

²² See SR 422 pr.7 (Al Douri on Nicaragua).

²³ See SR 170 pr.84 (Prado-Vallejo on Finland), reply at SR 172 pr.7.

²⁴ See SR 82 or 83 pr.27 (Hanga on Madagascar), SR 84 pr.11 (Uribe-Vargas on Madagascar), SR 222 pr.3 (Sadi on Colombia). See Singhvi, n.1 above, at n.2.

²⁵ See e.g., SR 355 pr.28 (Prado-Vallejo on Chile), SR 356 prs.31-32 (Ermacora on Uruguay), SR 127 prs.23-44 (Prado-Vallejo) and 128 pr.17 (Tomuschat) on Chile. See Siracusa Principles 22-34, n.1 above.

long as the life of the nation concerned is threatened".²⁶

7.8 State representatives have often been invited to explain how the legal regime under a public emergency conforms to the requirements of the Covenant. Were there any controls or restrictions upon the organs concerned with implementing the state of emergency?²⁷ In particular, was there any Parliamentary supervision or legislative control over the proclamation of a public emergency, its continuance, extension or termination?²⁸ Could the constitutionality or legality of the emergency measures be challenged in a Constitutional court or in the ordinary courts?²⁹ Was judicial review available and did remedies exist for those who alleged that their rights under the ICCPR had been violated?³⁰ How would conflicts between the constitutional powers and the terms of the Covenant be resolved?

7.9 It is of course important to note that emergency situations potentially affect all of the other rights in

²⁶ G.C.5/13, n.6 above, pr.3. See Siracusa Principle 48, n.1 above. The EUCM stated in the De Becker Case that continued derogation of rights will not be justifiable under the Convention after the emergency has ceased, A.214/56, 2 YBECHR p.214. The institutionalization of emergency measures into ordinary laws is a technique increasingly favoured by Governments, see pr.7.20 below (Graefrath on Chile).

²⁷ See e.g., SR 29 pr.6 (Lallah on Tunisia). See also the Siracusa Principles, n.1 above.

²⁸ See e.g., SR 52 pr.49 (Lallah on Sweden). See Siracusa Principles 49-50, 55, n.1 above. In the Lawless Case, n.14 above, the EUCT noted the number of safeguards designed to prevent abuses in the operation of the system of administrative detention, pr.37.

²⁹ See Siracusa Principles 56 and 60, n.1 above. See also Alexander, The Illusory Protection Of Human Rights By National Courts During Periods Of Public Emergency, 5 HRLJ (1984) pp.1-65.

³⁰ See e.g., SR 331 pr.39.

the ICCPR. The HRC's considerations must then be seen in the context of its detailed consideration of other rights in the ICCPR. However, even within the specific context of article 4 members have frequently required information and explanations of the effect of measures taken under public emergencies on the exercise and enjoyment of the rights and remedies in the ICCPR, from article 1 to article 27, including articles from which derogation had been made.³¹ For example, during consideration of the second periodic report of Spain³² a number of members expressed concern about the effect on articles 9 and 14 ICCPR of the operation of Organic Law No.8/1984 concerning the extension of the permissible period of police detention and limitations on access to counsel.³³ Similarly, during consideration of the report of Sri Lanka³⁴ a number of members expressed doubts about the compatibility of the Prevention Of Terrorism Act 1979 with the provisions of the Covenant, particularly articles 9, 14 and 15.³⁵

7.10 There has been no real indication from members as to what is covered by the expression "other obligations under international law" with which derogation measures must not be inconsistent.³⁶ The only indications of what

³¹ See e.g. SR 224 pr.77 (Lallah on Suriname), SR 282 pr.21 (Lallah on Tanzania), SR 442 pr.15 (Al Douri on Nicaragua), SR 128 pr.66 (Vincent-Evans on Chile), SR 221 pr.23 (Prado- Vallejo on Colombia).

³² Doc.CCPR/C/32/Add.3.

³³ See SR 586 prs.34-44, SR 587 prs.1-33.

³⁴ Doc.CCPR/C/14/Add.4 and 6 (19).

³⁵ See SR 471, 472, 473 and 477. Similarly see the summary of the HRC's discussion on the special powers in the Indian Constitution in Doc.A/39/40 pr.251.

³⁶ See Doc.A/2929, ch.V, pr.43. In the Lawless Case, n.14 above, the EUCT considered the same
(Footnote Continued)

might be covered have been the occasional suggestion from a HRC member that the terms of the 1949 Geneva Conventions on the Law Of War and the 1977 Protocols thereto³⁷ are of relevance to the situation concerned. for example, in Afghanistan³⁸ and in El Salvador.³⁹ Commentators have indicated that the expression would cover, for example, obligations for States parties under the United Nations Charter, humanitarian law treaties, regional human rights conventions and customary international law.⁴⁰

7.11 Criticism has been directed to national provisions which appear to violate the provision in article 4 (1) that derogation measures must not, "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". For example, article 23(3)(d) of the Constitution of Barbados was objected to on the basis that it allowed distinctions to

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expression. The EUCT stated that no facts had come to its knowledge to suggest that this condition had not been satisfied, prs.39-41. Similarly in U.K. v. Ireland, EUCT, Series A, Vol.25, pr.222, (1978).

³⁷ For the text of these see A.Roberts and R.Guelff, Documents On The Law Of War, pp.169-337 (1949) and 387-463 (1977). See H.Montealegre, The Compatibility Of State Party's Derogations Under Human Rights Instruments With Its Obligations Under Protocol II And Common Article 3, 33 Am.U.L.R. (1983) pp.41-51; C.Lysaght, The Scope Of Protocol II And Its Relation To Common Article 3 Of The Geneva conventions Of 1949 And Other Human Rights Instruments, *ibid.*, pp.9-27; Siracusa Principle 67, n.1 above.

³⁸ See SR 604 pr.36 (Tomuschat), reply at SR 608 pr.25 ("there was no civil war in Afghanistan") and SR 608 pr.51 (Tomuschat).

³⁹ See SR 469 pr.33 (Graefrath).

⁴⁰ See SR 444 pr.12 (Opsahl). See also Siracusa Principles 66-69, n.1 above; Glasser, ch.5, n.68 above. See also the advisory opinion of the IACT on "Other Treaties Subject To The Advisory Jurisdiction Of The Court", 3 HRLJ (1982) p.146.

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might be covered have been the occasional suggestion from a HRC member that the terms of the 1949 Geneva Conventions on the Law Of War and the 1977 Protocols thereto³⁷ are of relevance to the situation concerned, for example, in Afghanistan³⁸ and in El Salvador.³⁹ Commentators have indicated that the expression would cover, for example, obligations for States parties under the United Nations Charter, humanitarian law treaties, regional human rights conventions and customary international law.⁴⁰

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³⁸ See SR 604 pr.36 (Tomuschat), reply at SR 608 pr.25 ("there was no civil war in Afghanistan") and SR 608 pr.51 (Tomuschat).

³⁹ See SR 469 pr.33 (Graefrath).

⁴⁰ See SR 444 pr.12 (Opsahl). See also Siracusa Principles 66-69, n.1 above; Glasser, ch.5, n.68 above. See also the advisory opinion of the IACT on "Other Treaties Subject To The Advisory Jurisdiction Of The Court", 3 HRLJ (1982) p.146.

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be made in terms of public emergency on some prohibited grounds.⁴¹

7.12 The approach of France to article 4 attracted some interesting comments. France's ratification was accompanied by the following reservation,

"First, the circumstances enumerated in article 16 of the Constitution in respect of its implementation, in article 1 of the Act of 3 April 1978 and in the Act of 9 August 1849 in respect of the Declaration of a state of siege, in article 1 of Act No.55-385 of 3 April 1955 in respect of a declaration of a state of emergency and which enable these instruments to be implemented, are to be understood as meeting the purpose of article 4 of the Covenant; and secondly, for the purposes of interpreting and implementing article 16 of the Constitution of the French Republic, the terms 'to the extent strictly required by the exigencies of the situation' cannot limit the power of the President of the Republic to take 'the measures required by circumstances' ".⁴²

Mr.Herdocia-Ortega commented that, "the provisions of article 16 of the French constitution appeared to be in conformity with the requirements of article 4 of the Covenant, as were the arrangements with regard to states

⁴¹ See e.g., SR 265 pr.6 (Tarnopolsky on Barbados). See also the second periodic report of Barbados, Doc.CCPR/C/ 42/Add.3 pp.4-5. A.P.Blaustein and G.H.Flanz, *Constitutions Of The Countries Of The World*, vol.II (Dec.,1987). Similarly see SR 292 pr.39 (Vincent-Evans on Jamaica), Doc.A/39/40 pr.326 (on Gambia).

⁴² Human Rights - Status Of International Instruments, pp.34-35 (1987). For the French Report see Doc.CCPR/C/ 22/Add.2. Further information is provided in France's second periodic report, Doc.CCPR/C/46/Add.2 pp.17-19 (1987). See also McRae, ch.6, n.21 above.

of siege and emergency".⁴³ Mr. Tarnopolsky requested clarification of the first part of the reservation. Did it mean that the Covenant would apply only to the extent that it was possible under the Constitution or that the Constitution could normally be applied to the extent permitted by article 4 of the Covenant?⁴⁴ Mr. Al Douri commented that, "with due regard for the reservations entered by France in respect of that article, he would like to know who was responsible for exercising control over the acts of the President in that case".⁴⁵ Mr. Graefrath commented,

"France had made a reservation with regard to article 4, thereby confirming that reservations concerning article 4 were possible and that, by the entering of a reservation, the scope of emergency measures could be broadened considerably. It seemed clear from the text submitted that article 16 of the French Constitution and the relevant legislation had a far wider range of application than article 4 of the Covenant. Furthermore, the French reservation stated that it was the responsibility of the President of the Republic to decide what measures were strictly necessary. That was not a reservation, but a correct interpretation of the Covenant, which did not subject such powers of a State party to foreign control".⁴⁶

The French representative replied,

"As for the extent of the France's reservation to article 4, he repeated that the reservation only applied to paragraph 1, which was quite legitimate

⁴³ SR 440 pr.23.

⁴⁴ SR 440 pr.55.

⁴⁵ SR 441 pr.47.

⁴⁶ SR 441 pr.35 (as corrected).

under the Vienna Convention on the Law of the Treaty. It seemed to him that the question of whether reservations could be made to other paragraphs of that article was one for the Committee to decide".⁴⁷

7.13 It is submitted that the HRC should take a stricter approach to reservations to a derogation provision than this. It is difficult to reconcile a considerable broadening of the scope of emergency powers with the object and purpose of the ICCPR. It has been argued that a similar French reservation to the ECHR is invalid as incompatible with the objects and purposes of the ECHR.⁴⁸ This submission implies that the HRC should consider the validity of reservations made by States within the context of the article 40 reporting procedure.

7.14 In the HRC's considerations under article 4 there have been no clear indications of the application of any criteria by members to the declaration of a public emergency although there is useful comparative jurisprudence under the ECHR in this respect.⁴⁹ In specific cases individual members have expressed doubts as to the justification for a particular emergency regime or its continuation;⁵⁰ suggested that article 4

⁴⁷ SR 445 pr.32. As noted in ch.6, pr.6.3 above the HRC have made no formal determination on the question of the HRC's competence in respect of reservations.

⁴⁸ See ECHR - Collected Texts, p.77 (1987); Van Dijk and Van Hoof, pp.452-4; Higgins, n.1 above, p.317 n.5. Article 64 ECHR permits reservations other than those of a general character. See P.H.Imbert, Reservations To The European Convention On Human Rights Before The Strasbourg Commission: The Temeltasch Case, 33 ICLQ (1984) pp.558-595.

⁴⁹ See Lawless Case, n.14 above; U.K. v. Ireland, n.36 above; The Greek Case, 12 YBECHR (1969) pp.41-42.

⁵⁰ See SR 127-130, 527-31 and 546-8 on Chile. See (Footnote Continued)

allowed States parties considerable latitude in deciding when a public emergency justified derogation;⁵¹ and that the decision concerning the emergency situation was a sovereign act.⁵² There has not, however, been any clear statement by the HRC on the scope of its jurisdiction under article 4 or on the existence of any doctrine similar to that of the "margin of appreciation" developed under the ECHR.⁵³

7.15 The HRC has summed up its experience under the reporting procedure as follows,

"States parties have generally indicated the mechanism provided in their legal systems for the declaration of a state of emergency and the applicable provisions of the law governing derogations. However, in the case of a few States which had apparently derogated from Covenant rights, it was unclear not only whether a state of emergency had been officially declared but also whether rights from which the Covenant allows no derogation had in fact been derogated from and further whether the other States parties had been informed of the derogations and of the reasons for the derogations".⁵⁴

(Footnote Continued)

M.J. Bossuyt, *The United Nations And Civil And Political Rights In Chile*, 27 ICLQ (1978) pp.462-471.

⁵¹ See e.g., SR 128 pr.40 (Tarnopolsky on Chile). See the judgements of the EUCT in the cases of *Lawless*, n.14 above, and *Ireland v. U.K.*, n.36 above.

⁵² See e.g., SR 284 pr.34 (Aguilar on Mali), SR pr. (Graefrath on Nicaragua). See also SR 224 prs.47 (Lallah on Suriname).

⁵³ Reference to this doctrine was made during the discussions of the Third Committee in 1963, see Doc.A/5655 pr.49. On the doctrine of the margin of appreciation see ch.4, n.383 above.

⁵⁴ G.C.5/13, n.6 above, pr.2.

Article 4(2).

7.16 The HRC has stated that it holds the view that, "in times of emergency, the protection of human rights becomes all the more important, particularly those rights from which no derogation can be made".⁵⁵ State representatives are asked to explain how the relevant domestic provisions ensure that the non-derogable rights in article 4(2) are protected in times of public emergency.⁵⁶ On a number of occasions members have clearly stated their view that non-derogable rights were being violated, for example, in Chile,⁵⁷ Uruguay,⁵⁸ Iran,⁵⁹ and El Salvador.⁶⁰

7.17 Only one State, Trinidad and Tobago, has made a reservation to article 4(2). That reservation stated that,

"The Government of the Republic of Trinidad and Tobago reserves the right not to apply in full the provision of paragraph 2 of article 4 of the Covenant since section 7(3) of its Constitution enables Parliament to enact legislation even though it is inconsistent with sections (4) and (5) of the said Constitution".⁶¹

⁵⁵ G.C.5/13, n.6 above, pr.3. See Siracusa Principles 59-60, n.1 above.

⁵⁶ See e.g., SR 248 pr.4 (Prado-Vallejo on Venezuela), SR 271 pr.28 (Tarnopolsky on Kenya).

⁵⁷ See n.51 above.

⁵⁸ See SR 355, 356, 357, 359 and 373.

⁵⁹ See SR 364, 365, 366 and 368.

⁶⁰ See SR 468, 469, 474 and 485.

⁶¹ See Human Rights - Status, n.42 above, pp.44-45. For the relevant provisions of the Constitution of Trinidad and Tobago see Blaustein and Flanz, n.41 above, Vol.XVI (1977, 1983).

During consideration of the report of Trinidad and Tobago this reservation was criticized. For example, Mr. Tomuschat commented that,

"The matter was a serious one, since the drafters of the Covenant had stressed in their wording of the article their understanding that there should be limits to restrictions on specific rights even in situations of crisis. It was a serious inconsistency with the objectives and purposes of treaty law, for the Government of Trinidad and Tobago to have found it expedient to make such a reservation. The Government should be asked to consider withdrawing it".⁶²

The Federal Republic of Germany had also lodged a formal objection to the reservation stating that in its opinion, "it follows from the text and the history of the Covenant that the said reservation is incompatible with the object and purpose of the Covenant".⁶³ The State representative replied that in view of the serious nature of the question it would have to be put to the relevant Ministry.⁶⁴ The approach of Mr. Tomuschat represents a much more active view of the role of the HRC in the context of article 4 as regards reservations than that of Mr. Graefrath noted above and is to be preferred. Again it would be much better if the HRC as a body expressed a view in the validity of the reservation

⁶² SR 551 pr.1.

⁶³ See Human Rights- Status, n.42 above, p.51. On reservations see articles 19-23 of the V.C.L.T. (1969).

⁶⁴ SR 555 pr.2. It is difficult to see how a reservation to a derogation provision could be other than contrary to the object and purpose of a human rights treaty. When presenting the second periodic report of Trinidad and Tobago the state representative indicated that her Government had not deemed it necessary to withdraw the reservation to article 4(2), SR 765 pr.15. The reservation again attracted criticism, *ibid.*, prs.16-18 (Higgins), 20 (Cooray), 22 (Lallah).

in question. Similarly, there needs to be an established mechanism to ensure that a prompt reply is received from the State concerned rather than waiting until consideration of that States next periodic report.⁶⁵

7.18 Although article 4(2) indicates which of the articles are non-derogable members of the HRC have indicated that it would be difficult to justify derogations from some of the other articles of the Covenant, for example, concerning suspension of the political rights in article 25.⁶⁶

Article 4(3).

7.19 Members of the HRC have consistently referred to the requirements of article 4(3) ICCPR and stressed that they are not a "mere formality".⁶⁷ In its General Comment on article 4 it stated that along with the protection of human rights, "it was important that States parties, in times of public emergency, inform other States parties of the nature and extent of the derogations they have made and of the reasons therefore, and further, to fulfil their reporting obligation under article 40 of the Covenant by indicating the nature and extent of each right derogated from together with the

⁶⁵ See n.64 above.

⁶⁶ See e.g., SR 160 pr.51 (Vincent-Evans on Syria), SR 430 pr.32 (Prado-Vallejo on Peru), SR 528 pr.11 (Vincent-Evans on Chile). Some studies have suggested that the list of non-derogable rights in article 4(2) should be extended, see ICJ study, n.1 above, p.463, pr.38, and Siracusa Principle 70, n.1 above. Article 27 of the AMR contains a longer list of non-derogable rights than article 4(2). For States parties to the AMR these would be covered by "other obligations under international law" in article 4(2) ICCPR. Cf. The third Advisory Opinion of the IACT, n.40 above.

⁶⁷ SR 469 pr.9 (Tomuschat on El Salvador). See also SR 355 pr.24 (Prado-Vallejo on Uruguay).

relevant documentation".⁶⁸ The General Comment does not indicate whether or when States parties who have made derogations are required to report on them to the HRC and, as we have already noted, there has been some disagreement within the HRC as to the relationship between article 4 and the reporting obligation in article 40.⁶⁹ It has been submitted that it is patently inadequate for the HRC to be unable to consider derogations made by States parties except in accordance with the established five year periodicity period.⁷⁰

7.20 Although members have stressed the importance of notification of derogations and indicated on a number of occasions that notifications have not satisfied the requirements of article 4(3) there has been no real suggestion that derogations made under article 4(1) have been invalid on the basis of failure to comply or fully comply with the notification requirements in article 4(3).⁷¹ The furthest that individual members have gone

⁶⁸ G.C.5/13, n.6 above, pr.3. See also Siracusa Principles 44-47.

⁶⁹ See ch.3, pr.3.8-3.8.1 above.

⁷⁰ Ibid. For example the initial report of Poland (Doc. CCPR/C/3/Add.2 (1979) was considered by the HRC in 1979 (SR 186, 187 and 190). A state of emergency was declared in Poland on 13 December 1981. The state of emergency was finally terminated on 22 July 1983. The second periodic report of Poland, which reviews the state of emergency, was submitted to the HRC in October 1985 (Doc.CCPR/C/32/ Add.9 and Add.13). It was considered by the HRC in March 1987 (SR 708-711). Therefore the HRC had no opportunity to enter into a dialogue with Poland until the state of emergency had been terminated. For U.N. reports on the state of emergency in Poland see Doc.E/CN.4/1983/18 (Gobbi) E/CN.4/1984/26 (Gobbi and Patricio Ruedas), criticized by Franck, 78 Am.JIL p.811 at pp.829-830 (1984). See principle 73 of the Siracusa Principles, n.1 above.

⁷¹ See e.g., SR 355 pr.24 (Prado-Vallejo on Uruguay). Cf. the view expressed on this matter by the HRC under the O.P. in pr.7. below.

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has been to state their view that the derogations made have not satisfied the requirements of article 4(1) as to, for example, proportionality, necessity and official proclamation. For instance, during consideration of the second periodic report of Chile⁷² a number of members were severely critical of measures taken under the state of emergency. For example, Mr. Graefrath commented, *inter alia*, that,

"In order to permit continuing violations of human rights, the unconstitutional state of emergency had been institutionalized during an interim period and subsequently in the new Constitution. As a result, the Junta now disposed of various levels of emergency measures which could be used whenever necessary to protect the existing regime. What was called an emergency in Chile had nothing to do with what was intended by the same term in Article 4 of the Covenant. The so-called state of emergency was being used to justify the discriminatory measures provided for in article 8 of the 1980 Constitution, which condemned as illegal any action by an individual or group intended to propagate doctrines of a totalitarian character or based on class warfare".⁷³

7.21 Inevitably in its consideration of States of emergency under article 4, whether proclaimed officially or de facto, members of the HRC have had to consider the wider political context of inter-State disputes and

⁷² Doc.CCPR/C/32/Add.1 (1981).

⁷³ SR 528 pr.28. See also his comments on Chile at SR 128 prs.8-9 and on Iran at SR 366 pr.27. In the Greek Case the EUCM rejected the applicants view that a revolutionary government is barred from derogating under article 15 ECHR because it created the crisis, Greek Case, 12 YBECHR (1969) pp.31-32. Only Mr. Ermacora, now a member of the HRC, dissented from this view, *ibid.*, pp.102-103.

civil wars with or without the involvement of outside States, for example, with regard to the situations in Afghanistan⁷⁴ Colombia,⁷⁵ Cyprus,⁷⁶ Egypt,⁷⁷ El Salvador,⁷⁸ Jordan,⁷⁹ the Lebanon,⁸⁰ Nicaragua,⁸¹ Sri Lanka.⁸² It is notable that during consideration of these situations members have generally, though not always, avoided commenting on the political aspects and the relevance of actions of other States.⁸³ Normally members have simply confined themselves to asking how these factual situations affected the implementation of

⁷⁴ See SR 603, 604 and 608. For the recent international agreement on Afghanistan ch.5, n.74 above.

⁷⁵ See SR 221, 222, 223 and 226.

⁷⁶ See SR 27, 28, 165 and 166.

⁷⁷ See SR 499, 500 and 505.

⁷⁸ See SR 468, 469, 474, 485, 716, 717 and 719.

⁷⁹ See SR 103, 331 and 332.

⁸⁰ See SR 442, 443, 444 and 446.

⁸¹ See SR 420, 421, 422, 428 and 429. See also Case Concerning Military And Paramilitary Activities In And Against Nicaragua, (Nicaragua v. United States Of America), Merits, Judgement, I.C.J. Reports 1986, p.14; XXV ILM (1986) pp.1023-1289. See also the material at XXV ILM (1986) pp.1290-1325, 1337-1365.

⁸² See SR 471, 472, 473 and 477. See P.Hyndman, Human Rights, The Rule Of Law And The Situation In Sri Lanka, 8 U.N.S.W.L.J. (1985) pp.337-361.

⁸³ A good example of the judicious but critical approach of HRC members is the consideration of the report of Afghanistan, n.74 above. A less successful
(Footnote Continued)

the rights in the ICCPR in the States concerned.⁸⁴ Such an approach is to be commended in the light of the HRC's membership and status and the politicized nature of most other United Nations human rights bodies.⁸⁵

7.22 The stress put on article 4(3) by HRC members seems to be bearing fruit. It appears that States parties are increasingly complying with the notification obligations in article 4(3) particularly after the State has appeared before the HRC.⁸⁶

(Footnote Continued)

consideration took place of the report of the post-1979 regime in Iran, see SR 364, 365, 366 and 368. See also SR 430 pr.46 (Tomuschat on Peru).

⁸⁴ For some exceptions to the HRC's general approach see the comments at SR 442 prs.9-19 (Al Douri), prs.29-34 (Movchan), SR 443 prs.15-36,40 (Bouziri) and prs.40-42 (Errera) concerning the Israeli presence in the Lebanon; SR 468 pr.25 (Prado-Vallejo concerning U.S. interference in El Salvador), reply at SR 468 pr.36; SR 604 pr.64 (Graefrath on Afghanistan); SR 604 pr.44 (Higgins on the Soviet occupation of Afghanistan).

⁸⁵ Particularly the U.N. Human Rights Commission, see H.Tolley, ch.1, n.1 above.

⁸⁶ See Human Rights-Status, n.42 above, pp.58-85, covering twelve States parties. For an example see the detailed information provided by Chile in Doc.CCPR/C/32/Add.2 (1984). The ICJ study, n.1 above, suggests that during first five years the Covenant was in force at least fifteen States parties failed to give any or timely notice of States of emergency including Colombia, Peru and Uruguay, p.454.

The United Kingdom And Article 4.

7.23 It is instructive to look a little more closely at an example of the HRC's considerations under article 4. The example chosen is that of the United Kingdom because it most usefully illustrates the workings of the HRC.

7.24 The U.K. ratified the ICCPR on 20 May 1976.⁸⁷ By a note dated 17 May 1976 the U.K. gave notice under article 4(3) ICCPR to the Secretary-General of the United Nations of the existence in the U.K. of a public emergency threatening the life of the nation arising from campaigns of organised terrorism related to Northern Irish affairs. The notice indicated the intention of the Government to take and continue measures which might be inconsistent with certain provisions of the Covenant and would, to that extent, derogate from the U.K.'s obligations. In so far as any of the measures taken were inconsistent with the provisions of articles 9, 10(2), 10(3), 12(1), 14, 17, 19(2), 21 or 22 of the Covenant the U.K. derogated from those provisions.⁸⁸

7.25 The U.K. submitted its initial report under article 40 (1) (a) on 21 September 1977.⁸⁹ In a single paragraph concerning article 4 the report recapitulated the

⁸⁷ The U.K. had signed the Covenant on 16th Sept. 1968. See E.Schwelb, *The United Kingdom Signs The Covenants On Human Rights*, 18 ICLQ (1969) pp.457-468.

⁸⁸ Human Rights - Status, n.42 above, p.84. Hartman (1981), n.1 above, pp.19-20, criticizes the Covenants requirements that notice only need be given of the provisions from which there have been derogations rather than of the derogation measures taken as under article 15 (3) ECHR. Hartman also refers to the, "U.K.'s 'shotgun' approach of suspending all articles even remotely implicated by the emergency measures", p.20, n.102.

⁸⁹ Doc.CCPR/C/1/Add.17 (1977).

reasons for derogations.⁹⁰ During the "first-round"⁹¹ consideration of the U.K. report as regards article 4 it was noted that the report provided no substantial information on the measures which derogated from the obligations in the ICCPR.⁹² Two members raised questions concerning the territorial applicability of the emergency measures.⁹³ Finally, Mr. Movchan commented that he was not convinced that the events in question threatened the life of the nation and said that he would appreciate information on the juridical considerations that had influenced the decision to make the derogations.⁹⁴

7.26 The State representative from the U.K. replied that the U.K. considered that a threat to the life of the nation did exist and indicated that the European Court of Human Rights had unanimously agreed on this point.⁹⁵ He also gave further information with respect to certain of the emergency measures and how they might be considered to be incompatible with the relevant provisions of the ICCPR.⁹⁶

7.27 In a Supplementary Report the U.K. stated that the derogations applied to the U.K. as a whole and that they would not be withdrawn until the emergencies giving rise to them came to an end.⁹⁷ During consideration of that

⁹⁰ Ibid., p.3.

⁹¹ See ch.3, pr.3.20 above.

⁹² SR 69 pr.26 (Graefrath).

⁹³ Ibid., and SR 69 pr.31 (Tarnopolsky).

⁹⁴ SR 67 pr.27.

⁹⁵ "...[T]he existence of such an emergency was perfectly clear...", Ireland v. U.K., EUCT, n.36 above, pr.205.

⁹⁶ SR 70 prs.29-32.

⁹⁷ Doc.CCPR/C/1/Add.35, pr.10 (1978).

Supplementary report in 1979 questions were put concerning the use of internment,⁹⁸ interrogation procedures and the use of confessions, the right to consult with counsel and the availability of habeas corpus. Reference was also made to the report of the Bennett Committee On Police Interrogation Procedures In Northern Ireland.⁹⁹ The State representative replied to the questions put and gave some details on the recommendations of the Bennett Committee.¹⁰⁰

7.28 At this point of its work it was difficult to conclude otherwise than that the HRC's consideration of the situation in Northern Ireland was manifestly inadequate. From any perspective the situation there is clearly open to much greater scrutiny than the HRC had accorded to it. The International Commission of Jurists study on States of emergency suggested that the inadequacy of the HRC's consideration was due to its not having a greater awareness of the prevailing situation in Northern Ireland and of details of the Ireland v. U.K. litigation under the ECHR.¹⁰¹

7.29 On 4 December 1984 the U.K. submitted its second periodic report to the HRC under article 40(i)(b).¹⁰² As regards article 4 the report referred briefly to a

⁹⁸ The practice of internment was ended in December 1975. The question of its reintroduction has been raised recently after the bombings in Enniskillen in November 1987.

⁹⁹ Cmnd.7497 (1979).

¹⁰⁰ See SR 148.

¹⁰¹ ICJ study, n.1 above. For material and literature on the situation in Northern Ireland see S.H.Bailey, D.J.Harris And B.L.Jones, Civil Liberties - Cases And Materials, ch.4, (2d, 1985); K.Boyle and T.Hadden, n.117 below; ICJ study, n.1 above, pp.217-246; K.Boyle, Human Rights and Political Resolution In Northern Ireland, in YJPO, n.1 above, pp.156-177.

¹⁰² Doc.CCPR/C/32/Add.5 (1984).

letter of 22 August 1984 notifying the Secretary-General of the United Nations that the U.K. had withdrawn, from the date of notification, its notice of derogation. The notification stated, inter alia, that,

"...the United Kingdom Government, taking account of developments in the situation since the notice...[of derogation]...and in measures taken to deal with it, have come to the conclusion that it is no longer necessary, in order to comply with its obligations under the Covenant, for the United Kingdom to continue, at the present time, to avail itself of the right of derogation under article 4".¹⁰³

7.30 For the consideration of the second periodic report the "state of emergency" was one of the specific issues upon which the HRC decided that it would focus attention.¹⁰⁴ Prior to appearing before the HRC the State representatives were forward, inter alia, a number of questions and issues concerning the State of emergency upon which the HRC wanted further information and explanation.¹⁰⁵

7.31 Before the HRC the State representative stated that the,

"Government had withdrawn the notice of derogation because it believed that the rights in the Covenant were fully observed throughout the United Kingdom. That did not mean that there was no longer an emergency but simply that there had been changes in

¹⁰³ Doc.CCPR/C/2/Add.8, Ax.II, p.2. The U.K. derogations under article 15 ECHR were withdrawn at the same time.

¹⁰⁴ See ch.3, prs.3.25-3.27.

¹⁰⁵ Ibid.

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the situation in Northern Ireland and in the measures taken to deal with it".¹⁰⁶

Reference was made to the two Acts of Parliament giving special powers,¹⁰⁷ the recommendations of Sir George Baker on Northern Ireland Emergency legislation,¹⁰⁸ and the system for investigating complaints against police officers in Northern Ireland.¹⁰⁹

7.32 After the statement of the State representative a number of members made comments and put questions. The range of views and issues was much wider and more critical than hitherto. Questions were raised concerning the Diplock Courts;¹¹⁰ convictions based on confessions

¹⁰⁶ SR 594 pr.3.

¹⁰⁷ Ibid., pr.4. The Northern Ireland (Emergency Provisions) Act 1978 and the Prevention Of Terrorism (Temporary Provisions) Act 1984. The Government has indicated that the latter is to be made permanent. A number of applications concerning the 1978 and 1984 Acts are currently before the EUCM, see Brogan, Coyle, McFadden and Tracey, Report of the EUCM, A.11234/84, A.11266/84 and A.11386/85 (14 May 1987); Fox, Campbell and Hartley v. U.K., A.12244/86, A.12245/86 and A.12383/86, Council of Europe Press Release C(88)45.

¹⁰⁸ Ibid. Review Of The Operation Of The Northern Ireland (Emergency Powers) Act 1978, Cmnd.9222, (1984). See also Review Of The Operation Of The Prevention Of Terrorism (Temporary Provisions) Act 1984 by Viscount Colville of Culross, Cmnd.264 (1987). See generally D.P.J.Walsh, The Use And Abuse Of Emergency Legislation (1983); C.Walker, The Prevention Of Terrorism In British Law (1986); D.Bonner, Emergency Powers In Peacetime (1985).

¹⁰⁹ Ibid., pr.5.

¹¹⁰ SR 594 pr.6 (Lallah), 8 (Graefrath). See S.C..Greer and A.White, Abolishing the Diplock Courts - The Case For Restoring Jury Trial To Scheduled Offences In Northern Ireland, (1986). Recent suggestions that
(Footnote Continued)

or on the evidence of accomplices;¹¹¹ progress towards resolution of the "Irish Question"; Police Complaints Boards; the control of the actions of and the use of force by the police and security forces;¹¹² inquiries into civilian deaths;¹¹³ why it was thought possible to work within the provisions of the Covenant rather than derogating from them;¹¹⁴ the implementation of the recommendations of the Bennett Committee;¹¹⁵ Parliamentary control over the emergency powers of the executive; the consequences of the period of derogation;¹¹⁶ the possibility of recourse to the Covenant to determine the legitimacy of measures taken by the Government; action being taken in the social and political fields to solve the problems of Northern Ireland and the current situation of violence in

(Footnote Continued)

Diplock courts would be reformed have apparently been rejected by the Home Office, see The Times, 21/7/87.

¹¹¹ See T.Gifford, Supergrasses - the Use Of Accomplice Evidence In Northern Ireland, (1984); S.C.Greer, Supergrasses And The Legal System In Britain And Northern Ireland, 102 LQR (1986) pp.198-249; S.C.Greer, The Rise And Fall Of The Northern Ireland Supergrass System, 1987 Crim.L.R. pp.663-670.

¹¹² SR 594 pr.7 (Lallah), 9 (Movchan), 12 (Opsahl). See RUC Stalker - Sampson Investigations, 1435 Hansard (House of Commons) (25/1/88) col.21-23.

¹¹³ Ibid.

¹¹⁴ SR 594 pr.11 (Opsahl).

¹¹⁵ SR 594 pr.13 (Cooray).

¹¹⁶ SR 594 pr.14 (Pocar).

Northern Ireland;¹¹⁷ and the matter of self-determination in Northern Ireland.¹¹⁸

7.33 The State representative replied to the range of questions put and indicated why the U.K. felt able to withdraw its derogations under the ICCPR.¹¹⁹ Two members of the HRC continued to make their concerns felt. Mr.Graefrath again raised the matter of the practice of the use of firearms under the law.¹²⁰ The right to life (article 6) is, of course, one of the non-derogable provisions of the ICCPR.¹²¹ In his concluding comments Mr.Movchan clearly indicated that he was not persuaded by the views of the State representative,

"The handling of the emergency situation in Northern Ireland demonstrated a clear departure from the provisions of Article 4 in so far as the United Kingdom representative had admitted that the security forces were not under active control and that they supervised their own acts. There had been no court proceedings in relation to the loss of life, including the lives of children, which had occurred".¹²²

¹¹⁷ SR 594 pr.15 (Prado-Vallejo). The most important political step since the consideration of the U.K.'s second periodic report has been the conclusion and implementation of the Anglo-Irish Agreement, see ch.5, n.73 above. See also K.Boyle and T.Hadden, Ireland - A Positive Proposal (1985).

¹¹⁸ SR 594 pr.42 (Wako). See ch.5, n.73 above.

¹¹⁹ SR 594 prs.16-33.

¹²⁰ SR 596 pr.2. A number of applications to the EUCM have concerned the use of firearms in Northern Ireland, see ch.8 below on article 6 under the O.P.

¹²¹ Article 4(2) of the Covenant, see pr.7.1 above. See W.P.Gormley, The Right To Life And The Rule Of Non - Derogability: Peremptory Norms Of Jus Cogens, in Ramcharan, (ed.), The Right To Life, pp.120-159 (1985).

¹²² SR 598 pr.30.

7.34 On the basis of the foregoing review it is submitted that the consideration of the implementation of article 4 ICCPR with respect to the U.K. and Northern Ireland was much more impressive and critical during consideration of the U.K.'s second periodic report than during consideration of the U.K.'s initial report. This bodes well for the HRC in light of the fact that in practical terms it appears that the consideration of second and subsequent periodic reports will dominate the HRC's future work under article 40.¹²³

¹²³ See ch.3, prs.3.25-3.28 above.

Article 4 under the O.P.

7.35 Article 4 ICCPR has been considered in a number of the HRC's views under article 5(4) O.P. A high proportion of those views have concerned the situation in Uruguay where multiple violations of rights under the ICCPR have been alleged. The communications have generally concerned the application of "prompt security measures" under the state of emergency in Uruguay.¹²⁴ Uruguay has often made general reference to the state of emergency in its submissions. The now established approach of the HRC is exemplified by its view in Ramirez v. Uruguay,¹²⁵

"The Human Rights Committee has considered whether any acts and treatment, which are prima facie not in conformity with the Covenant, could for any reason be justified under the Covenant in the circumstances. The Government has referred to provisions of Uruguayan law, including the Prompt Security Measures. However, the Covenant (article 4) does not allow national measures derogating from its provisions except in strictly defined circumstances, and the Government has not made any submissions of fact or law to justify such derogation. Moreover, some of the facts referred to above raise issues under provisions from which the Covenant does not allow derogation under any circumstances".¹²⁶

7.36 This view clearly indicates that the HRC will consider ex officio the possible application of article 4 even when the State party does not specifically rely

¹²⁴ See also the consideration of the Uruguayan reports in SR 355, 356, 357, 359 and 373 See also the ICJ Study, n.1 above.

¹²⁵ Doc.A/35/40 p.121.

¹²⁶ Ibid., pr.17.

upon it. The obvious question raised is what would be the approach of the HRC if there were possible justifications under the Covenant for alleged violations. The above view clearly places the burden of proof on the State party so presumably the HRC could do no more than invite the State party to submit evidence of fact or law justifying the derogations concerned. Such an approach on the part of a human rights body of inviting justifications for derogations would have little to commend it.¹²⁷ The HRC's view in Silva v Uruguay¹²⁸ below suggests that if a State party could justify its derogations under the terms of article 4(1) and (2) ICCPR the fact that it had not complied with the notification requirements under article 4(3) ICCPR would not preclude it from raising a defence based on its derogations.

7.37 In Silva and Others v. Uruguay¹²⁹ the State party expressly relied on the terms of article 4. The alleged victims claimed that Uruguay had violated article 25 ICCPR (the right of citizens to take part in public affairs, to vote and have access to the public service).¹³⁰ Under article 1(a) of Institutional Act No.4 of 1/9/76 the alleged victims had been deprived of the right to engage in any activity of a political nature, including the right to vote for fifteen years because they had been candidates for elective office on the lists of certain political groups in the 1966 and

¹²⁷ In McVeigh et al. v. U.K., the EUCM stated that where there is a critical situation in the country concerned, it will not take article 15 into consideration if it has not been relied upon by the respondent Government, A.8022/77, 25 D.& R. p.15.

¹²⁸ Doc.A/36/40 p.130. See pr.7.37 below.

¹²⁹ Doc.A/36/40 p.130.

¹³⁰ For the text of article 25 see Apx.I below.

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1971 elections.¹³¹ The groups concerned had subsequently been declared illegal by the Uruguayan Government.

7.38 Uruguay submitted to the HRC that it had derogated from the ICCPR and had informed the Secretary-General of the United Nations of this in accordance with article 4(3) ICCPR.¹³² Moreover,

"Article 25, on which the authors of the communication argue their case, is not mentioned in the text of article 4(2). Accordingly, the Government of Uruguay, as it has a right to do, has temporarily derogated from some provisions relating to political parties".¹³³

7.39 The Government submitted no further information to the HRC. The HRC expressed the view that it felt unable to accept that the requirements set forth in article 4(1) had been met. After noting the terms of article 4(1) and the notification submitted by Uruguay under article 4(3) the HRC stated that,

"The Government of Uruguay has made reference to an emergency situation in the country which was legally acknowledged in a number of "Institutional Acts". However, no factual details were given at that time. The note confined itself to stating that the existence of the emergency situation was "a matter of universal knowledge"; no attempt was made to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant, or to show that such derogations were strictly necessary. Instead, the Government of Uruguay declared that more information would be provided in connexion with the

¹³¹ Doc.A/36/40 p.130 at p.131, note (a).

¹³² See Human Rights - Status, n.42 above, pp.84-85.

¹³³ Doc.A/36/40 p.130, pr.6.

submissions of the country's reports under article 40 of the Covenant. To date neither has this report been received, nor the information by which it was to be supplemented".¹³⁴

This approach indicates that the HRC will take account of information concerning article 4 submitted in the reports of States parties under article 40. This approach would seem to accord with common sense as it allows the HRC to take account of all relevant information known to it.

7.40 The HRC continued with the following critically important passage,

"Although the sovereign right of a State party to declare a state of emergency is not questioned, yet, in the specific context of the present communication, the Human Rights Committee is of the opinion that a State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant. Although the substantive right to take derogating measures may not depend on a formal notification being made pursuant to article 4(3) of the Covenant, the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4(1) of the Covenant in proceedings under the Protocol. It is the function of the Human Rights Committee, acting under the Optional Protocol, to see to it that States parties live up to their commitments under the Covenant. In order to assess whether a situation of the kind described in article 4(1) of the Covenant exists in the country concerned, it needs full and comprehensive information. If the respondent Government does not

¹³⁴ Ibid., pr.8.2.

furnish the required justification itself, as it is required to do under article 4(2) of the Optional Protocol and article 4(3) of the Covenant, the Human Rights Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal regime prescribed by the Covenant".¹³⁵

This passage represents a strong assertion of the HRC's assessment function under the O.P., a clear statement that the burden of proof is on the respondent State to provide "full and comprehensive information" to the HRC, and a definite warning that, in default of justification, the respondent State's derogations will not be accepted as legitimate under the terms of the Covenant.¹³⁶ More generally, the HRC, while acknowledging the sovereign right of a State to declare a state of emergency, asserts a measure of international

¹³⁵ Ibid., pr.8.3. Similarly in *De Montejo v. Colombia*, "[T]he State party concerned is duty bound, when it invokes article 4 (1) of the Covenant in proceedings under the Optional Protocol, to give a sufficiently detailed account of the relevant facts to show that a situation of the kind described in article 4(1) of the Covenant exists in the country concerned", Doc.A/37/40 p.168, pr.10.3.

¹³⁶ See generally on the burden of proof under the O.P., ch.4, prs.4.27-4.35 above.

supervision over that national determination.¹³⁷ This approach closely parallels that of the EUCT.¹³⁸

7.41 The HRC then proceeded to consider the situation on the assumption that a State of emergency did exist in Uruguay. It expressed the view that even on that assumption it could not see,

"what ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political rights for a period as long as 15

¹³⁷ See pr.7.41 below. For a comparable approach to other provisions see *Maroufidou v. Sweden*, Doc.A/36/40 p.160, (expulsion law applied and interpreted in good faith and in a reasonable manner: no violation of article 13), prs.10.1-10.2 ; *Aumeeruddy-Cziffra v. Mauritius*, Doc.A/36/40 p.134, ("the legislation...is discriminatory with respect to Mauritian women and cannot be justified by security requirements", pr.9.2 (b) 2 (ii) 3; *Hamel v. Madagascar*, Doc.A/42/40 p.130, (H's expulsion violated article 13 because the grounds of expulsion were not those of compelling national security), pr.20.

¹³⁸ "It falls in the first place to each contracting State, with its responsibility for the 'life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter, Article 15(1) leaves those authorities a wide margin of appreciation. Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Art.19), is empowered to rule on the question of whether the States have gone beyond the 'extent strictly required by the exigencies' of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision", *U.K. v. Ireland*, n.36 above, pr.207.

years. This measure applies to everyone, without distinction as to whether he sought to promote his political opinions by peaceful means or by resorting to, or advocating the use of, violent means. The Government of Uruguay has failed to show the interdiction of any kind of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom".¹³⁹

Here the HRC is assessing the actions of the State party in terms of necessity and proportionality of the measures applied and the onus is on the State party to justify its measures in those terms. On the basis of the foregoing the HRC expressed the view that the prohibition on the authors unreasonably restricted their rights under article 25 ICCPR and that the State party was, therefore, under an obligation to take steps with a view to enabling them to participate again in the political life of the nation.¹⁴⁰

7.42 In Guerrero v. Colombia¹⁴¹ the author (G's husband) alleged that G and seven other persons had been arbitrarily killed by the police in a raid, that the police action was unjustified and had been inadequately investigated by the Colombian authorities. Criminal investigations into the cases were defeated by recourse to a Legislative Decree No.0070 which justified actions taken by the police in the course of certain operations.¹⁴² The Decree Law had been introduced in the context of an existing state of siege in Colombia and

¹³⁹ Doc.A/36/40 p.130, pr.8.4.

¹⁴⁰ Ibid., prs.9-10.

¹⁴¹ Doc.A/37/40 p.137. The case is also considered in ch.8, prs.8.17-8.20 below.

¹⁴² For the text of the Decree see *ibid.*, pp.148-149.

had been upheld as constitutional by the Supreme Court.¹⁴³ The State party had referred to that decision in its submissions to the HRC. In an 'Interim Decision' the HRC decided to request information as to, "[H]ow, if at all, the state of siege proclaimed in Colombia affected the present case".¹⁴⁴ The State party replied that the state of siege would affect the case only if those involved in the police operation invoked the Decree Law in justification of the act and if this was accepted by the Military Tribunal trying the case. It was submitted that the state of siege had no effect on either criminal or civil proceedings or on any administrative action brought by the injured party, although it was acknowledged that no civil action could be instituted in conjunction with military proceedings. The ultimate acquittal of all the accused precluded the filing of a civil or an administrative suit.

7.43 The HRC stated that in formulating its views it took account of the reference to a situation of disturbed public order in Decree No.0070 and took note of the notification of Colombia under article 4(3) ICCPR.¹⁴⁵ That notification referred to the existence of a state of siege in all the national territory since 1976 and to the necessity of adopting extraordinary measures to deal with such a situation. The notification declared that, "temporary measures have been adopted that have the effect of limiting the application of articles 19 paragraph 2 (freedom of expression) and article 21 (right of peaceful assembly)".¹⁴⁶ The HRC observed that the case was not concerned with either of

¹⁴³ Ibid., pr.3.2.

¹⁴⁴ Ibid., pr.5.

¹⁴⁵ Doc.CCPR/C/2/Add.4.

¹⁴⁶ Doc.A/37/40 p.137, pr.12.2.

those articles and that under article 4(2) of the Covenant several rights were non-derogable including articles 6 and 7 which had been invoked by the author.¹⁴⁷ The HRC then examined the facts and expressed the view that article 6(1) [the right to life] had been violated in two respects and that any further violations had been subsumed within the more serious violations of article 6.¹⁴⁸

¹⁴⁷ Ibid. See chs.8 (article 6) and 9 (article 7) below.

¹⁴⁸ See ch.8, prs.8.17-8.20 below.

APPRAISAL.¹⁴⁹

7.44 Of the 87 States parties to the ICCPR (as of 1st April 1988) 12 of them have given notification of derogations under article 4(3) while states of emergency are known to exist or have existed since entry into force of the ICCPR for the State concerned in a number of other States parties.¹⁵⁰ The HRC's work under article 4 then is obviously of major importance as regards its role in the implementation of the ICCPR. However, as noted, its General Guidelines on the form and content of initial reports adopted contained no reference to derogations.¹⁵¹ This absence must bear an element of responsibility for the inadequate information submitted with respect to article 4. The absence could, to some extent, have been made good by the General Comments adopted by the HRC under article 40(4) ICCPR. Unfortunately, the HRC has to date only adopted one rather brief and inadequate General Comment on article 4. Its terms have been noted above. It would be of immense help to States parties if in its General Comments the HRC had indicated more of its understanding of the content of article 4 and the applicable principles and limitations concerning its application. The unofficial attempts to do just this in the Siracusa Principles¹⁵² and the Paris Standards¹⁵³ represent invaluable aids to the interpretation and application of article 4 and facilitate a more critical analysis of the

¹⁴⁹ See Hartman, n.1 above (1981) pp.40-52; Jaap A. Walkate, The Human Rights Committee And Public Emergencies, in Yale JWPO, n.1 above, pp.133-147.

¹⁵⁰ See n.86 above and G.C.5/13 pr.2, cited in pr.7.15 above.

¹⁵¹ See pr.7.3 above.

¹⁵² See n.1 above.

¹⁵³ See n.1 above.

implementation of article 4 by States parties. It is submitted that on the basis of its considerable experience under the reporting procedure the HRC should attempt to do something similar when it comes to preparing a second general comment on article 4.¹⁵⁴

7.45 We have already noted the HRC's summary its experience under article 4 (up to 1981) its its General Comment in which it noted the lack of clarity in the information provided by States parties.¹⁵⁵ In the light of this much of the work of the HRC has been directed to obtaining a clearer picture of the situation in the States concerned. Moreover, we have already noted that the HRC's considerations of article 4 ICCPR must be understood in the context of their consideration of other articles of the ICCPR.¹⁵⁶ Notwithstanding this point, however, the foregoing review indicates the best and the worst of the procedures adopted by the HRC. At its worst can be found no information in the State report;¹⁵⁷ no questions made or comments put by members regarding article 4; inadequate and sporadic questioning; inadequate replies of State representatives or no reply at all;¹⁵⁸ the failure of States to supply such information in Supplementary Reports;¹⁵⁹ the absence of HRC procedures to determine whether or not

¹⁵⁴ Members have suggested that a second General Comment on article 4 should be adopted. However, no such comment is in preparation.

¹⁵⁵ G.C.5/13, pr.2, cited in pr.7.15 above.

¹⁵⁶ See pr.7.9 above.

¹⁵⁷ E.g., the initial USSR report, Doc.CCPR/C/1/Add.2.

¹⁵⁸ E.g., the representative of Iraq (SR 203, 204) did not reply to questions concerning article 4, SR 199 pr.13 (Vincent-Evans).

¹⁵⁹ States parties have often failed to supply promised Supplementary Reports.

questions have received a satisfactory reply; the failure of the HRC to develop procedures for requesting ad-hoc reports from States parties undergoing States of emergency;¹⁶⁰ no formal determinations of whether the requirements of article 4 (1) and (3) have been satisfied or the terms of article 4(2) being violated.¹⁶¹

7.46 The HRC procedures appear in a better light during consideration of second periodic reports. There attention can be more adequately focused on a state of emergency and the situation can therefore be subjected to a more critical and exacting analysis as, for example, was the case with the United Kingdom examined above.¹⁶² More generally individual members have on occasions made it quite clear that they took the view that article 4 was being violated.¹⁶³ The range of questions put by members has been extensive but, unfortunately, until the consideration of second periodic reports they are not put in an intelligible and systematic manner. Members have also clearly made use of outside sources of information when considering states of emergency.¹⁶⁴ It is also worth noting that the continued stress on the importance of article 4(3) appears to be eliciting more responses from States parties than was evident in the HRC's earlier years.¹⁶⁵

7.47 It is quite clear then that the HRC sees its role as that of examining the compliance of States parties

¹⁶⁰ See ch.3, prs.3.8-3.8.1 above.

¹⁶¹ Cf. ICJ study, n.1 above.

¹⁶² See prs.7.23-7.34 above.

¹⁶³ See pr.7.16 above.

¹⁶⁴ See ch.3, prs.3.12-3.18 above. See Siracusa Principle 72, n.1 above.

¹⁶⁵ See prs.7.19-7.22 above.

with the provisions of article 4 ICCPR.¹⁶⁶ There has been no question of simply accepting the judgement and determinations of the national authorities as conclusive.¹⁶⁷ However, it is difficult to foresee more effective international supervision of the implementation of article 4 by the HRC unless progress is made on resolving two of the fundamental jurisdictional questions that were raised in chapter 3.¹⁶⁸

7.48 Firstly, whether the HRC has jurisdiction to request ad-hoc reports from States parties undergoing states of emergency. The HRC's failure to resolve this matter meant, for example, that the state of emergency in Poland was never considered by the HRC while it was in force.¹⁶⁹ The recent decision of the HRC to make a specific request for information to El Salvador on the basis of article 40(1)(b) of the Covenant could be an important development in the jurisprudence but the full implications of that decision are not yet clear.¹⁷⁰ It would be preferable for the HRC to take a formal decision on when it will consider exercising its jurisdiction under article 40(1)(b).¹⁷¹ The second jurisdictional question which awaits resolution is whether the HRC has competence under article 40(4) to make General Comments addressed to specific individual states parties to the ICCPR. However harsh and critical the comments of individual members they could not

¹⁶⁶ See Siracusa Principle 71, n.1 above.

¹⁶⁷ See Siracusa Principle 57, n.1 above.

¹⁶⁸ See ch.3, prs.3.29-3.38 above.

¹⁶⁹ See n.70 above.

¹⁷⁰ See ch.3., pr.3.8.1 above.

¹⁷¹ See, e.g., the proposals of Opsahl in SR 349 prs.16-17 and Tarnopolsky in SR 404 prs.95-99.

compare with a determination by the HRC as a body that article 4 was not being complied with. The considerations of the HRC in this respect compare unfavourably with the review of certain selected States (a number of which have been considered by the HRC) in the International Commission of Jurists, 'Study On States Of Emergency'.¹⁷² The latter presented much more critical and structured appraisals.

7.49 The approach of the HRC under the O.P. has complemented that under the reporting process. The HRC have clearly put the burden of proof on the derogating State to show compliance with the requirements of article 4.¹⁷³ Such an approach is necessarily dictated by the HRC's minimal fact-finding opportunities in the absence of oral hearings and fact-finding missions.¹⁷⁴ An international supervisory role is assumed, "to see to it that States parties live up to their commitments under the Covenant".¹⁷⁵ Derogations provisions are strictly examined in terms of necessity, proportionality and the specific limitations in article 4.¹⁷⁶

7.50 It was crucially important for the HRC to take a critical and restrictive approach to the implementation of article 4 for two reasons. Firstly, as we have already noted, public emergencies present grave problems for the securing of human rights.¹⁷⁷ Secondly, in view

¹⁷² See n.1 above. It is interesting to note that the Siracusa Principles, n.1 above, do not cover this question of General Comments addressed to individual States parties.

¹⁷³ See prs.7.35-7.36, 7.40 above.

¹⁷⁴ See ch.4, prs.4.23-4.26.

¹⁷⁵ See pr.7.40 above.

¹⁷⁶ See prs.7.41-7.43 above.

¹⁷⁷ See pr.7.2 above.

of its very limited powers both under the reporting¹⁷⁸ and individual communications procedures,¹⁷⁹ "[t]he most the implementation bodies can do is to adopt a scrupulous judicial attitude that will influence world opinion by its objectivity and thoroughness".¹⁸⁰ Despite the criticisms made of the HRC's work above the HRC has established itself as an independent and respected international human rights body¹⁸¹ which can bring a constructive analysis to bear on public emergencies. That analysis can be of considerable assistance to a government acting in good faith and in cooperation with the HRC. Where those elements of good faith and cooperation are lacking the most the HRC's considerations can achieve is to stimulate international pressure through national and international publicity.

¹⁷⁸ See ch.3 above.

¹⁷⁹ See ch.4 above.

¹⁸⁰ Hartman, n.1 above (1981), p.49.

¹⁸¹ See ch.2 above.

CHAPTER 8. ARTICLE 6: THE RIGHT TO LIFE.¹8.1 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 of a competent court.

(3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article

¹ The right to life is also recognized in art.3 UDHR, art.2 ECHR, Art.1 ADRD, art.4 AMR, art.4 AFR. On the drafting of article 6 see in general Docs.A/2929, ch.VI, prs.1-10, A/3764, prs.85-121; Bossuyt, 'Guide', pp.113-146. On the right to life see Amnesty International, Political Killings By Governments, (1983); Y.Dinstein, The Right To Life, Physical Integrity And Liberty, in L.Henkin (ed.), The International Bill Of Rights - The ICCPR, pp.114-127 (1981); G.P.Fletcher, The Right To Life, 13 Georgia Law Review (1979) pp.1371-1394; E.Lane, Mass Killings By Governments: Lawful In The World Legal Order? 12 NYUJILP (1979) pp.239-280; L.E.Landerer, Capital Punishment As A Human Rights Issue Before The United Nations, 4 RDH/HRJ (1981) pp.511-534; R.Lillich, Civil Rights, in T.Meron (ed.), Human Rights In International Law, p.115 at pp.120-124 (1984); L.J.MacFarlane, The Theory And Practice Of Human Rights, ch.2 (1985); F.Przetacznik, The Right To Life As A Basic Human Right, 9 RDH/HRJ

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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 prevent the abolition of capital punishment by any State party to the present Covenant.

Introduction.

8.2 The right to life is the only right in the ICCPR which is expressly stated to be "inherent" in every

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(1976) pp.585-609; B.G.Ramcharan, The Right To Life, 30 NILR (1983) pp.297-329; B.G.Ramcharan (ed), The Right To Life In International Law,(1985); N.Rodley, The Treatment Of Prisoners Under International Law, chs.6-8 (1987); P.Sieghart, The International Law Of Human Rights, pp.128-135 (1983); U.N. Action In The Field Of Human Rights (1983) pp.129-133; Report of UN Rapporteur, n.28 below; ECOSOC Safeguards Guaranteeing Protection Of The Rights Of Those Facing The Death Penalty, ECOSOC Resn.1984/50. The U.N. Sub-Commission On The Prevention Of Discrimination and The Protection Of Minorities failed at its most recent session (1987) to act on a proposal to elaborate a second optional protocol to the ICCPR aimed at abolishing the death penalty, see 39 Rev.ICJ (1987) p.29. Cf. Protocol No.6 to the ECHR, in ECHR - Collected Texts, pp.46-49, (1987)

human being.² In its first General Comment on article 6 under article 40(4) the HRC described it as, "the supreme right".³ It is one of the rights under the ICCPR from which no derogation is permitted even in a, "time of public emergency which threatens the life of the nation".⁴ Only one State has made a reservation to article 6 and that was subsequently withdrawn.⁵

The importance which the HRC has attached to article 6 can be gauged from the fact that it is the only article which has been the subject of two general comments.⁶ The work of the HRC under article 6 has coincided with the increased concern of regional and international human rights institutions for the protection of the right to life in the face of widespread violations.⁷

² Many of the commentators in n.1 above suggest that the right to life is part of customary international law.

³ G.C.6(16), Doc.A/37/40 pp.93-94; also in Doc.CCPR/C/ 21/Add.1. Adopted by the HRC at its 378th meeting (July 1982). For the HRC's discussion see SR 369, 370, 371 and 378 Add.1.

⁴ See article 4 ICCPR, which is dealt with in ch.7 above. Cf. article 15 ECHR. Professor Gormley has argued that the right to life in article 6(1) represents jus cogens, see W.P.Gormley, *The Right To Life And The Rule Of Non-Derogability: Peremptory Norms Of Jus Cogens*, in Ramcharan (1985), n.1 above, pp.120-159.

⁵ G.C.6(16), n.3 above; G.C. 14(23), Doc.A/40/40 pp.162-163; also in Doc.CCPR/C/21/Add.4. Adopted by the HRC at its 563rd meeting (November 1984).

⁶ G.C.6(16), n.3 above; G.C. 14(23), Doc.A/40/40 pp.162-163; also in Doc.CCPR/C/21/Add.4. Adopted by the HRC at its 563rd meeting (November 1984).

⁷ See UN Action In The Field Of Human Rights, pp.129-133, (1983); Reports of the Special Rapporteur of the Human Rights Commission on Summary Or Arbitrary
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Article 6 Under The Reporting Process.

8.3 In the consideration of State reports article 6 has been accorded critical importance and a wide interpretation that has permitted discussion of many vital and wide ranging matters whose inclusion within the realms of article 6 is perhaps not immediately apparent.⁸ Within the bounds of the ICCPR itself the articles identified as having a particular relationship with article 6 include articles 7, 9, 10, 14 and 20.⁹

The following words of a former HRC member, Mr.Ganji, are a useful precursor to an examination of the HRC's approach to article 6 because they indicate the rationale behind the wide perspective brought to bear on the right to life,

"In order to exercise any of the rights with which the Committee was concerned an individual had to exist, and in order to exist, he must die neither before nor after birth and he must receive a minimum of food, education, health care, housing and clothing. There was undoubtedly an interconnexion between the right to life, the requirements of which were material and the right to exercise 'all other freedoms'.¹⁰

In its General comment the HRC supported this broad approach to article 6,

"...the Committee has noted that quite often the information given concerning article 6 has been

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Executions, latest report, Doc.E/CN.4/1987/20; E.Lane, n.1 above; E.Kaufman and P.Weiss Fagen, Extrajudicial Executions: An Insight Into The Global Dimensions Of A Human Rights Violation, 3(4) HRQ (1981) pp.81-100.

⁸ See in particular the works by Ramcharan, n.1 above.

⁹ See chs.9-11 below.

¹⁰ SR 67 pr.78, during consideration of the report of the GDR. Cf. The decision of the Indian Supreme Court in n.20 below.

limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.

...the Committee has noted that the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connexion, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics".¹¹

8.4 The right to life has been dealt with by almost all of the reports submitted to the HRC but the information supplied by States parties, particularly in the early years, has generally been confined to an indication of how their respective legal systems outlaw the taking of life.¹² In its consideration of State reports HRC members have attempted to gain a much deeper understanding of how States have approached and dealt

¹¹ G.C.6(16), n.3 above, prs.1, 5 (my emphasis). A number of other general comments make reference to the requirement on States to take positive measures, see e.g. ch.6, prs.6.11-6.12 above on article 2. See also SR 30 pr.32 (Tomushcat on Finland) who contrasts the respective obligations (art.2) under the two international Covenants. On art.2 ICCPR see ch.6 above. See also F.Menghistu, The Satisfaction Of Survival Requirements, in Ramcharan (ed.), n.1 above, pp.63-83.

¹² See text to preceding note. For examples of inadequate information see the reports of Portugal (Doc.C/C/6/Add.6) and Jordan (Doc.C/1/Add.24). For much more adequate information see the reports of Canada (Doc.C/1/Add.43) and the second periodic report of Australia (Doc.C/42/Add.2 (1987)). The information in the latter covers criminal law, murder, manslaughter/negligent driving, abortion, suicide, aboriginal customary law, penalties, emergency medical treatment, civil law, aids, capital punishment and genocide.

with their undertaking to "protect" the right to life and in particular what "positive measures" had been adopted.¹³ As Mr. Tomuschat commented during consideration of the report of the Lebanon, "...it was not only for the legislator, but for all State authorities, the executive, the police, the military - actively to protect life".¹⁴ Information has consistently been sought on the measures taken to reduce maternal and infant mortality and to raise life expectancy.¹⁵ Along the same lines the HRC's considerations have extended to such matters as measures taken in the public health and environmental fields, for example, concerning labour safety measures, industrial accidents, the combating of occupational diseases, the control of food and pharmaceutical products, combatting crime and drug abuse, the development of a nutritional policy and the establishment of health centres, efforts to eradicate malnutrition and eliminate epidemics, reduce unemployment and implementation agrarian reforms.¹⁶

¹³ See Ramcharan, n.1 above (1983); H.A.Kabaalioglu, The Obligations To 'Respect' And To 'Ensure' The Right To Life, in Ramcharan (ed.), n.1 above, pp.160-181; A.Redelbach, Protection Of The Right To Life By Law And Other Means, *ibid.*, pp.182-220.

¹⁴ SR 443 pr.55.

¹⁵ See e.g. SR 65 pr.31 (Graefrath on Czechoslovakia), and G.C.6(16), in pr.8.3 above. For examples of States parties responding to requests for such information see e.g. Hungarian Report, Doc.C/1/Add.44; Syrian Report, Doc.C/1/ Add.31. A criteria of assessment often used in the P.Q.I. Index, see e.g. J.I.Dominguez et al, Assessing Human Rights Conditions, in J.I.Dominguez et al, Enhancing Global Human Rights, pp.21-116 (1980).

¹⁶ See e.g. SR 54 pr.90 (Graefrath on Finland); SR 92 pr.52 (Graefrath on FRG); SR 199 pr.10 (Hanga on Iraq); SR 257 pr.38 (Hanga on Italy); SR 319 pr.27 (Graefrath), 52 (Hanga on Japan); SR 386 pr.32 (Footnote Continued)

This broad approach and the consequent call for "positive measures" including those indicated by the HRC as "desirable" raises some legal difficulties. The HRC's approach inevitably takes it into consideration of matters covered by the parallel International Covenant on Economic, Social and Cultural Rights.¹⁷ The obligations under the ICESCR are clearly of a progressive nature.¹⁸ There is nothing necessarily illogical in interpreting article 6 as containing both immediate and progressive obligations with respect to the right to life but if this is accepted then the argument that all of the obligations under the ICCPR are immediate is no longer sustainable.¹⁹ This in turn would raise problems concerning the consideration of a communication under the O.P. alleging a violation of a broader, progressive aspect of the right to life.²⁰ By comparison a very cautious attitude has been adopted to the question of any "positive" obligation in article 2 ECHR.²¹ Finally, in terms of the HRC, it is worth noting that two members of the HRC were particularly

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(Graefrath on Mexico); SR 431 pr.21 (Cooray on Peru); SR 441 pr.36 (Graefrath on France). See generally K.Tomasevski and P.Alston, (eds), *The Right To Food*, (1984); K.Tomasevski, *The Right To Food: Guide Through Applicable International Law* (1987); R.J.Dupuy (ed.), *The Right To Health As A Human Right*, 1978-79 *Recueil Des Cours*.

¹⁷ U.K.T.S. 6 (1977). See ch.1, pr.1.16 above.

¹⁸ See article 2 ICESCR, n.17 above.

¹⁹ See ch.1, pr.1.16 and ch.6, prs.6.11-6.12 above.

²⁰ It is interesting to speculate how the HRC would have responded to the alleged violations of the right to life in the decision of the Indian Supreme Court in *Tellis and Others v. Bombay Municipal Corporation and Others*, [1987] LRC (Const) 351. "The right to life...includes the right to livelihood"., *ibid.*, p.371.

²¹ See ch.6, n.55 above and the cases cited in article 6 under the O.P., below.

influential in developing the HRC's approach to article 6, Mr.Graefrath (expert from the GDR), and Sir Vincent-Evans (expert from the U.K.).

8.5 Abortion²² and euthanasia²³ have only been spasmodically dealt with by HRC members. The ICCPR contains no express provision concerning the points in time at which life commences and terminates and thus the precise extent of a State's obligation is uncertain.²⁴ Draft proposals that would have covered a right to life "from conception" were not adopted.²⁵ A number of HRC members have commented that the question of abortion was a peculiarly moral and controversial one and that it would therefore be difficult to achieve a Committee view on it.²⁶ However, individual members have felt free to express their own personal views on the subject. For

²² See e.g. SR 412 pr.5 (Herdocia-Ortega on Austria), reply at SR 416 pr.25; SR 391 pr.40 (Prado-Vallejo on Iceland). Where abortion has been dealt with it has sometimes been linked to article 23 and 24 of the Covenant, see apx.I below. See also J.K.Mason and R.A.McCall Smith, Law And Medical Ethics, ch.5, (2d, 1987); T.Ritterspach, Abortion Law In Italy, 5 HRLJ (1984) pp.385-388.

²³ See Mason and MaCall Smith, *ibid.*, ch.15.

²⁴ See Lillich, n.1 above, pp.123-124.

²⁵ See Doc.E/CN.4/SR.140 pr.11; E/CN.4/SR.149 prs.10-11; Doc.A/3764, pr.113. Cf. article 4(4) AMR which provides that the right to life exists, "in general, from the moment of conception". See the Baby Boy Case, IACM, Case No.2141, (United States), 2 HRLJ (1981) 110. The ECHR does not expressly cover the point but see A.867/60, X v. Norway, 4 YBECHR p.270; A.6959/75, Bruggemann and Scheuten v. FRG, 5 D. & R. p.103, in which the EUCM noted article 6(5) ICCPR, and A.8416/79, X. v. U.K. 19 D. & R. p.244 (1980).

²⁶ For some support for this view see SR 369 prs.22, 33, 26 and SR 370 pr.12. Part of the draft general comment on article 6, which was not kept in the final version, read, "The Committee notes, on the other hand, that the extent of the protection of the right to
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example, during consideration of the abortion law adopted in Italy in 1978 Mr. Bouziri commented that he, "thought the abortion laws so strict that they infringed, perhaps on religious grounds, the woman's freedom in that respect which it was essential to respect".²⁷ When dealing with the question of abortion the principal concern of the members has been to determine the circumstances in which abortions were

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life of the unborn is a controversial issue in many States parties and cannot be resolved by reference to this article. This would also appear to be the position as regards voluntary euthanasia and, in particular, when death is permitted to take its natural course". No explanation appears of why this text was dropped but it is submitted that its omission was more concerned with not prejudging the question rather than saying that the Covenant provides no assistance at all. See Graefrath. ch.6, n.1 above (1984-85), p.6 who comments on abortion, "Obviously, this cannot be decided by invoking article 6 of the Covenant". The jurisprudence under the ECHR would suggest that the right to privacy (art.17 Covenant) would also be relevant to the determination of such issues. See Bruggemann and Scheuten Case, n.25 above. Similarly the U.S. approach in *Roe v. Wade*, 93 S.Ct. 705 (1973). For a recent U.S. Supreme Court ruling see *Thornburgh v. American College Of Obstetricians And Gynecologists*, Pennysylvania Section, 106 S.Ct. 2169 (1986). See also *Borowski v. Attorney-General of Canada*, (1983) DLR (4th) 112 and *R. v. Morgentaler*, Smoling and Scott, (1985) DLR (4th) 502.

²⁷ SR 258 pr.58 commenting on the Italian Report, Doc.C/6/Add.4, pr.29. Similarly at SR 110 pr.19, SR 292 prs.9-10, SR 369 pr.25 (on Portugal). For a parallel example concerning euthanasia see the critical remarks at SR 222 pr.6 and SR 223 pr.5 on a provision of the Colombian Penal Code permitting mitigation of sentence in the case of mercy killings.

authorized.²⁸ This could be taken to suggest that abortions are not per se contrary to the ICCPR or at least that they might be compatible with the ICCPR in certain circumstances. The jurisprudence under the ECHR and of the United States Supreme Court would suggest that the right to privacy in article 17 ICCPR would be relevant to the determination of those circumstances.²⁹ Similarly with respect to euthanasia.³⁰ Questions concerning birth control have been exceptional.³¹

8.6 Of particular concern to the HRC has been the taking of life by and the use of firearms by the police and security forces. In its first General Comment the HRC stated that,

"The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6(1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit

²⁸ See e.g SR 206 pr.11 (Bouziri on Canada); SR 439 pr.29 (Bouziri on France); SR 481 pr.41 (Bouziri on New Zealand).

²⁹ See n.26 above on these cases. Article 17 is not dealt with in this thesis. The HRC has recently completed a general comment on article 17. The general comment makes no reference to abortion or euthanasia, title and reference.

³⁰ See the decision in the Matter of Quinlan, Supreme Court of New Jersey, 70 NJ 10, 355 A 2d 664 (1976).

³¹ See SR 551 pr.110 (Bouziri on Trinidad and Tobago).

the circumstances in which a person may be deprived of his life by such authorities".²⁵

In accordance with this approach members have sought information on any legislation, regulations or administrative orders concerning the circumstances in which the police and security forces are entitled to open fire, for example, in cases of riots, political disturbances, arrests and escapes from prison, how they were enforced and what safeguards existed against the arbitrary use of such arms.²⁶ The representative of the GDR was questioned as to whether its laws and practices concerning the use of firearms by security forces at its borders could be reconciled with the requirements of article 6 on the non-arbitrary deprivation of life and proportionality in the use of force.²⁷

8.7 The growing world phenomena of so called "disappeared persons" and extra-legal killings have increasingly attracted the attention of the HRC.²⁸

²⁵ G.C.6(16), n.3 above, pr.3. The G.C. was echoed in the HRC's views in the Guerrero Case, prs.8.17-8.20 below.

²⁶ See e.g. SR 65 pr.2 (Tomuschat on Czechoslovakia); SR 67 pr.60 (Tomuschat on GDR); SR 92 pr.31 (Opsahl on FRG); SR 155 pr.9 (Ukrainian SSR); SR 110 pr.18 (Opsahl on Mauritius); SR 292 pr.18 (Tarnopolsky on Jamaica); SR 353 pr.20 (Vincent-Evans on Guyana); SR 431 pr.66 (Opsahl on Peru); ch.7, pr.7.32, n.112, 113 above (on U.K.). On the use of force by security forces in Northern Ireland see K.Asmal (Chairman), 'Shoot to Kill' - International Lawyers Inquiry (1985); R.Spjut, The 'Official' Use Of Deadly Force By The Security Services Against Suspected Terrorists: Some Lessons From Northern Ireland, [1986] P.L. pp.38-64.

²⁷ SR 533 prs.16 (Ermacora), 18 (Tomuschat on GDR); reply at SR 534 pr.1-6.

²⁸ See e.g. SR 128 pr.69 (Vincent-Evans on Chile); SR 421 pr.16 (Ermacora on Nicaragua); SR 468 pr.28 (Prado-Vallejo on El Salvador); SR 421 pr.16 (Ermacora on Nicaragua); SR 475 pr.35 (Aguilar on Mali); SR 364 pr.73 (Vincent-Evans on Iran). The massacres at the Sabra and Chatila camps in the Lebanon were raised by a number of members, see SR 443 prs.8 (Vincent-Evans), 22 (Bouziri), 39 (Ermacora), 42 as corrected (Errera), 55 (Tomuschat), SR 446 pr.19 State representative). Generally see Rodley, n.1 above, chs.6 and 8; Ibid.,
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Generally, members have avoided making direct accusations but rather have concentrated on whether specific and effective measures existed to prevent the disappearance and killing of individuals.²⁹ Moreover, by linking article 6 with the guarantee of the right to a fair hearing in article 14 ICCPR the HRC have stressed that, "States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life".³⁰ During consideration of the report of Sri Lanka a number of members expressed great concern at emergency regulations which authorized police officers to take possession of deceased persons and to bury or cremate them without an inquest.³¹ On occasions HRC members have referred to international reports³² alleging violations of the right

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U.N. Action Against 'Disappearances', Summary Or Arbitrary Executions And Torture, 8 HRQ (1986) pp.700-730; D.Kramer and D.Weissbrodt, The 1980 U.N. Commission On Human Rights and the Disappeared, 3 HRQ (1981) pp.18-33; E.Kaufman and P.Weiss Fagen, n.7 above; Reports of the U.N Special Rapporteur, n.1 above, Docs.E/CN.4/1983/16 and Add.1 and Add.1, Corr.1; E/CN.4/1984/29; E/CN.4/1985/17; E/CN.4/1986/21; D.Weissbrodt, Protecting The Right To Life: International Measures Against Arbitrary Or Summary Killings By Governments, in Ramcharan (ed.), n.1 above, pp.297-314.

²⁹ See the discussion concerning questions raised during consideration of the second periodic report of Iraq, SR 746 prs.6 (Higgins), 17 (State representative), 19-20 (Lallah), 21 (Pocar), SR 747 pr.1 (Lallah).

³⁰ G.C.6(16), n.3 above, pr.4. See e.g. SR 469 pr.37 (Dimitrijevic on El Salvador).

³¹ SR 472 pr.9 (Vincent-Evans), pr.29 (Errera); reply at SR 477 prs.26-27.

³² See e.g. SR 356 pr.15 (Tarnopolsky on Chile referring to reports of the IACM; reply at SR 359 pr.12; SR 421 pr.16 (Ermacora on Nicaragua); SR 746 pr.19 (Lallah on Iraq referring to the report of the Special

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to life or to notorious cases concerning particular individuals³³ or groups³⁴ other than those dealt with in views under the O.P.³⁵

If violations of the right to life have been alleged the HRC members have indicated that it is the responsibility of the Government to investigate the allegations irrespective of whether it is alleged that the Government is responsible.³⁶ This accords with the approach of the HRC under the O.P.³⁷ and complements the

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U.N. Rapporteur). During consideration of the report of Chile members made constant reference to the reports of the Ad Hoc Working Group of the HRCion and to U.N. resolutions.

³³ See e.g. SR 354 pr.18 (Tarnopolsky on Guyana concerning the death of Walter Rodney, a political activist); SR 128 pr.10 (Graefrath on Chile concerning the assassination of Orlando Letelier); SR 475 pr.46 (Tomuschat on Guinea concerning the death of Dialo Telli, former Secretary-General of the OAU, caused by the so-called 'black-death' or starvation diet).

³⁴ See e.g. SR 364 pr.76 and 365 pr.7 concerning the alleged execution of a number of leaders of the Bahai' faith in Iran; reply at SR 368 prs.11, 53; SR 472 pr.15 (Ermacora on Sri Lanka); SR 431 pr.8 (Tarnopolsky on Peru).

³⁵ See e.g. SR 355 pr.29 (Uruguay).

³⁶ See e.g. SR 469 pr.32 (Graefrath on El Salvador); SR 746 pr.6 (Higgins on Iraq); SR 354 pr.188 (Tarnopolsky on Guyana concerning the mass killings at the Jonestown religious community). See also 128 pr.32 (Tomuschat on Chile) on the jeopardizing of a persons health or life by a penalty of banishment.

³⁷ See pr.8.24 below.

general rules of State responsibility concerning the treatment of aliens.³⁸

8.8 One matter that has been subjected to scrupulously close and punishing analysis has been the use of the death penalty.³⁹ Members have comprehensively dealt with all facets of this matter including the six express limitations on the imposition and implementation of a sentence of death. Such a sentence (a) may only be imposed for the most serious crimes;⁴⁰ (b) must be in accordance with the law in force at the time of the commission of the crime;⁴¹ (c) must not be contrary to the other provisions of the Covenant⁴² or to the Genocide Convention;⁴³ (d) can only be carried out pursuant to a final judgement rendered by a competent

³⁸ See I.Brownlie, *Systems Of The Laws Of Nations - State Responsibility*, Part I, chs.VII and VIII, (1983).

³⁹ See *The Death Penalty*, Amnesty International Report (1979); D.Pannick, *Judicial Review Of The Death Penalty*, (1982); Landerer, n.1 above; Rodley, n.1 above, ch.7; R.Sapienza, *International Legal Standards On Capital Punishment*, in Ramcharan (ed.), n.1 above, pp.284-296; Advisory Opinion of the IACT on Restrictions To The Death Penalty, (Arts.4(2) and (4) AMR), Advisory Opinion OC-3/83, (Sept, 1983), 4 HRLJ (1983) pp.345.

⁴⁰ During the drafting the phrase "most serious crimes" was criticized as lacking legal precision, since the concept of "serious crime" differed from one country to another, Doc.A/2929, ch.VI, pr.6.

⁴¹ This limitation is a specific application of the general principle in article 15 ICCPR.

⁴² For example, imposed in an inhuman or degrading manner contrary to article 7 ICCPR. Cf.the joint dissenting judgement of Lords Scarman and Lord Brightman in *Riley and Others V. Attorney-General of Jamaica*, [1983] 1 A.C. 719. Similarly if the death penalty is imposed after proceedings which do not comply with article 14 ICCPR, see *Mbenge v. Zaire*, pr.8.25 below.

⁴³ *Convention On The Prevention And Punishment Of*
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court;⁴⁴ (e) shall not be imposed for crimes committed by persons below eighteen years of age⁴⁵ and shall not be carried out on pregnant women;⁴⁶ (f) any person sentenced to death shall have the right to seek pardon or commutation of the sentence.

The notably consistent approach of the HRC to the death penalty, as compared with the rather spasmodic treatment of abortion and euthanasia noted above⁴⁷, stems largely from the clearly perceived abolitionist philosophy behind the provisions of paragraphs (2) and (6) of article 6. In its General Comment the HRC stated that,

"While it follows from article 6 (2) and (6) that States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it for other than the 'most serious crimes'. Accordingly, they ought to consider reviewing their criminal laws in this

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The Crime Of Genocide, 1948, U.K.T.S. 58 (1970); 78 U.N.T.S. 277.

⁴⁴ The word "competent" also appears in article 14 ICCPR, see ch.10 below.

⁴⁵ See SR 402 pr.18 (Prado-Vallejo on Australia). Cf. Article 4(5) AMR prohibits the imposition of capital punishment where the person was under eighteen years of age at the time the crime was committed. Cf. Roach and Pinkerton v. United States, Case No.9647, IACM, 8 HRLJ (1988) pp.145-155.

⁴⁶ The text does not make it clear whether it would be permissible to carry out the death penalty on the mother after the child is born. The point was raised but not resolved during the drafting, Doc.A/2929, n.1 above, pr.10. Even if not prohibited by article 6(5) such action might constitute inhuman treatment with respect to both the mother and the child. See SR 468 pr.29 (Prado-Vallejo on El Salvador); SR 443 pr.25 (Bouziri on Lebanon). Cf. art.4(5) AMR. See also Meron, n.1 above, pp.99-100.

⁴⁷ See pr.8.5 above.

light and, in any event, to restrict the application of the death penalty to the 'most serious crimes'. The article also refers generally to abolition in terms which strongly suggest (paras.(2) and (6)) that abolition is desirable".⁴⁸

As regards the limitation of the application of the death penalty to the "most serious crimes" the HRC has expressed the view that this, "must be read restrictively to mean that the death penalty should be quite an exceptional measure".⁴⁹ Members have looked closely at the offences for which the death penalty is prescribed and questioned State representatives as to the categorization of certain offences as "most serious".⁵⁰ Members have expressed concern at the possible imposition of the death penalty for vague, generalized or economic crimes, for example, "crimes against the State";⁵¹ "sabotage";⁵² "murder committed for gain or for leading a parasitic way of life";⁵³ "armed operations", "corruption on earth" and "offences against the Constitution";⁵⁴ "misuse of public funds";⁵⁵

⁴⁸ G.C.6(16), n.3 above, pr.6. Other general comments have called for the review of applicable laws, e.g. G.C.4(13) pr.4 on article 3, Doc.A/36/40 pp.109-110.

⁴⁹ G.C.6(16), n.3 above, pr.7. This interpretation has though been present since the inception of the HRC's work. See n.40 above.

⁵⁰ SR 482 pr.22 (Prado-Vallejo on New Zealand). Cf.art.4(3) AMR which forbids the re-establishment of the death penalty in States which have abolished it.

⁵¹ SR 117 pr.40 (Tomuschat on Byelorussian SSR).

⁵² SR 198 pr.8 (Bouziri on Mongolia); reply at SR 202 prs.6-7.

⁵³ SR 64 pr.38 (Tarnopolsky on Czechoslovakia).

⁵⁴ SR 364 prs.38 (Sadi), 56 (Opsahl) on Iran.

double membership of political parties or for political activities;⁵⁶ for non-violent crimes, for example, drug offences,⁵⁷ for minor sexual crimes,⁵⁸ and for violations of the basic duties of command in a military context.⁵⁹ Representatives are asked how many persons have been sentenced and executed for such crimes. Some importance has been attached by HRC members to the need for the relevant provisions of law to be expressed in sufficiently explicit terms to enable everyone to understand what activities are prescribed.⁶⁰

To understand the practical application of the relevant provisions of a State's laws and regulations members have further requested some statistics on the use of the death penalty within a given period, particularly for political offences,⁶¹ whether the death penalty was the exclusively prescribed punishment for those offences or whether alternatives exist,⁶² the

(Footnote Continued)

⁵⁵ SR 135 pr.54 (Vincent-Evans), SR 136 pr.28 (Sadi) on Romania.

⁵⁶ SR 200 pr.19 (Opsahl on Iraq). Cf.art.4(4) AMR, "In no case shall capital punishment be inflicted for political offences or related common crimes".

⁵⁷ See SR 322 pr.68 (Tomuschat on the Netherlands); reply at SR 325 pr.19.

⁵⁸ SR 364 pr.39 (Sadi), SR 365 pr.8 (Tarnopolsky) on Iran.

⁵⁹ SR 257 pr.70 (Sadi on Italy).

⁶⁰ See e.g. SR 366 pr.15 (Tomuschat on Iran). Cf. Restrictions Of The Rights And Freedoms Of The American Convention - The Word "Laws" In Article 30, Advisory Opinion No.OC-6/86 of the IACT, 7 HRLJ (1986) pp.231-267.

⁶¹ See e.g. SR 283 pr.11 (Tarnopolsky on Mali); SR 735 pr.4 (Mommersteg on Zaire).

⁶² The principle of proportionality would demand that the death sentence should only be the penalty for
(Footnote Continued)

frequency of the commutation of sentences and whether, as required by article 6(2), the imposition of the death penalty was in accordance with the law at the time of the commission of the crime and not contrary to the provisions of the Covenant particularly with respect to the vitally important procedural guarantees in articles 9 and 14 ICCPR.⁶³ As the HRC stated in its General Comment,

"It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the Covenant, The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of sentence".⁶⁴

Again only rarely have members put specific allegations to States of the abuse of the death penalty.⁶⁵ On the limitation that the death penalty should not be imposed contrary to the provisions of the Genocide Convention the standard approach has been to

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the most serious of crimes. It might also require that it not be the mandatory penalty. See Pannick, n.1 above,⁶³ chs.6, 7.

See e.g. SR 364 pr.73 (Vincent-Evans on Iran).

⁶⁴ G.C.6(16), n.3 above, pr.7. See the Mbenge Case, pr.8.25 below.

⁶⁵ For some exceptional cases see the consideration of the reports of Chile, SR 127-130; of Iran, SR 364-366, 368.

ask whether the State party's national law contains provisions in conformity with the Genocide Convention.⁶⁶

8.9 Notwithstanding the express provision that "Amnesty, pardon or commutation of the sentence may be granted in all cases", at least one member has suggested that a State party cannot abuse this provision. During consideration of the report of Chile Mr.Graefrath commented that,

"States parties to the Covenant an obligation to ensure the realization of the right recognized in that instrument. It was generally recognized, and had been affirmed by all the reports hitherto dealt with in the Committee, that the obligation extended to penal prosecution and punishment for grave breaches of human rights. The present occasion was the first on which a regime had boasted that it had pardoned those who had committed grave breaches of human rights and had discontinued penal prosecutions against them. He fully shared the view expressed in paragraph 326 of the Working Group's report⁶⁷ to the effect that an amnesty declared by a Government in favour of officials who engaged in systematic and gross violations of human rights was legally ineffective as contrary to the generally accepted principles of law and that on the international level persons responsible for such violations were liable for crimes committed by

⁶⁶ "[T]he information from various official sources...pointed to the existence of genocide in El Salvador", SR 474 pr.4 (Movchan on El Salvador); reply, *ibid.*, pr.5. On Genocide see U.N. Action, n.1 above, ch.XII; L.Kuper, *Genocide And Mass Killings: Illusion And Reality*, in Ramcharan (ed.), n.1 above, pp.114-119.

⁶⁷ Doc.E/CN.4/1310.

them. Such conduct was a clear violation of the Covenant".⁶⁸

The question of amnesties at the end of prolonged and violent civil conflicts is a controversial one. The conflict between bringing offenders to justice and the need for national reconciliation is a difficult one to resolve. The situation in Chile, however, is a different one because the regime in power sought to grant an amnesty while remaining in power for the foreseeable future.⁶⁹ It is submitted that in such circumstances the purported amnesty should not be recognized as legally effective at either the national or international level.⁷⁰

8.10 In accordance with the abolitionist philosophy of article 6 information has been sought on any consideration given by a State party to abolition of the death penalty,⁷¹ the state of public opinion on that question and the reasoning behind a particular State's retention of the death penalty.⁷²

After consideration of a substantial number the HRC expressed the following conclusion in 1982,

"The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life within the meaning of article 40, and should as such be reported to the Committee. The Committee notes that a number of

⁶⁸ SR 128 pr.5. See Judgement On Human Rights Violations By Former Military Leaders (Argentina), XXVI ILM (1987) pp.317-372. See L.Joinet, Amnesty Laws, 35 Rev.ICJ (1985) pp.27-30.

⁶⁹ The regime of President Pinochet remains in power despite increasing opposition.

⁷⁰ See Joinet, n.68 above, pp.28-30.

⁷¹ See e.g., SR 292 pr.18 (Tarnopolsky on Jamaica).

⁷² See e.g. SR 197 pr.17 (Vincent-Evans on Mongolia).

States have already abolished the death penalty or suspended its application. Nevertheless, States' reports show that progress made towards abolishing or limiting the use of the death penalty is quite inadequate".⁷³

8.11 The relationship between war and the right to life has only rarely been directly referred to within the context of specific State reports.⁷⁴ However, the HRC still chose to include a paragraph in its first General Comment on article 6 explicitly dealing with this question, if only in somewhat generalized terms,

"The Committee observes that war and other acts of mass violence continue to be a scourge of humanity⁷⁵ and to take the lives of thousands of human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in the exercise of the inherent right of self-defence, is already prohibited.⁷⁶ The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermo-nuclear war, and the strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life. In this respect, the Committee notes, in particular, a connection between article

⁷³ G.C.6/16, n.3 above, pr.6.

⁷⁴ SR 414 pr.21 (Hanga, referring to general disarmament).

⁷⁵ Cf.the reference to the "scourge of war" in the preamble to the United Nations Charter.

⁷⁶ See Military And Paramilitary Activities In And Against Nicaragua (Nicaragua v. U.S.), Merits, 1986 ICJ Rep.14.

6 and article 20, which states that the law shall prohibit any propaganda for war (paragraph 1) or incitement to violence (paragraph 2) as therein described".⁷⁷

8.12 The broader relationship between the right to life and war taken a step further in the HRC's second general comment. Its importance justifies a substantial extract,

"2. In its previous general comment, the Committee also observed that it is the supreme duty of States to prevent wars. Wars and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year.

3. While remaining deeply concerned by the toll of human life taken by conventional weapons in armed conflicts, the Committee has noted that, during successive sessions of the General Assembly, representatives from all geographical regions have expressed their growing concern at the development and proliferation of increasingly awesome weapons of mass destruction, which not only threaten human life but also absorb resources that could otherwise be used for vital economic and social purposes, particularly for the benefit of developing countries, and thereby for promoting and securing the enjoyment of human rights for all.

4. The Committee associates itself with this concern. It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are amongst the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only

⁷⁷ G.C.6(16), n.3 above, pr.2. On article 20 see ch.12 below. See also SR 414 pr.21 (Hanga on general disarmament).

in the event of war, but even through human or mechanical error or failure.

5. Furthermore, the very existence and gravity of this threat generate a climate of suspicion and fear between States, which is in itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.

6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity.

7. The Committee accordingly, in the interests of mankind, calls upon all States, whether parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace".⁷⁸

8.13 This General Comment raises a number of key points and issues. Clearly the HRC recognized that a comment relating to nuclear weapons was going to be politically sensitive and so it proved.⁷⁹ The French expert on the HRC, who was not present when the comment was adopted, felt compelled to register a number of objections.⁸⁰ A number of States in the Third Committee also criticized the comment.⁸¹ The obvious question raised is why the HRC felt it necessary to broach the issue of nuclear weapons which had not featured prominently in its

⁷⁸ G.C.14(23), n.6 above, prs.2-7 (my emphasis).

⁷⁹ See SR 545 pr.15. The HRC sent the general comment straight to the General Assembly in view of its importance, Doc.A/40/40 pr.683.

⁸⁰ See SR 571 prs.2-7 (Errera). See also SR 563 pr.6 (Ermacora).

⁸¹ See Doc.A/C.3/39/SR.46, 48, 49, 50, 51.

questioning under the article 40 reporting process.⁸² The General Comment itself points to a number of reasons including the views in successive sessions of the General Assembly and the resources absorbed by nuclear weapons that could be used for developing countries.⁸³ We noted in consideration of self-determination under article 1 ICCPR the increasing demands made by developing countries for a legal right to more resources from the developed countries as part of the proposed New International Economic Order and the Right to Development.⁸⁴ The comment also responds to the much wider application of the human rights in recent years in terms of alleged rights to peace, development and a healthy environment.⁸⁵ In general terms this also raises the problem of how to respond to changing conceptions of the contents of human rights over time.⁸⁶ Note that the HRC makes its call "in the interest of mankind" and to all States whether parties to the Covenant or not. The

⁸² The issue has been dealt with more often since the adoption of the second general comment. See e.g. SR 532 pr.65 (GDR State representative). See also SR 533 pr.13 (Prado-Vallejo on GDR on the "right to live in peace").

⁸³ See e.g. G.A.Resn.37/189A (18/12/82). See also HRCion Resn.1982/7 (19/12/82).

⁸⁴ See ch.5, prs.5.4, 5.11 above. We also noted that nuclear testing by France has been raised but in context of article 1, see *ibid.*, pr.5.10.

⁸⁵ See ch.5, n.111 above. See also P.J.M. De Waart, *The Inter-Relationship Between The Right To Life And The Right To Development*, in Ramcharan (ed.), n.1 above, pp.84-96; A.A.Tikhonov, *The Inter-Relationship Between The Right To Life And The Right To Peace*, *ibid.*, pp.97-113.

⁸⁶ See C.C.Morrisson, *The Dynamics Of Development In The European Human Rights Convention System*, (1981).

States most obviously concerned who are not parties are the United States and China.⁸⁷

As for the content of the General Comment the most controversial is that in paragraph 6 that the, "production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity". This was the comment that attracted criticism, particularly from Western States in the Third Committee. It is difficult to accept that the term "should" suggests anything other than a desirable goal to be achieved rather than a statement of immediate legal obligation deriving from article 6 ICCPR. If it were a statement of the HRC's view of present international law then a number of States parties, including the U.K., the USSR, France and India, would clearly be in breach of the Covenant. If this interpretation of the HRC's view is correct the criticism of the HRC is that it is stepping outside its role of supervising the immediate implementation of the rights in the ICCPR.⁸⁸ Similarly, the ICCPR is being interpreted to contain progressive as well as immediate obligations.⁸⁹ Equally, however, it is difficult to dispute the HRC's assertion that nuclear weapons are "amongst the greatest threats to the right to life which confront man today".

As a matter of international law "crimes against humanity" derive from the Charter of the Nuremburg Tribunal.⁹⁰ In more general terms the comment raises

⁸⁷ One of the objections of Errera, n.80 above, was this reference to non-States parties.

⁸⁸ See ch.6, prs.6.11-6.13 above on art.2 of the Covenant.

⁸⁹ Ibid.

⁹⁰ The Charter is annexed to the Agreement For The Establishment Of An International Military Tribunal,
(Footnote Continued)

again the question of the relationship between the two 'International Covenants'.⁹¹ Finally we can again note a reference to the obligations in the United Nations Charter.⁹²

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U.K.T.S. 4 (1945); 5 U.N.T.S. 251. See also G.A.Resn.95(1), GAOR Resolutions, First Session, Part II, p.188, affirming the principles of international law recognised by the Charter and the judgement of the Tribunal.

⁹¹ See ch.1, pr.1.16 and ch.6, prs.6.11 above.

⁹² References to the UN Charter have appeared in other general comments, see e.g., the comments on article 1, see ch.5, prs.5.3, 5.17 above.

Article 6 Under The Optional Protocol.

8.14 Violations of article 6 have been alleged in a small number of communications. On all but one occasion the HRC expressed the view that there had been a violation. The one case in which the HRC did not actually state that article 6 had been violated is dealt with first.

8.15 In Bleir v. Uruguay⁹³ it was alleged that B was arrested in October 1975, detained incommunicado and subjected to cruel treatment and torture.⁹⁴ The State party submitted that a warrant for B's arrest had been issued since August 1976 but that his whereabouts were unknown.⁹⁵ No information, explanations or observations were offered in reply to various submissions, including eyewitness testimony, from the authors' concerning B's detention.⁹⁶

In an interim decision the HRC stated that it considered,

"..that it is the clear duty of the Government of Uruguay to make a full and thorough inquiry (a) into the allegations concerning Mr.Bleir's arrest and his treatment while in detention prior to 26 August 1976, and (b) as to his apparent disappearance and the circumstances in which a warrant for his arrest was issued on 26 August 1976. The Committee urges that this should be done without further delay and that the Committee should be informed of the outcome of the action taken by

⁹³ Doc.A/37/40 p.130. See Rodley, n.1 above, pp.192-193.

⁹⁴ Ibid., pr.2.2.

⁹⁵ Ibid., pr.4.9.

⁹⁶ Ibid., pr.9. The authors were B's husband and father.

the Government of Uruguay and the outcome of the inquiry".⁹⁷

The jurisprudence of the HRC under the O.P., examined in chapter 4 above, would indicate that the "clear duty" referred to by the HRC is a legal duty deriving from the terms of the O.P.⁹⁸ The HRC's opinion is clearly of great practical importance and mirrors the position under customary international law concerning the treatment of aliens.⁹⁹ It is also interesting to note the use of the device of an 'interim decision' by the HRC which, as we suggested above, can be a useful device for indicating to the State party the approach the HRC is likely to take and the information and cooperation it expects.¹⁰⁰

After outlining the considerations on which it based its interim decision¹⁰¹ the HRC stated that,

"The failure of the State party to address in substance the serious allegations brought against it and corroborated by unrefuted information, cannot but lead to the conclusion that Eduardo Bleir (B) i.e. either still detained, incommunicado, by the Uruguayan authorities or has died while in custody at the hands of the Uruguayan authorities".¹⁰²

The Uruguayan government strongly objected to this part of the HRC's interim decision and those objections

⁹⁷ Ibid., pr.11. See G.C.6(16), pr.4 in pr.8.7, n.30 above.

⁹⁸ See ch.4, prs.4.28-4.33 above.

⁹⁹ See e.g. the decisions in the Janes Claim, U.S. v. Mexico, (1926) 4 R.I.A.A. p.82; Noyes Claim, U.S. v. Panama (1933), 6 R.I.A.A. p.308.

¹⁰⁰ See ch.4, pr.4.4 above.

¹⁰¹ Doc.A/37/40 p.130, pr.11.2.

¹⁰² Ibid.

are noted elsewhere.¹⁰³ In its final views the HRC expressed itself a little more cautiously. The HRC found violations of articles 7, 9 and 10(1) and stated,

"...that there are serious reasons to believe that the ultimate violation of article 6 has been perpetrated by the Uruguayan authorities".¹⁰⁴

The HRC took the approach that although it could not conclusively express the view that article 6 had been violated it could and should state that there were "serious reasons" to believe that there had been a violation. The view adopted by the HRC shows a flexible approach to its work under the O.P. A strictly judicial organ might have felt obliged to make a clear determination as to the alleged violation. The HRC's view ended by urging Uruguay to reconsider its position and to take effective steps to establish what had happened to B since October 1975, to bring to justice any persons found to be responsible for his death, disappearance or ill-treatment and to pay compensation to him or his family for any injury suffered and to ensure that similar violations did not occur in the future.¹⁰⁵

¹⁰³ Ibid., pr.12, noted at ch.4, pr.4.31 above.

¹⁰⁴ Ibid., pr.14. "The IACM has said that where individuals have 'disappeared' but the Government concerned refuses to provide any information about them or about the progress of any investigations aimed at determining their whereabouts, it is legitimate to presume that the (American Declaration on the Rights and Duties of Man) has been violated, and that agents of the Government, or individuals protected or tolerated by it, have not been uninvolved in the violation", Sieghart, n.1 above, pp.133-134, citing Cases 1702,1745 and 1755 (Guatemala), IACM Annual Report (1975) p.67. See also Rubio v. Colombia, pr.8.24 below.

¹⁰⁵ Ibid., pr.15. See also n.116 below.

8.16 In H.Barbato v. Uruguay¹⁰⁶, H completed an eight year term of imprisonment in July 1980 but was kept in detention thereafter under the "prompt security measures regime".¹⁰⁷ His release was to be conditioned on him leaving the country.¹⁰⁸ He was informed that he would be released to leave for Sweden but this decision was revoked. At the end of November 1980 H was transferred to Montevideo Police Headquarters. His whereabouts were then unknown until 28 December 1980. He was allegedly seen at the quarters of a cavalry regiment and was reportedly on good spirits. He was last seen alive on 24 December 1980. On 28 December his mother was called to the Military Hospital without any explanation and shown H's body for identification purposes. The death certificate stated as the cause of death "acute haemorrhage resulting from a cut of the carotid artery" and his mother was told that he had committed suicide with a razor blade. The author (H's cousin) alleged that this explanation was false and that H had died as a consequence of the mistreatment and torture to which he had allegedly been subjected.

In its admissibility decision the HRC held the communication inadmissible and made its standard request for written explanations or statements clarifying the matter, court orders and relevant decisions.¹⁰⁹ It also requested copies of the death certificate and medical

¹⁰⁶ Doc.A/38/40 p.124.

¹⁰⁷ Ibid., pr.1.6. This regime was subjected to close analysis by HRC members under the article 40 reporting process. See also ICJ Study, ch.7, n.1 above, pp.43-68 (1983).

¹⁰⁸ It is not uncommon for such an offer to be made in Latin American countries.

¹⁰⁹ See ch.4, pr.4.4 above.

report and of the reports on whatever enquiries were held into the circumstances surrounding H's death.¹¹⁰

The State party forwarded a transcript of the autopsy report concerning H.¹¹¹ The author replied that the State party had given no explanations concerning his numerous complaints; that the autopsy in no way indicated beyond any doubt that the cause of H' death was suicide as claimed; that the autopsy was conducted by military personnel (it was conducted by a Lieutenant in the Medical Corps) and not by doctors chosen by relatives; the body showed signs of having undergone a tracheotomy and having been kept refrigerated; there was no explanation of the circumstances in which death was certified; there was no information on any investigation into the circumstances of death; the official explanation was implausible and unacceptable and represented a cover-up; and that even if the victim did commit suicide it could only have been because of compulsion by threats of violence.¹¹²

In its expression of views the HRC stated that it had taken into account the following consideration,

"Only a transcript of the autopsy report had been submitted. The State party has not submitted any report on the circumstances in which Hugo Dermitt (B) died or any information as to what inquiries have been made or the outcome of such inquiries. Consequently, the Committee cannot help but give appropriate weight to the information submitted by the author, indicating that a few days before Hugo's death he had been seen by other prisoners and was reported to have been in good spirits, in spite of the interruption of the preparations for

¹¹⁰ Doc.A/38/40 p.124, pr.5.3.

¹¹¹ Ibid., pr.6.1.

¹¹² Ibid., pr.7.2.

his release and departure from Uruguay. While the Committee cannot arrive at a definite conclusion as to whether Hugo Dermitt committed suicide or was killed by others while in custody; yet, the inescapable conclusion is that in all the circumstances the Uruguayan authorities either by act or by omission were responsible for not taking adequate measures to protect his life, as required by article 6(1) of the Covenant".¹¹³

In this case the HRC felt that this "inescapable conclusion" allowed them to express the view that article 6 had been violated because, "the Uruguayan authorities had failed to take appropriate measures to protect H's life while in custody".¹¹⁴ The HRC's view then was that the circumstances allowed them to go further than stating that there were "serious reasons" to believe that article 6 had been violated, as they had in Bleir v. Uruguay,¹¹⁵ even though the HRC acknowledged that they could not arrive at a "definite conclusion" as to what had happened to H. According to the HRC's view an "act" or "omission" can violate article 6 as the obligation is to take "adequate" or "appropriate" measures to "protect" the life of a person held in custody. The approach of the HRC would seem to mirror the customary international law obligation of a State to account for an individual held in custody although there is no reference in the HRC's view to any relevant international jurisprudence.¹¹⁶ The HRC's approach would seem to indicate that if an author establishes a prima

¹¹³ Ibid., pr.9.2.

¹¹⁴ Ibid., pr.10(a).

¹¹⁵ See pr.8.15 above.

¹¹⁶ See e.g., the Quintanilla Claim, Mexico v. U.S. (1926) 4 R.I.A.A. p.101; the Turner Claim, U.S. v. Mexico (1927) 4 R.I.A.A. p.278.

facie case the State party concerned is obliged to conduct an inquiry into the circumstances of death and submit that report to the HRC. Failure to comply with that obligation will mean that the allegations made will form the basis of a finding of violation against the State party. In practical terms this is probably the only sensible approach open to the HRC as the State party is clearly in a situation in which the relevant evidence is either in its exclusive control or only available to it.¹¹⁷

After expressing the view that article 6 had been violated the HRC again expressed the view that the State party was under an obligation, *inter alia*, to take effective steps to establish the facts of Hugo Dermit's (B's) death and to pay appropriate compensation to his family.¹¹⁸

8.17 In *Guerrero v. Colombia*¹¹⁹ the authors wife died in the course of a police raid on a house where it was believed that a kidnapped Ambassador was being held prisoner. The Ambassador was not found but the police patrol waited in the house for the arrival of the suspected kidnappers. Seven persons who subsequently entered the house were shot by the police and died. Among these was the authors wife, G. Although the police initially claimed that the victims had died while resisting arrest the forensic, ballistic and other reports repudiated this account. The reports showed that none of the victims had fired a shot and that they had all been killed at point blank range, some of them shot in the back or in the head. It was also established that

¹¹⁷ See ch.4, prs.4.27-4.33 above.

¹¹⁸ Doc.A/38/40 p.124 pr.11. See the cases cited in n.116 above.

¹¹⁹ Doc.A/37/40 p.137. See Rodley, n.1 above, pp.149-150.

the victims were not all killed at the same time, but at intervals, as they arrived at the house, and that most of them had been shot while trying to save themselves from the unexpected attack. With respect to G the forensic report showed that she had been shot several times after she had already died from a heart attack.¹²⁰

The Office of the State Counsel for the National Police instituted an administrative inquiry into the case.¹²¹ The dismissal of all members of the patrol involved in the operation was requested and was ordered on 16 June 1980.¹²² Two criminal investigations into the case were defeated by recourse to Decree-Law No.0070 of 1978.¹²³ This Decree amended article 25 of the Penal Code, "for so long as the public order remains disturbed and the national territory is in a state of siege".¹²⁴ The Decree established a new ground of defence that could be pleaded by members of the police force to exonerate them if an otherwise punishable act was committed, "in the course of operations planned with the object of preventing and curbing the offences of extortion and kidnappings...".¹²⁵ The Supreme Court of Colombia had held the Decree to be

¹²⁰ Ibid., pr.1.2.

¹²¹ Ibid., pr.6.4. This Office was responsible for exercising judicial supervision over the system of military criminal justice with regard to proceedings against national police personnel.

¹²² Ibid., prs.3.4, 6.5.

¹²³ Ibid., prs.1.4, 7.1, 7.2. The first criminal investigation was annulled as a result of an ex officio review by a Higher military Court. The full text of Decree-Law No.0070 is appended to the HRC's view, *ibid.*, pp.148-149.

¹²⁴ Ibid., pr.1.5.

¹²⁵ Ibid., pr.11.2.

constitutional.¹²⁶ At no time could a civil action for damages be instituted in conjunction with military criminal proceedings.¹²⁷

8.18 Before dealing directly with the facts of the case the HRC indicated its approach to article 6,

"The right enshrined in this article is the supreme right of the human being. It follows that the deprivation of life by the authorities of the State is a matter of the utmost gravity. This follows from the article as a whole and in particular is the reason why paragraph 2 of the article lays down that the death penalty may be imposed only for the most serious crimes. The requirement that the right shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State".¹²⁸

The HRC's description of the right to life as the "supreme right" accords with the importance attached to article 6 under the reporting process.¹²⁹ As we noted the HRC has looked very closely at the domestic laws and regulations authorizing the taking of life by the authorities of the State.¹³⁰ The terms of the above paragraph are almost exactly recited in the HRC's first General Comment on article 6.¹³¹

¹²⁶ Ibid., pr.3.2 citing extracts from the Supreme Court's judgement. Cf. the ICJ Study, ch.7, n.1 above, pp.53-54, which describes the effect of the Decree and the judgement as a "licence to kill".

¹²⁷ Ibid., pr.11.8.

¹²⁸ Ibid., pr.13.1.

¹²⁹ See pr.8.2, above at n.3.

¹³⁰ See pr.8.6 above at n.25.

¹³¹ G.C.6/16, pr.3, see pr.8.6 above.

8.19 The HRC then proceeded to deal with the facts of the case,

"In the present case it is evident from the fact that seven persons lost their lives as a result of the deliberate action of the police that the deprivation of life was intentional. Moreover, the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more more than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all of the protections of due process of law laid down in the Covenant. In the case of Mrs. Maria Fanny Suarez De Guerrero (G), the forensic report showed that she had been shot several times after she had already died from a heart attack. There can be no reasonable doubt that her death was caused by the police patrol. For these reasons it is the Committee's view that the action of the police resulting in the death of Mrs. Maria Fanny Suarez De Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her right to life contrary to article 6(1) of the International Covenant On Civil And Political Rights. Inasmuch as the police action was made justifiable as a matter of Colombian law by Legislative Decree No.0070 of 20 January 1978, the right to life was not adequately

protected by the law of Colombia as required by article 6(1)".¹³²

A number of important points can be noted. It is unclear exactly how the HRC determined that G's death was "caused" by the action of the police patrol when the medical report revealed that she had already died from a heart attack before being shot several times. It could be that G's heart attack was caused by the unexpected attack by the police patrol and the accompanying shock but no process of causation is clearly spelt out. When the allegation is of a violation of the right to life the process of causation is fundamental and the HRC's explanation is defective in this respect.

On its view of the facts the HRC was of the opinion that article 6(1) had been violated in two respects. Firstly, G had been arbitrarily deprived of her life. In it interesting that the HRC characterized this deprivation of life as "intentional". This term was proposed during the drafting as a substitute for "arbitrarily" but the proposal was not accepted.¹³³ An intentional killing is obviously more difficult to justify in terms of necessity and proportionality. However, it is submitted that "arbitrary" deprivation is probably not limited to intentional killing and would probably include negligent or reckless killing in certain circumstances.¹³⁴

¹³² Doc.A/37/40 p.137, prs.13.2, 13.3 (my emphasis).

¹³³ See Doc.A/2929, ch.vi, pr.3; Doc.A/3746 pr.94. See pr.8.22.1 below on the general comment on article 17.

¹³⁴ The term "intentionally" does appear in art2 ECHR. It is interesting to compare the decision of the HRC in Guerrero with the opinion of the EUCM in A.2758/66, X v.Belgium, admiss.decn., 12 YBECHR p.174 (1969). The applicants husband, an innocent bystander, was killed by a bullet fired (it was assumed arguendo) at short range

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The HRC then proceed to indicate some of the circumstances in which the taking of life might not violate article 6(1), namely, when necessary in self-defence or the defence of others or necessary to effect an arrest or to prevent an escape.¹³⁵ The circumstances of the case are then closely scrutinized. In this case the HRC pointed out the factual elements suggesting that the police action was not necessary: the victims were given no warning, no opportunity to surrender or offer any explanation, and were only suspects. In this way the HRC introduce the principle of "proportionality to the requirements of law enforcement" as an element in the evaluation of the circumstances allegedly constituting a violation of article 6(1). Presumably in the application of this important principle it would only be in extremely rare cases that it would be permissible to use lethal force.¹³⁶

(Footnote Continued)

by a constable engaged in quelling a riot. The EUCM held that the Constable did not intend to kill and therefore did not violate article 2(1) and that his action could be justified as self-defence under article 2(2) ECHR. See also A.9013/80, Farrell v. U.K., EUCM, 5 EHRR 465; Stewart v. U.K., EUCM, n.171 below.

¹³⁵ These circumstances are specifically provided for in article 2 ECHR. They were also among the exceptions proposed during the drafting of the covenant. The exceptions proposed in the HRCion were: (a) execution of death sentence imposed in accordance with the law; (b) killing in self-defence or defence of another; (c) death resulting from action lawfully taken to suppress insurrection, rebellion or riots; (d) killing in attempting to affect lawful arrest or preventing the escape of a person in lawful custody; (e) killing in the case of enforcement measures authorized by the Charter; (f) killing in defence of persons, property or State or in circumstances of grave civil commotion; (g) killing for violation of honour. For more details see Bossuyt, n.1 above, pp.115-119.

¹³⁶ The kidnapping of an Ambassador, particularly if accompanied by death threats, might in some circumstances be viewed as a serious enough offence to

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8.20 The second basis on which the HRC expressed the view that article 6 had been violated in the Guerrero Case¹³⁷ was that G's right to life was not adequately protected by law. The mere existence of Legislative Decree No.0070 amounted to a failure to protect the right to life because it could effectively be invoked to justify in law the arbitrary deprivation of life contrary to article 6.¹³⁸ The HRC expressed the view that the State party was obliged to compensate G's husband and to ensure that the right to life was duly protected by amending the law.¹³⁹ The HRC's view is a clear expression of the obligation on a State party whose law is found to be in violation of the Covenant notwithstanding its constitutionality in domestic law.¹⁴⁰ The approach of the HRC is commendably positive in this respect. Finally, taking the two bases of the

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justify lethal force if necessary, for example, to effect the arrest of the kidnappers. On the facts of the Guerrero case, however, the police action was clearly unnecessary. Cf. the decision of the Federal Constitutional Court of the FRG, B VerfGE 46 p.160, cited in UN Yearbook on Human Rights 1977-78 p.53 (1982), on the obligation of a State to protect human life where an individual has been abducted by terrorists.

¹³⁷ Doc.A/38/40 p.137.

¹³⁸ Ibid., pr.13.3. In the HRCion it was stated that the draft provision the "everyone's right to life shall be protected by law" was intended to emphacize the duty of States to protect life, Doc.A/2929, ch.vi, pr.4.

¹³⁹ Ibid., pr.15. According to the ICJ Study, ch.7, n.1 above, p.67, the relevant law ceased to have effect when the state of siege was lifted in June 1982. Subsequent states of siege were imposed in 1984, see Human Rights - Status of International Instruments, pp.60-62 (1987). Extra-judicial killings and disappearances continue while investigations are obstructed by death threats, see e.g., the accounts in the Amnesty International Annual Reports.

¹⁴⁰ See n.126 above.

HRC's view together it can also be argued that "arbitrary" covers more than just illegal killings as the offenders had a legal defence under a domestic law that had been adjudged constitutional by the Colombian Supreme Court.¹⁴¹

8.21 During the drafting of the Covenant it was argued in the HRCion that the text of article 6 should state specifically and exhaustively the circumstances in which the taking of life would not violate the right to life.¹⁴² Against this approach it was argued that any such enumeration would necessarily be incomplete and would tend to give the impression that greater importance was being given to the exceptions than to the right.¹⁴³ The final HRCion text contained a general formulation of the right without exceptions.¹⁴⁴ It was explained that a clause providing that no one should be deprived of his life "arbitrarily" would indicate that the right was not absolute and obviate the necessity of setting out possible exceptions in detail. Others criticized the use of the term "arbitrary" because it failed to express a generally recognized idea and was ambiguous. It was argued that the term "arbitrarily" meant "illegally" or "unjustly" or both and that it should be retained as it had been used in several articles in the Universal Declaration Of Human Rights and in certain articles of the draft Covenant.¹⁴⁵ The term again prompted differences of opinion in the Third Committee of the General Assembly where various meanings

¹⁴¹ See n.126 above.

¹⁴² See n.135 above.

¹⁴³ Doc.A/2929, ch.vi, pr.2.

¹⁴⁴ Ibid., at p.29.

¹⁴⁵ Ibid., pr.3. The other articles of the Covenant in which the terms "arbitrary" or "arbitrarily" appear are articles 9(1), 17(1) and 12(4).

were suggested, for example, "fixed or done capriciously or at pleasure; without adequate determining principle; depending on the will alone; tyrannical; despotic; without cause based upon law; not governed by any fixed rule or standard".¹⁴⁶ It was proposed by the Netherlands that article 6 should follow the formulation of article 2 ECHR in specifying the cases in which deprivation of life would be deemed lawful.¹⁴⁷ The majority, however, did not favour such a formulation.¹⁴⁸ It is also interesting to note that the HRC drew attention to the fact that the police action deprived the suspects of all the, "protections of due process laid down in the Covenant".¹⁴⁹ During the discussions in the Third Committee some representatives argued that the term "arbitrarily" was synonymous with the expression "without due process of law" and implied such guarantees as the right to a fair trial and protection against false arrest.¹⁵⁰

8.22 In their considerations under the O.P. the HRC have the task of determining in what circumstances the deprivation of life will be characterized as arbitrary and thus violate article 6.¹⁵¹ It is difficult to conclude other than that no clearly defined meaning of

¹⁴⁶ Doc.A/3746, pr.114. See Bossuyt, n.1 above, pp.(123-124).

¹⁴⁷ Doc.A/C.3/L.651.

¹⁴⁸ Doc.A/3764, pr.115. The proposal was rejected by 50 votes to 9, with 11 abstentions.

¹⁴⁹ See pr.8.19 above.

¹⁵⁰ Doc.A/3764, pr.114.

¹⁵¹ See C.K.Boyle, The Concept Of Arbitrary Deprivation Of Life, in B.Ramcharan (ed.), (1985), n.1 above, pp.221-244.

the term emerged from the drafting process.¹⁵² In the Guerrero Case¹⁵³ the HRC revealed some indications of its approach to "arbitrary" by reference to matters of intention, necessity in particular circumstances and proportionality to the requirements of law enforcement. In determining its approach the albeit limited jurisprudence under article 2 ECHR can provide the HRC with persuasive comparative material.¹⁵⁴ However, there is little doubt that the terms of article 6 and the inconclusiveness of the travaux preparatoires leave the HRC with the flexibility to develop and apply its own understanding of 'arbitrary' on a case by case basis. There seems to be no ordinary meaning or clear evidence from the travaux preparatoires to restrict that flexibility.¹⁵⁵

8.22.1 The HRC has recently completed a general comment on article 17 of the Covenant.¹⁵⁶ In that general comment the HRC gave some definition to the terms of article 17,

"The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take

¹⁵² See pr.8.21 above and notes thereto.

¹⁵³ Doc.A/38/40 p.137.

¹⁵⁴ See Fawcett, pp.33-40. Similarly the jurisprudence of the IACM and IACT in respect of article 1 ADRD and article 4 AMR. See The 'Baby Boy' Case, n.25 above; D.Shelton, Abortion And The Right To Life In The Inter-American System: The Case Of The "Baby Boy", 2 HRLJ (1981) pp.309-318; D.Weissbrodt and R.Andrus, The Right To Life During Armed Conflict: Disabled Peoples International v. U.S., 29 Harv.IJL (1988) pp.59-83.

¹⁵⁵ See articles 31 and 32 Of the Vienna Convention On The Law Of Treaties (1969).

¹⁵⁶ G.C.16 (32) (article 17), Doc.CCPR/C/21/Add.6, adopted by the HRC at its 791st meeting (23 March 1983).

place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances".¹⁵⁷

This interpretation of "arbitrary" as having an autonomous, Covenant meaning is of immense importance.¹⁵⁸ The term clearly goes beyond what is lawful under national laws. This definition is consistent with the approach of the HRC to the interpretation of article 6 under the O.P., for example in the Guerrero Case, discussed above.¹⁵⁹

8.23 In Baboeram and Others v. Suriname¹⁶⁰ the HRC had to consider a notorious incident in which fourteen persons were arrested, subjected to violence and executed.¹⁶¹ The State party argued that a coup attempt

¹⁵⁷ Ibid., prs.3-4.

¹⁵⁸ An autonomous interpretation has also been given to the expression "suit at law" in article 14 of the Covenant, see ch.10 below.

¹⁵⁹ See prs.8.17-8.20 above.

¹⁶⁰ Doc.A/40/40 p.187. See Rodley, n.1 above, pp.155-156.

¹⁶¹ The incident was also considered in a number of reports by individuals and bodies investigating the human rights situation in Suriname, see e.g., IACM
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had been foiled and that a number of arrested persons had been killed while trying to escape.¹⁶² After repeating part of its general comment on article 6,¹⁶³ the HRC took the same view as in the Guerrero Case¹⁶⁴ that, "it was evident from the fact that 15 prominent persons had lost their lives as a result of deliberate action by the military police that the deprivation of life was intentional."¹⁶⁵ The State party has failed to submit any evidence proving that these persons were shot while trying to escape".¹⁶⁶ Thus the HRC took the view that the victims were arbitrarily deprived of their life in violation of article 6(1).¹⁶⁷ As regards the "intentional" deprivation of life the same comments as in the Guerrero Case apply.¹⁶⁸ It is also interesting to note the HRC using its general comments under article 40(4) of the Covenant in a view under the Optional Protocol.

8.24 The HRC has had to consider the problems of disappearances and killings. In Herrera Rubio v. Colombia¹⁶⁹ H.R. was allegedly arrested, tortured by

(Footnote Continued)

Report On A Visit to Suriname in June 1983, OAS/Ser.L/II.61, Doc.6 Rev.1. (1983), ch.II; Report Of The Special Rapporteur Of The HRCion On Summary And Arbitrary Executions, Doc.E/CN.4/1985/17, Ax.5; Report Of The Dutch Lawyers Committee For Human Rights, Doc.E/CN.4/1983/55.

¹⁶² Doc.A/40/40 p.187, pr.6.3, 13.2.

¹⁶³ See pr.8.6 above.

¹⁶⁴ See prs.8.17-8.20 above.

¹⁶⁵ Ibid., pr.8.19.

¹⁶⁶ Doc.A/40/40 p.187, pr.14.1.

¹⁶⁷ Ibid., pr.15.

¹⁶⁸ See pr.8.19 above.

¹⁶⁹ Doc.C/31/D/161/1983. The view will be published in Doc. A/43/40 (1988).

Colombian military authorities who also threatened him that unless he signed a confession his parents would be killed. Subsequently persons in civilian clothes and others wearing military uniforms, identifying themselves as members of the counter-guerrillas, went to the home of H.R.'s parents and took them away by force. A week later the corpses of H.R.'s parents were discovered. A judicial investigation was carried out concerning the killings which the state party claimed established that no member of the Armed Forces had taken part in the killings.¹⁷⁰ As regards article 6 the HRC expressed the following view,

"Whereas the Committee considers that there is reason to believe, in the light of the author's allegations, that Colombian military persons bear responsibility for the deaths of Jose Herrera and Emma Rubio de Herrera, no conclusive evidence has been produced to establish the identity of the murderers. In this connection the Committee refers to its general comment 6 (16) concerning article 6 of the Covenant, which provides inter alia, that States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life. The Committee has duly noted the State party's submissions concerning the investigations carried out in this case, which, however, appear to have been inadequate in the light of the State party's obligations under article 2 of the Covenant".¹⁷¹

¹⁷⁰ Ibid., pr.10.2.

¹⁷¹ Ibid., pr.10.3.

On this basis the HRC expressed the view that there had been a violation of, "article 6, because the State party failed to take appropriate measures to prevent the disappearance and subsequent killing of Jose Herrera and Emma Rubio de Herrera and to effectively investigate the responsibility for their murders".¹⁷² The HRC stated that the obligations on the the State party included further investigation of the offences.¹⁷³

The HRC's view is interesting in a number of respects. Firstly, it clearly suggests that there is a preventative or positive aspect to the right to life.¹⁷⁴ Unfortunately it does not indicate what the HRC considered the appropriate measures the State party could have taken to prevent the disappearance and killing of H.R.'s parents. This is a particularly important omission when, as will usually be the case,

¹⁷² Ibid., pr.11.

¹⁷³ Ibid., pr.12.

¹⁷⁴ Cf. In A.6040/73, X. v. Ireland, admiss.decn., 16 YBECHR p.388 (1973), the applicant complained that the refusal of the authorities to give her severely disabled daughter a medical card and thus free treatment and other welfare benefits constituted a breach of her daughter's right to life. The EUCM raised but did not pursue the question of whether the scope of article 2 is limited to the negative prohibition of the taking of life or could, in certain circumstances, call for more positive action. In A.7154/75, Association X. v. U.K., 14 D. & R. p.31 (1979), the EUCM examined the risks of a programme of voluntary vaccination and concluded that the system of control and supervision established by the State was sufficient to comply with its obligation to protect life under article 2 of the Convention. In its opinion the EUCM stated that it considered that, "the first sentence of article 2 imposes a broader obligation on the State than that contained in the second sentence. The concept that "everyone's life shall be protected by law" enjoins the State not only to refrain from taking life "intentionally" but, further, to take appropriate steps to safeguard life. This interpretation was affirmed in Stewart v. U.K., A.10044/82, 7 EHRR p.409. See also on positive obligations A.9360/81 v. Ireland, 32 C.D. 211; A.9825/82 v. U.K. and Ireland, 8 EHRR 49; A.10565/83 v. FRG, 7 EHRR 152.

the State party denies the involvement of official personnel in the incidents concerned. In such circumstances the HRC's view that the responsibility for murders must be thoroughly and effectively investigated, and that it is competent to determine the adequacy of those investigations, assumes critical importance.¹⁷⁵ Again, however, the HRC is open to criticism for not being more specific as to the particular inadequacies of the investigation and not elucidating on a State party's obligations under article 2 of the Covenant.¹⁷⁶

8.24.1 In Miango v. Zaire¹⁷⁷ M was allegedly kidnapped, taken to a military camp and tortured. M was later seen in a precarious physical condition in a hospital at Kinshasa. M's relatives were subsequently brought to the hospital to identify M's body. The explanation in the report of the traffic police was that M was dies as a result of a traffic accident. The HRC did not accept this. They preferred the explanation in a report by a forensic physician that M had died as a result of traumatic wounds probably caused by a blunt instrument. The author's family had requested the public prosecutor's office to conduct an enquiry into the death of M, in particular that the military officer who delivered M to the hospital be summoned for questioning. However, the officer concerned, with the consent of his superiors, had refused to be questioned.¹⁷⁸

After noting the failure of the State party to furnish any information and clarifications concerning the matter in accordance with the duty in article 4(2)

¹⁷⁵ Cf. The obligation under customary international law, see the cases cited in n.116 above.

¹⁷⁶ On article 2 see ch.6 above.

¹⁷⁷ Doc.C/31/D/194/1985 (29 Oct 1987). To be published in Doc.A/43/40 (1988).

¹⁷⁸ Ibid., pr.8.2.

of the Optional Protocol¹⁷⁹ the HRC expressed the view that the facts disclosed a violation of article 6(1) of the Covenant. However, the HRC made no attempt to explain this violation for example, in terms of the responsibility to account for persons held in official custody¹⁸⁰ or in terms of the obligation to thoroughly and effectively investigate the responsibility for murders.¹⁸¹

8.25 The most significant decision of the HRC concerning article 6 is perhaps that in Mbenge v. Zaire.¹⁸² M, a Zairian citizen and former Governor of the Shaba region, left Zaire in 1974 and thereafter resided in Belgium as a political refugee. In his absence he was twice sentenced to capital punishment by Zairian tribunals. The HRC examined the information before it and expressed the view that the facts disclosed violations, inter alia, of articles 14(3)(a), (b), (d), and (e) because M was charged, tried and convicted in circumstances in which he could not effectively enjoy the safeguards of due process enshrined in those provisions.¹⁸³ This aspect of the decision is dealt with elsewhere.¹⁸⁴ M had also alleged breach of article 6. On this the HRC expressed the view that,

"Paragraph 2 of that article provides that the sentence of death may be imposed only "in accordance with the law (of the State party) in force at the time of the commission of the crime and not contrary to the provisions of the

¹⁷⁹ See ch.4, prs.4.27-4.33 above.

¹⁸⁰ See n.116 above.

¹⁸¹ See pr.8.24 above.

¹⁸² Doc.A/38/40 p.134.

¹⁸³ Ibid., pr.21(b).

¹⁸⁴ See ch.10, prs.10.33, 10.40 below.

Covenant". This requires that both the substantive and the procedural law in the application of which the death penalty was imposed was not contrary to the provisions of the Covenant and also that the death penalty was imposed in accordance with that law and therefore in accordance with the provisions of the Covenant. Consequently, the failure of the State party to respect the relevant requirements of article 14(3) leads to the conclusion that the death sentence pronounced against the author of the communication were imposed contrary to the provisions of the Covenant, and therefore in violation of article 6(2)".¹⁸⁵

It is understood that before reaching this decision the HRC referred to the travaux preparatoires to ascertain whether it was the intention of the drafters to establish this double protection aspect in relation to article 6 of the Covenant. Certain members of the HRC were only willing to accept this interpretation after that referral. It is unfortunate that in its expression of views the HRC does not acknowledge this referral and thereby facilitate a more informed understanding of how a particular interpretation was adopted.¹⁸⁶

In terms of the decision itself the HRC states that the failure of the substantive or procedural law of a State party to comply with any provision of the Covenant will render any death penalty imposed a violation of article 6(2). Considering the wide range of rights

¹⁸⁵ Doc.A/38/40 p.134, pr.17. See also G.C.6(16), n.3 above, pr.7, text to n.49 above.

¹⁸⁶ The text of the HRCion's draft had referred in article 6(2) to a death penalty not being contrary to the "principles of the Universal Declaration of Human Rights" rather than to the Covenant, Doc.A/2929 ch.vi, and p.29. Article 6(2) as adopted was largely that proposed in a report of a Working Group of the Third Committee (A/C.3/L.655 and Corr.1), A/3764, prs.102, 116-117.

protected by the Covenant the HRC's decision is of enormous significance. Thus, for example, a death penalty might violate article 6(2) if it were imposed in a discriminatory manner (articles 2, 3, 26),¹⁸⁷ if the mode of execution were inhuman or degrading (article 7),¹⁸⁸ if it were imposed on a person who had been arbitrarily arrested or detained (article 9), if imposed after a trial which did not satisfy all the demands of article 14, if the evidence to ground the conviction had been obtained in violation of the persons right to privacy (article 17), if the crime concerned a freedom guaranteed by the Covenant, for example, if the death penalty was imposed for some of the vague generalized offences noted during the consideration of article 6 under the reporting process.¹⁸⁹ The HRC's approach accords with that of the Supreme Courts of the United States¹⁹⁰ and India¹⁹¹ but the EUCT has yet to rule on this question.¹⁹²

¹⁸⁷ Cf. The recent decision of the United States Supreme Court in *McClesky v. Kemp*, 95 L Ed. 2d 262 (1987) in which M argued unsuccessfully that the death penalty was applied in racially discriminatory manner.

¹⁸⁸ See the decision of the EUCM concerning the extradition of an applicant to face the death penalty in the U.S., see A.10479/83, *Kirkwood v. U.K.*, 6 EHRR 373.

¹⁸⁹ See pr.8.8 above.

¹⁹⁰ See Pannick, n.1 above, pp.26-27, citing, inter alia, *Herbert v. Louisiana* 272 U.S. 312 (1926). See also the decision of the Privy Council in *Mootoo v. Attorney-General* [1979] 1 WLR 1334, cited in Pannick, *ibid.*, p.36.

¹⁹¹ See Pannick, *ibid.*, pp.27-29, citing, inter alia, *Maneka Gandhi v. Union of India*, [1978] 1 S.C.C. 248.

¹⁹² Article 2 ECHR does not contain any equivalent to article 6(2) of the Covenant. Pannick, *Ibid.*, p.30, cites from the judgements of the EUCT in the Sunday
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In Mbenge¹⁹³ M claimed that he had been the victim of purely politically motivated and substantially unfounded charges. The HRC expressed no view on these allegations because of lack of sufficient information.¹⁹⁴ On its approach to article 6(2) a death penalty imposed for political reasons would violate article 6(2) if the HRC were of the view that the substantive or procedural law of the State breached any provision of the Covenant, for example, article 2, 3 or 26.¹⁹⁵

8.26 In Lafuente Penarrieta v. Bolivia¹⁹⁶ the authors alleged that there had been a violation, inter alia, of article 6(4) because, notwithstanding a Presidential Decree granting them an amnesty, the alleged victims were not released.¹⁹⁷ Although the HRC referred to this matter in

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Times Case, EUCT, Series A, vol.30, pr.49 (1979), and the Winterwerp Case, EUCT, Series A, vol.33, pr.45 (1979), and comments that, "It is uncertain whether the European Court will, like the American and Indian Supreme Courts, develop the concept of "law" to embrace substantive criteria of the rule of law and due process of law. What is certain is that the three most prestigious constitutional courts in the world have accepted that, in the context of a constitutional document, a statute is not necessarily "law". See also the decision of the IACT in n.60 above.

¹⁹³ Doc.A/38/40 p.134.

¹⁹⁴ Ibid., prs.9, 15.

¹⁹⁵ The Covenant does not contain any "political offence" exception to capital punishment. Such an exception was proposed in the HRCion but was not adopted, Doc.A/2929, ch.vi, pr.6. Cf. article 4(4) AMR which provides that, "In no case shall capital punishment be inflicted for political offences or related common crimes". See Advisory Opinion OC/3/83 of the IACT, n.39 above.

¹⁹⁶ Doc.C/31/D/176/1984 (23 Nov 1987). To be published in Doc. A/43/40 (1988).

¹⁹⁷ Ibid., prs.1.9, 10.3. The detainees were subsequently released, ibid., pr.15.2.

its finding of facts it inexplicably expressed no view in respect of it.¹⁹⁸

¹⁹⁸ Ibid., prs.15.2. The HRC's view states that it lacked sufficient evidence to make findings with regard to other claims made by the authors, *ibid.*, pr.17.

APPRAISAL.

8.27 Under the reporting procedure the HRC has interpreted article 6 as encompassing wide-ranging positive obligations some of which are clearly of a progressive nature. For example, matters such as infant mortality, malnutrition and public health schemes have been raised.¹⁹⁹ This approach was echoed in the collective opinion of the HRC as expressed in its first general comment on article 6.²⁰⁰ Views under the Optional Protocol have also suggested that there is a preventative or positive aspect to article 6.²⁰¹ While many academic commentators have pressed for a liberal and positive interpretation of the right to life,²⁰² in the context of the ECHR, Professor Fawcett has stressed, "the fact that it is not life, but the right to life; which is to protected by law".²⁰³ If a liberal interpretation is given to the right to life inevitably introduces the concept of progressive obligations into the Covenant.²⁰⁴ It also inevitably leads to some overlapping between civil and political and social and economic rights.²⁰⁵ This in turn raises the question of the applicability of Optional Protocol procedure to a liberally interpreted right to life. For example, how would the HRC respond if a communication alleged a

¹⁹⁹ See prs.8.3-8.4 above.

²⁰⁰ G.C.6/16, pr.5. Text in pr.8.3 above.

²⁰¹ See pr.8.24 above at n.174.

²⁰² See in particular Ramcharan, n1 above.

²⁰³ Fawcett, p.37.

²⁰⁴ See pr.8.4 above. See also ch.6 above on article 2 and ch.1, pr.1.16 on the immediacy of the obligations in the Covenant.

²⁰⁵ See the literature cited in ch.1, pr.1.16 above.

violation of the right to life on the basis of the failure of the State authorities to reduce infant mortality or reduce malnutrition.²⁰⁶ The matter could hardly be declared inadmissible ratione materiae²⁰⁷ in the light of its practice under the reporting procedure and its first general comment on article 6.²⁰⁸ What would be the nature of the obligation on a State party? Who could petition the HRC as a victim? How, if at all, could the process of causation be established? The much debated general problem concerns the justiciability of economic and social rights.²⁰⁹ The EUCT has had to deal with cases involving overlap between the ECHR and the European Social Charter in matters of trade union rights and illegitimate children.²¹⁰

8.28 The duty of any human rights organ in the interpretation of human rights guarantees is to approach its task in good faith and interpret in accordance with the general rules of treaty interpretation.²¹¹ If that approach results in rights being interpreted to contain obligations that were not realized or perhaps even not intended by the drafters no reproach may be levelled at the interpreting organ.²¹² The danger of too positive

²⁰⁶ Cf. the decision of the EUCM in A.7154/75, n.174 above.

²⁰⁷ See ch.4, prs.4.53-4.63 above.

²⁰⁸ See prs.8.3-8.4 above.

²⁰⁹ See ch.1, pr.1.16 above.

²¹⁰ See D.J.Harris, *The European Social Charter*, p.271 (1984).

²¹¹ See Hassan, ch.4, n.361 above.

²¹² For a very significant view under the HRC in this respect see the cases concerning article 26 of the covenant considered in ch.4, pr.4.55-4.58 above. It has been argued that the decision of the EUCT in *Young, James and Webster v. U.K.*, EUCT, Series A, vol.44 (1981) (Footnote Continued)

and liberal interpretation of rights is that it may leave States parties uncertain of their obligations and discourage other States from undertaking the obligations at all. Similarly, states parties may balk at the indirect introduction of aspects of social and economic rights into a petitions system when this was clearly contrary to their intentions.²¹³

The liberal interpretation of article 6 is also manifested in the HRC's general comments concerning the right to life and war, and in particular, thermo-nuclear war.²¹⁴ We have already commented on those general comments.²¹⁵

8.29 Already within the small number of cases it has considered the HRC have had to deal with some important aspects of article 6. There is a "clear duty" to make full, thorough and effective inquiries concerning alleged violations.²¹⁶ The HRC will state that there are "serious reasons" to believe that article 6 has been violated even if it cannot be conclusively proved.²¹⁷ There are obligations to account for and to take "adequate" or "appropriate" measures to protect the life of persons held in custody.²¹⁸ There are obligations,

(Footnote Continued)

contradicted the clear intentions of the drafters concerning closed shops.

²¹³ Note that both the European Social Charter and the ICESCR do not make any provision concerning petitions. The Constitution of the ILO, articles 24 and 26, provide for complaints from trades unions, employers and States, but not individuals.

²¹⁴ See prs.8.11-8.12 above.

²¹⁵ See pr.8.13 above.

²¹⁶ Bleir v. Uruguay, pr.8.15 above, at n.97.

²¹⁷ Ibid., at n.102.

²¹⁸ Barbato v. Uruguay, pr.8.16 above at notes 113 and 114.

though not spelt out, to prevent the disappearance and killing of potential victims.²¹⁹ There are various obligations attendant upon a finding of a violation of the right to life, for example, to compensate the family²²⁰ and to amend a law which does not adequately protect the right to life.²²¹ More specifically, in interpreting "arbitrarily" the HRC have introduced the concepts of intention, necessity, proportionality to the requirements of law enforcement and justification.²²² The general comment on article 17 supports an autonomous interpretation on "arbitrary".²²³ The HRC has interpreted article 6(2) as requiring that the substantive and procedural laws in the application of which a death penalty is imposed are not contrary to the provisions in the Covenant.²²⁴ Finally, the HRC has made use of its general comments and stressed that the right to life is the "supreme right"²²⁵ and that article 6 requires strict controls and limitations on the circumstances in which a person may be deprived of life by the authorities of the State.²²⁶

²¹⁹ Rubio v. Colombia, pr.8.24 above.

²²⁰ See e.g. Miango v. Zaire, pr.8.24.1 above, pr.11.

²²¹ See Guerrero v. Colombia, prs.8.17-8.20 above at n.139.

²²² See Guerrero v. Colombia, *ibid.*

²²³ See pr.8.22.1 above.

²²⁴ See Mbenge v. Zaire, pr.8.25 above.

²²⁵ G.C.6/16, pr.8.2 above at n.3. Guerrero v. Colombia, pr.8.18.

²²⁶ See pr.8.6 above.

CHAPTER 9. ARTICLE 7.¹

9.1 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 treatment.

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.

¹ For similar prohibitions see art.5 UDHR, art.XXVI ADRD, art.3 ECHR, art.5(2) AMR, art.5 AFR. On the drafting of articles 7 and 10 see Doc.A/2929, ch.vi, prs.11-16, 39-44; Doc.A/4045, prs.3-22, 68-86; M.Bossuyt, 'Guide', pp.147-160. See Amnesty International, *Torture In The Eighties*, (1984); S.Ackerman, *Torture And Other Forms Of Cruel And Unusual Punishment In International Law*, 11 *Vand.J.Trans.L.* (1978) pp.653-707; C.Bassiouni and Derby, *An Appraisal Of Torture In International Law and Practice: The Need For An International Convention For The Suppression And Prevention Of Torture*, 48 *Revue Internationale De Droit Penal*, (1977) pp.17-114 ; Y.Dinstein, *The Right To Life, Physical Integrity And Liberty*, in L.Henkin (ed.), *The International Bill Of Rights - The Covenant On Civil And Political Rights*, pp.122-126 (1981); B.H.Klayman, *The Definition of Torture In International Law*, 51 *Temple L.Q.* (1978) pp.449-515; P.Koojimanns, *Torture And Other Cruel Or Degrading Treatment Or Punishment*, Docs.E/CN.4/1986/15, E/CN.4/1987/13; H.Noor Mohammed, *Due Process Of Law For Persons Accused Of A Crime*, in L.Henkin (ed.), *ibid.*, pp.122-126; E.Peters, *Torture* (1985); N.Rodley, *The Treatment Of Prisoners Under International Law*, chs.1-5, (1987); P.Sieghart, *The International Law Of Human Rights*, pp.159-174 (1983); U.N. *Action In The Field Of Human Rights*, pp.142-174 (1983).

The following Conventions have recently been concluded, United Nations Convention Against Torture
(Footnote Continued)

(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 status.

Article 7 Under The Reporting Process.

Introduction

9.2 Article 7 is non-derogable in any circumstances.² It has been the subject of a General Comment under article 40(4).³ In that general comment the HRC stated that the purpose of article 7 was, "to protect the integrity and

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(1985), U.N.Doc.A/Res/39/46, 23 ILM 1027 (1984) and 24 ILM 535 (1985); European Convention For The Prevention And Suppression Of Torture And Inhuman Or Degrading Treatment Or Punishment, E.T.S. No.126; Inter-American Convention to Prevent And Punish Torture (1985), O.A.S.T.S. 67, 25 ILM 519 (1986). See also the following international instruments, Standard Minimum Rules For The Treatment Of Prisoners, approved by ECOSOC in Resn.663C (XXIV) (1957) and with an additional article in ECOSOC Resn.2076 (LXII) (1977); Declaration On The Protection Of All Persons From Being Subjected To Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, G.A.Resn.3542 (XXX) (1975); Code Of Conduct For Law Enforcement Officials, G.A.Resn.34/169 (1979); Principles Of Medical Ethics Relevant To The Role Of Health Personnel, Particularly Physicians, In The Protection Of Prisoners And Detainees Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, G.A.Resn.37/194 (1982). These international instruments are collected in Human Rights-A Compilation Of International Instruments, (1983), and in the appendices to Rodley, above.

² Art.4(2) Covenant. See ch.7 above.

³ G.C.7(16), Doc.A/37/40 p.94. Also in Doc.C/21/Add.1. For the HRC's discussion see SR 371, 373 and 378 Add.1.

dignity of the individual".⁴ Article 7 has featured consistently in the 'views' adopted by the HRC under article 5(4) of the O.P.⁵ In the consideration of State reports under article 40 it has been linked in particular with articles 9⁶ and 10(1). In its general comment the HRC stated that,

"For all persons deprived of their liberty, the prohibition of treatment contrary to article 7 is supplemented by the positive requirement of article 10(1) of the Covenant that they shall be treated with humanity and with respect for the inherent dignity of the human person".⁷

Similarly, in its general comment on article 10 the HRC recalled that, "this article supplements article 7 as regards the treatment of all persons deprived of their liberty".⁸ More generally article 7 has been linked in differing contexts with various articles of the Covenant including articles 6, 8, 9, 14, 23 and 24.⁹ Comments often link, for example, disappearances, torture and ill-treatment, extra-judicial killings and the destruction of family life.¹⁰ Moreover, since its inception the HRC has taken a broad view of the scope of

⁴ Ibid., pr.1.

⁵ See prs.9.11-9.25 below.

⁶ See e.g. SR 327 pr.31 (Aguilar on Morocco). Article 9 concerns the liberty and security of the person, see Apx.I below. The HRC has adopted a General Comment on article 9, see G.C.8(16), Doc.A/37/40 p.95. Also in Doc.C/21/Add.1.

⁷ G.C.7(16), n.3 above, pr.2.

⁸ G.C.9(16), pr.2, Doc.A/37/40 p.96. Also in Doc.C/21/Add.1.

⁹ See e.g. SR 327 pr.43 (Tarnololsky on Morocco). For these articles see Apx.I below.

¹⁰ See e.g. SR 475 pr.18 (Opsahl on Guinea).

article 7. In its view article 7, "clearly protects not only persons arrested or imprisoned, but also pupils and patients in educational and medical institutions".¹¹ Similarly in its general comment on article 10 the HRC stated that, "the wording of paragraph, its context - especially its proximity to article 9, paragraph 1, which also deals with all deprivations of liberty - and its purpose support a broad application of the principle expressed in that provision".¹² This broad approach also parallels that taken to article 3 ECHR under which there is now substantial jurisprudence, and is to be strongly commended as it adds considerably to the protection offered by the ICCPR.¹³

9.3 In the course of their considerations under article 40 HRC members have generally limited their questions, comments and observations to matters stemming from information provided by the State reports or from cases considered under the Optional Protocol. However, members have not refrained from making specific charges of torture against a number of States, for example, Iran,¹⁴ Afghanistan,¹⁵ El Salvador,¹⁶ Uruguay,¹⁷ Chile.¹⁸ Obviously the prohibition in article 7 covers matters of

¹¹ G.C.7(16), n.3 above, pr.2.

¹² G.C.9(16), n.8 above, pr.2. On treaty interpretation see articles 31, 32 VCLT (1969).

¹³ See Fawcett, pp.41-53; Van Dijk and Van Hoof, pp.192-200; C.C.Morrisson, *The Developing Law Of The ECHR*, (1981); P.J.Duffy, *Article 3 Of The European Convention On Human Rights*, 32 ICLQ (1983) pp.316-346.

¹⁴ See Doc.A/37/40 pr.309.

¹⁵ See Doc.A/40/40 pr.598.

¹⁶ See Doc.A/42/40 pr.160.

¹⁷ See Doc.A/37/40 prs.272, 278.

¹⁸ See Docs.A/34/40 pr.80; A/39/40 prs.463-464.

extreme political sensitivity at both the domestic and international levels. HRC members have recognized this by showing restraint and diplomacy in the framing of their questions and comments to State representatives. In general they have successfully followed a difficult line in establishing and maintaining a condition of "constructive dialogue" while at the same time making clear their concerns and reservations to State representatives.¹⁹ However, there has been no question of members glossing over or evading the issues. Many comments have been precisely formulated and critical, for example,

"Reports had been published of healthy persons being interned in Soviet psychiatric institutions for political or punitive reasons, which would appear to be a clear violation of the terms of that article. He asked whether those reports were being investigated and what precautions were being taken in the Soviet Union to ensure that such treatment did not occur....some of the sentences meted out in previous years to persons convicted of political offences seemed excessively severe to observers in other countries. It would be appreciated if some comments could be made to assist the committee in its understanding of this matter".²⁰

9.4 The information provided by most State reports has generally been limited to an indication of the major

¹⁹ See ch.3, pr.3.3 above.

²⁰ SR 108 pr.50 (Sir Vincent-Evans). See also the discussion of this issue during consideration of the second periodic report of the USSR, see the summary in Doc.A/40/40 prs.275-281. See C.Yeo, *Psychiatry, The Law And Dissent In The Soviet Union*, 14 Rev.ICJ (1975) p.41; A.Koryagin, *Involuntary Patients In Soviet Psychiatric Hospitals*, 26 Rev.ICJ (1981) p.49. It is reported that the matter has now been officially recognized in the USSR. See *The Times*, 5-6th January 1988.

constitutional and legislative provisions embodying the proscription in article 7. The HRC noted that,

"it is not sufficient for the implementation of this article to prohibit such treatment or punishment or make it a crime. Most States have Penal provisions which are applicable to cases of torture or similar practices. Because such cases nevertheless occur, it follows from article 7, read together with article 2 of the Covenant, that States must ensure an effective protection through some machinery of control. Complaints about ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective remedies at their disposal including the right to obtain compensation".²¹

Accordingly, HRC members have requested more details on the practical workings of those provisions and other aspects within the ambit of article 7. States have been questioned as to whether their laws and practices with respect to accused and convicted persons, those held in preventative detention, and the imposition and execution of punishments and penalties, correspond to the United Nations Minimum Standard Rules For The Treatment Of Prisoners²² and the United Nations Code Of Conduct For

²¹ G.C.7(17), n.3 above, pr.2. On article 2 see ch.6 above. Cf. In the Ireland v. U.K. Case, EUCT, Series A, vol.25 (1978), the EUCT took the view that it could not order the U.K. to institute criminal or disciplinary proceedings, prs.62, 82. In the Greek Case, 12(2) YBECHR (1969), the EUCM transmitted remedial proposals to the Committee of Ministers which approved them by Resolution, see pp.514-515.

²² See n.1 above. Doc.A/4045 pr.84 (Report of the Third Committee, 1958). Cf. the decision of the EUCM in Eggs v. Switzerland, A.7341/76, 6 D.& R. 176. See also D.L.Skoler, World Implementation Of The U.N. Standard (Footnote Continued)

Law Enforcement Officials.²³ More specifically members have raised such issues as the physical conditions of detention,²⁴ the discriminatory treatment of political detainees,²⁵ the conditions, procedures and safeguards applicable in cases of psychiatric detention,²⁶ and the general principle of proportionality as regards punishments.²⁷

9.4.1 In its general comment the HRC drew on its experience in dealing with article 7 to indicate to State parties the kinds of safeguards which it considered could make control machinery effective. These were,

"provisions against detention incommunicado, granting, without prejudice to the investigation, persons such as doctors, lawyers, and family members access to the detainees; provisions requiring that detainees should be held in places that are publicly recognized and that their names

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Minimum Rules For Treatment Of Prisoners, 10 J.Int.L.& Econ. (1975) pp.453-482; ECOSOC Resn.1984/47 on procedures for the effective implementation of the SMR for the treatment of prisoners.

²³ See n.1 above. See e.g. SR 65 pr.3 (Tomuschat on Czechoslovakia); SR 67 pr.61 (Tomuschat on GDR); SR 249 pr.74 (Tomuschat on Venezuela).

²⁴ See e.g. SR 346 pr.7 (Tarnopolsky on Rwanda).

²⁵ See e.g. SR 67 pr.61 (Tomuschat on GDR); SR 99 pr.11 (Lallah on Yugoslavia). See Bleir v. Uruguay, notes to pr.9.24 below.

²⁶ See e.g. text to pr.9.3, n.20 above (on USSR); SR 136 pr.5 (Lallah on Romania); SR 264 pr.23 (Vincent-Evans on Barbados). See the leading cases under the ECHR of Winterwerp v. Netherlands, EUCT, Series A, vol.33 (1979); X. v. U.K., EUCT, Series A, vol.46, (1981); Nielsen v. Denmark, EUCT, Series A, (1988); A.4340/69, Simon Herald v. Austria, 14 YBECHR p.352.

²⁷ See e.g. SR 440 pr.57 (Tarnopolsky on France); SR 560 pr.7 (Tomuschat on Canada), reply at SR 562 pr.5.

and places of detention should be entered in a central register available to persons concerned, such as relatives; provisions making confessions or other evidence obtained through torture or other treatment contrary to article 7 inadmissible in court; and measures of training and instruction of law enforcement officials not to apply such treatment".²⁸

This kind of general comment is particularly useful from the point of view of States parties. It gives practical, concrete indications of how the HRC views the demands of article 7 in terms of national laws and practices by which the performance of each State can be measured. That this aspect of the general comment adopts many of the safeguards suggested by international non-governmental organisations such as Amnesty International suggests that such organisations are having an input into the HRC's work in this respect.²⁹

9.5 The HRC has stated that article 7 has a wide scope of application. However, the HRC has refrained from defining or providing clear criteria for the application of article 7. The general comment stated that,

"As appears from the terms of this article, the scope of the protection required goes far beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment".³⁰

²⁸ G.C.7(16), n.3 above, pr.2.

²⁹ See Amnesty International Report, n.1 above, pp.247-251. See ch.3, prs.3.12-3.18 above on the sources of information used under the reporting process.

³⁰ G.C.7(16), n.3 above, pr.2. See articles 1 and 16 of the U.N. Convention Against Torture, n.1 above.

9.6 Among the particular forms of punishments and practices the application of which have attracted the attention and sometimes the criticism of HRC members have been certain interrogation methods,³¹ the evidential use of illegally obtained information,³² virginity testing of immigrants,³³ the treatment of the so called "blanket people" in Northern Ireland,³⁴ stoning and flogging,³⁵ whipping,³⁶ 30-40 years rigorous

³¹ See e.g. SR 65 pr.3 (Tomuschat on Czechoslovakia); SR 69 pr.18 (Graefrath), SR 148 prs.3-6 (Lallah on U.K.). For the U.K. reply see SR 148 prs.23-27 and Supplementary Report, Doc.C/1/Add.35 prs.14-17.

³² See e.g. SR 69 pr.32 (Tarnopolsky on U.K.); SR 98 pr.64 (Tomuschat on Yugoslavia); SR 413 pr.28 (Tomuschat on Austria). See also article 15 of the U.N.C.A.T., n.1 above.

³³ SR 148 pr.3 (Lallah on U.K.). Reply at SR 148 pr.21.

³⁴ SR 69 pr.7 (Lallah on U.K.). Cf. McFeely v. U.K., A.8317/78, 3 EHRR (1981) p.161.

³⁵ SR 365 pr.10 (Tarnopolsky on Iran).

³⁶ SR 403 pr.19 (Graefrath on Australia). "Whipping as a punishment has been abolished in all States but Western Australia", Second periodic report of Australia, Doc.C/42/Add.2 (1987), prs.209-210. That report also raises the problem of traditional laws enforced by aboriginal communities which involved punishments which could be regarded as unacceptable and cruel, including, "thigh spearing, forms of corporal punishment, initiation or putting young offenders 'through the law', exile to an outstation or another

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imprisonment,³⁷ loss of nationality,³⁸ and deprivation of civil and political rights for extended periods.³⁹

9.7 The HRC has consistently probed State representatives on their practices of solitary confinement and corporal punishment. Matters canvassed have included the determination of the authorities with power to authorize these practices, for what periods, for what offences or conduct, in what circumstances, and the conditions governing the confinement and punishment.⁴⁰ As regards solitary confinement the HRC has expressed the view that, "[e]ven such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, may be contrary to this article".⁴¹ This approach seems to accord with that of the EUCM to such

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community and public 'shaming' or 'growling'", *ibid.*, pr.205. The report continued by noting the view of the Australian Law Reform Commission that, [w]hat would be degrading in one community or culture might not be degrading, indeed might be fully accepted in another", and the general view of the commission that, "while the general law did not and should not condone or sanction 'unlawful' (in the general sense) punishments, courts should take account of the traditional law basis of the unlawful action in determining the existence of a criminal intent and in sentencing. In many instances this already occurs", *ibid.*, pr.207.

³⁷ SR 142 pr.6 (Tarnopolsky on Spain).

³⁸ SR 129 pr.5 (Bouziri on Chile).

³⁹ See the comments of Tomuschat at SR 128 pr.22 (on Chile). Such deprivation has, in certain circumstances, been held to violate article 25 of the Covenant, see e.g., *J.L.Massera v. Uruguay*, Doc.A/34/40 p.124, pr.10.2. See also Fawcett, p.49.

⁴⁰ See e.g. SR 111 pr.18 (Esperson on Mauritius); SR 153 pr.41 (Vincent-Evans on Ukrainian SSR); SR 213 pr.14 (Tarnopolsky on Senegal); SR 386 pr.33 (Graefrath on Mexico).

⁴¹ G.C.7(16), n.3 above, pr.2. The keeping of
(Footnote Continued)

cases.⁴² As regards corporal punishment the individual members of the HRC have generally taken an anti-corporal punishment stance, often suggesting that it may contravene both article 7 and article 24(1) ICCPR which provides that, "Every child shall have, without any discrimination...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".⁴³ In its general comment the HRC was more equivocal and ambiguous. After referring to the various prohibited forms of treatment or punishment the comment continued, "[i]n the view of the Committee the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure".⁴⁴ The obvious ambiguity is as to whether the prohibition in article 7 extends to corporal punishment per se and to excessive chastisement as an educational or disciplinary measure, or only to corporal punishment which amounts to such excessive chastisement. In view of the doubt it is probably only safe to assume the latter at the present time.⁴⁵

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persons incommunicado has, in certain circumstances, been held to be a violation of article 10(1) of the Covenant, see pr.9.24 below.

⁴² See Fawcett pp.47-48. See e.g., *Hilton v. U.K.*, A.5613/72, 4 D.& R. p.177; *Bonzi v. Switzerland*, A.7854/77, 12 D.& R. p.185 at 189.

⁴³ See e.g. SR 162 pr.91 (*Tarnopolsky on U.K. Dependencies*).

⁴⁴ G.C.7(16). n.3 above, pr.2. During the drafting of this general comment Mr.Tarnopolsky stated that references to chastisement as an educational measure and protecting pupils in educational institutions, "tended to trivialize the prohibition of torture or cruel, inhuman or degrading treatment or punishment", SR 371 pr.16.

⁴⁵ See the decisions of the EUCT in *Tyrer v. U.K.*,
(Footnote Continued)

9.8 During its consideration of State reports the HRC has emphasized the fundamental role in the implementation of the prohibition in article 7 of "an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity" (article 2(3)).⁴⁶ State representatives have been requested to provide examples, if any, of recent investigations and prosecutions for contravention of the domestic provisions corresponding to article 7.⁴⁷ Reference has been made to views adopted under article 5(4) O.P. concerning violations of articles 7 and 10(1).⁴⁸ Similarly questions have been raised concerning arrangements for visits by the International Red Cross⁴⁹ and the possibility of establishing prison inspection services.⁵⁰ In its general comment on article 7 the HRC stated that , "it is the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority".⁵¹ There is no explanation of "official authority". The "duty" to "ensure protection" suggests a positive and active role for the State in this context. In practical terms the HRC's comment would cover the activities of so-called "death squads", which operate in certain countries. Such groups are often

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EUCT, Series A, vol.26 (1978); Campbell and Cosans v. U.K., EUCT, Series A, vol.48 (1982). For a more recent EUCM decision see A.9471/81, X and X. v. U.K., 7 EHRR (1985) p.450.

⁴⁶ On article 2(3) see ch.6 above.

⁴⁷ SR 469 pr.38 (Dimitrijevic on El Salvador).

⁴⁸ SR 356 pr.14 (Tarnopolsky on Uruguay).

⁴⁹ See e.g. SR 364 pr.74 (Vincent-Evans on Iran).

⁵⁰ See e,g, SR 366 pr.16 (Tomuschat on Iran).

⁵¹ G.C.7(16), n.3 above, pr.2.

allegedly linked to, if not comprised of, State security forces.⁵²

9.9 The prohibition on medical and scientific experimentation without the free consent of the person concerned has been the subject of consistent but rather limited consideration.⁵³ A matter commonly raised has concerned the regulations, if any, governing the removal and transplant of human organs or tissue.⁵⁴ The Mexican representative was asked whether it could be concluded from a provision of the Health Code permitting authorized clinical research of human beings "only when...there is no foreseeable possibility of causing death", that medical experiments which did not endanger the life of the subject could be carried out without his consent. If so, it was suggested that the provision was in conflict with the Covenant.⁵⁵

9.10 During the drafting process it was recognized that medical and scientific experimentation were very complex

⁵² See e.g. the view of the HRC in Baboeram v. Suriname, ch.8, pr.8.23 above. See also AI Report on Political Killings, ch.8, n.1 above; Reports of the U.N.Special Rapporteur, *ibid.*, notes 1 and 28.

⁵³ See e.g., SR 92 pr.53 (Graefrath on FRG); SR 779 pr.35 (Higgins on Denmark). The limited consideration is perhaps surprising given that the provision was controversial at the drafting stage, see n.1 above. See also A.C.Ivy, *The History And Ethics Of The Use Of Human Subjects In Medical Experiments*, (1948) 108 Science p.1 H.Saba, *Les Droits De L'homme Et De L'experimentation Biomedicale Sur L'homme*, *Melanges Offerts A Polys Modinos*, pp.260-266 (1968); J.K.Mason and A.McCall-Smith, *Law And Medical Ethics*, chs.17-18, (2d, 1983). See also the texts on human experimentation in (1980) *Revue Internationale De Droit Penal* at pp.419, 445 and 459.

⁵⁴ See e.g. SR 77 pr.27 (Hanga on Norway); SR 170 pr.60 (Hanga on Finland); SR 205 pr.51 (Hanga on Canada).

⁵⁵ SR 386 pr.10 (Prado-Vallejo). For reply see SR 404 pr.36.

matters raising many difficult questions.⁵⁶ Though the provision was drafted with the atrocities of the Nazi concentration camps during World War II in mind it was clearly recognized that the provision as formulated went much wider.⁵⁷ Among the particular issues discussed were exceptions to this principle where the health of the individual or the community were involved, the problem of the consent of the sick or unconscious person, the need to outlaw criminal experimentation without hindering legitimate scientific or medical practices, the distinction between treatment and experimentation.⁵⁸ Modern practices such as psychosurgery,⁵⁹ research on children, research concerning pharmaceutical products,⁶⁰ the aids virus, fetal and embryo experimentation,⁶¹ and fluoridation might well raise issues for the HRC to consider. The fundamental issues to note will be the HRC's approach to and interpretation of "free consent" and the distinction between treatment and experimentation.⁶² No real assistance on these issues has been gained from the HRC's practice to date.

⁵⁶ See n.1 above for the drafting records.

⁵⁷ Ibid. There is no comparable express provision in other international human rights texts.

⁵⁸ Ibid.

⁵⁹ SR 92 pr.53 (Graefrath on FRG). See Mason and McCall Smith n.53 above, pp.293-296.

⁶⁰ See e.g., SR 441 pr.37 (Graefrath on France).

⁶¹ See Mason and McCall Smith, n.53 above, chs.16-17; Human Fertilisation And Embryology: A Framework For Legislation, Cmd.259 (1987); The Third Report of The Voluntary Licensing Authority For Human In Vitro Fertilisation And Embryology (1988); B.M.Knoppers, Modern Birth Technology And Human Rights, 33 Am.J.Comp.L. (1985) pp.1-31.

⁶² See Mason and McCall Smith, n.53 above, chs.9 and 16.

In its general comment on article 7 the HRC noted the paucity of information received on the second sentence of article 7 and commented it took the view that,

"at least in countries where science and medicine are highly developed, and even for peoples and areas outside their borders if affected by their experiments, more attention should be given to the possible need and means to ensure the observance of this provision. Special protection in regard to such experiments is necessary in the case of persons not capable of giving their consent".⁶³

⁶³ G.C.7(16), n.3 above, pr.3.

Articles 7 And 10 Under The Optional Protocol.⁶⁴

9.11 Articles 7 and 10(1) have featured prominently in the HRC's final views. In many of these the HRC found that both articles had been violated. This is accounted for the fact that these views have concerned the treatment of detainees which is a subject covered by both articles 7 and 10(1).⁶² All of the HRC's views on article 7 have concerned the first sentence of article 7. No final view has dealt with the matter of consent to medical and scientific experimentation.⁶³ Many of the HRC's important decisions on evidential and procedural matters under the O.P. have been developed in cases concerning articles 7 and 10(1). These have been dealt with in chapter 4 above.

9.12 The main features of the HRC's views under articles 7 and 10(1) will now be reviewed. Their usefulness in facilitating an understanding of the HRC's approach to its work has been reduced by a number of factors. The great majority of the HRC's views have concerned Uruguay. The factual allegations have been relatively confined and consistent focusing on methods of torture and mistreatment and conditions of detention. Thus the scope for the HRC to develop the borderline of articles 7 and 10(1) has been restricted. A much wider range of

⁶⁴ This section covers both articles 7 and 10 of the Covenant because, in terms of the views of the HRC, it was not sensible to consider article 7 in isolation.

⁶² We have noted that in its general comments on articles 7 and 10 the HRC made reference to the relationship between the two articles, see pr.9.2 above.

⁶³ In *Acosta v. Uruguay*, A alleged that, "he was subjected to psychiatric experiments (giving the name of the doctor) and that for three years, against his will, he was injected with tranquilizers every two weeks", Doc.A/39/40 p.169 pr.2.7. The HRC noted that these allegations concerned a period before the entry into force of the Covenant and the O.P. for Uruguay, *ibid.*, pr.14.

issues have been considered under article 3 ECHR.⁶⁴ Even within its limited scope the HRC's analyses have been rather sparse, cautious and unhelpful. This is partly explicable by the consistent failure of the Uruguayan authorities to cooperate with the HRC, for example, with respect to the production of evidence or the specific rebuttal of allegation.⁶⁵ The result is that the HRC's jurisprudence has been developing in a rather abstract, academic manner without the benefit of detailed counter argument. Often the HRC's views have simply consisted of a recitation of the factual allegations and the HRC's stating that those facts form the basis of findings of violations of, inter alia, articles 7 and 10(1) of the Covenant. Accordingly, many of the HRC's views are unsatisfactory with regard to an understanding of a particular decision and also, more generally, in terms of facilitating a comprehensible development of the meaning of the Covenant. The following cases are examples of the unsatisfactory nature of the HRC's approach in these regards.

9.12.1 In *Ambrosini v. Uruguay*⁶⁶ it was alleged that A was held incommunicado in an unidentified place, confined with four other political prisoners in a cell measuring 4.2 by 2.5 meters in conditions seriously detrimental to his health. The HRC expressed the view that the facts revealed, inter alia, violations of articles 7 and 10(1) because A was detained under conditions seriously detrimental to his health.⁶⁷

⁶⁴ See n.13 above.

⁶⁵ For the HRC's approach to these problems see ch.4, prs.4.27-4.36 above. A number of States have shown little cooperation to the HRC, see ch.4, prs.4.42-4.43, 4.127-4.132 above.

⁶⁶ Doc.A/34/40 p.124.

⁶⁷ Ibid., pr.10 at (i).

Article 10(1) was also violated because A was held incommunicado for months and was denied the right to be visited by any family member.⁶⁸ Presumably the conditions of detention did not amount to torture but there is no indication whether the conditions amounted to "cruel treatment", "inhuman treatment" or "degrading treatment". Article 10(1) provides little assistance as each of these limbs of article 7 might be covered by the requirement for detainees to be, "treated with humanity and respect for their inherent dignity". The HRC also does not explain the source of the "right" to be visited by any family member. It does not expressly appear in the ICCPR but it may be implied by a combination of other articles.⁶⁹ Visits by family members were mentioned as a safeguard by the HRC in its general comment on article 7 but was not referred to as a right.⁷⁰

9.12.2 In Antonaccio v. Uruguay⁷¹ the HRC expressed the view that there had been violations of article 7 and 10(1) because was held in solitary confinement for three months in an underground cell, was subjected to torture over a period of three months and was being denied the medical treatment his condition required.⁷² There is no further explanation of the HRC's views so it is uncertain whether such a period of and circumstances of solitary confinement alone would have violated article 7 or article 10(1) or both.⁷³ We noted above that in its

⁶⁸ Ibid.

⁶⁹ See also Simones v. Uruguay, pr.9.23 below.

⁷⁰ See pr.9.4.1. above, and Quinteros v. Uruguay and Simones v. Uruguay in pr.9.23 below.

⁷¹ Doc.A/37/40 p.114.

⁷² Ibid., pr.12.

⁷³ See pr.9.24 below.

general comment on article 7 the HRC stated that solitary confinement, "may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article".⁷⁴ It is unfortunate that the HRC does not comment on or explain the circumstances of solitary confinement in this case and thereby afford a useful example of the scope of its general comment.⁷⁵ Similar criticism can be made with regard to the denial of medical treatment to A.⁷⁶

9.12.3 Another unhelpful finding is that in Lanza and Perdoma v. Uruguay.⁷⁷ L and P made detailed allegations of ill-treatment (L) and physical and mental torture (P). The HRC simply expressed the view that the facts disclosed violations of articles 7 and 10(1) because of the "treatment which they received while in detention".⁷⁸ No attempt is made to more specific. No comment is made on the allegations of mental and distinct from physical torture.⁷⁹ Even more inexplicable are cases where the HRC makes no finding of facts and expresses no view on the allegations at all. An example is M.V.Massera v. Uruguay⁸⁰ where it was alleged that while in detention M suffered from an inadequate diet

⁷⁴ See pr.9.7 above.

⁷⁵ A number of cases under the ECHR have concerned solitary confinement, see n.42 above.

⁷⁶ See pr.9.17 below at n.124 and pr.9.18 below. Cf. Kotalla v. Netherlands, A.7994/77, 14 D.& R. p.238.

⁷⁷ Doc.A/35/40 p.111.

⁷⁸ Ibid., pr.16.

⁷⁹ See the Estrella Case, pr.9.18 below.

⁸⁰ Doc.A/34/40 p.124.

and unhealthy working conditions so that her state of health was weakened.⁸¹

9.13 To turn to the substance of the HRC's views, there have been a substantial number of views in which the HRC has specifically categorized allegations as constituting torture.⁸² The first of these was in the HRC's first expression of views. In J.L.Massera v. Uruguay⁸³ it was alleged that M had been forced to remain standing with his head hooded for many hours, had lost his balance, fallen down and broken his leg. The injury was not immediately taken care of with the result that the leg was left several centimetres shorter than the other one. The HRC found that as a result of the maltreatment received M had suffered permanent injury, and expressed the view that the facts disclosed violations of articles 7 and 10(1) because during his detention M was tortured as a result of which he suffered permanent physical

⁸¹ Ibid., pr.2. The HRC did express the view that article 10(1) had been violated but on other grounds. Similarly, in Machado v. Uruguay, Doc.A/39/40 p.148, pr.1.7, concerning allegations of ill-treatment. In Ireland v. U.K., A.5301/71, Report of the EUCM, (1978), the EUCM stated that restrictions on diet, if considered separately, may not as such constitute inhuman treatment, p.401.

⁸² See J.L.Massera v. Uruguay, Doc.A/34/40 p.124; Grille Motta v. Uruguay, Doc.A/35/40 p.132; Lopez Burgos v. Uruguay, Doc.A/36/40 p.176; Antonaccio v. Uruguay, Doc.A/37/40 p.114; Bleir v. Uruguay, Doc.A/37/40 p.130; Estrella v. Uruguay, Doc.A/38/40 p.150; E.Quinteros v. Uruguay, A/38/40 p.216; Muteba v. Zaire, Doc.A/39/40 p.182; Gilboa v. Uruguay, Doc.A/41/40 p.128. See also Conteris v. Uruguay, pr.9.14.1 below, and Baboeram v. Suriname, pr.8.23 above, in which in the light of its view that article 6(1) of the Covenant had been violated it did not consider it necessary to consider assertions that other provisions of the Covenant (including articles 7 and 10) were violated.

⁸³ Doc.A/34/40 p.124. See Rodley, n.1 above, p.80. J.L.Massera, a distinguished Uruguayan mathematician, has since been released.

damage.⁸⁴ There is no definition or explanation of the term torture. The only factual evidence of M's mistreatment was that he was hooded and forced to remain standing for long hours. If this treatment alone constituted torture then the threshold has been set at a much lower level than that indicated by the EUCT in the Ireland v. United Kingdom Case.⁸⁵ In that case "wall-standing" and "hooding" were only two of five techniques which the EUCT held to constitute a practice of inhuman and degrading treatment but specifically not a practice of torture because the techniques, "did not occasion suffering of the particular intensity and cruelty implied by the word torture".⁸⁶ Alternatively, the HRC's view may have been that it was the fact that permanent physical injury resulted from M's treatment that rendered it torture. On that basis a State party is being held responsible for any injury resulting from the mistreatment of an individual even if the extent of injury was not intended. Interesting questions of foreseeability and liability for omissions would inevitably be raised if this approach was pursued.⁸⁷ Other findings of torture by the HRC would reject the

⁸⁴ Ibid., pr.9(ii).

⁸⁵ See n.21 above.

⁸⁶ Ibid., pr.173. For the EUCT's understanding of torture see *ibid.*, pr.167. There were four dissents from the EUCT's judgement. The EUCM had held unanimously that the combined use of the five techniques constitutes a practice of inhuman treatment and torture, Report of the EUCM, n.81 above, p.401. The EUCT's understanding of torture has been criticized, see Fawcett, p.46; Klayman.1 above, pp.497-500, 504-505.

⁸⁷ The definition of torture in article 1 of the U.N. Convention Against Torture, n.1 below, refers to the "intentional" infliction of any "act" by which severe pain or suffering, whether physical or mental.

possible argument that a finding of "permanent physical damage" is a precondition to a finding of torture.⁸⁸

9.14 The factual allegations in the communications in which the HRC has made a finding of torture have included practices which would clearly have come within any conception of torture: application of electric shocks, use of submarino (putting the detainee's hooded head into foul water), insertion of bottles or barrels into detainee's anus, being forced to remain standing, hooded and handcuffed with a piece of wood in the mouth for several days and nights;⁸⁹ physical beatings⁹⁰ or treatment which results in permanent physical damage⁹¹ or a broken jawbone and perforated eardrums,⁹² being forced to do the 'planton' (standing upright with eyes blindfolded throughout the day), being buried and walked over;⁹³ beatings with rubber truncheons, near asphyxiation in water, psychological torture including threats of torture or violence to friends or relatives, or of dispatch to Argentina to be executed, threats of having to witness the torture of friends, mock

⁸⁸ In many of the cases cited in n.82 above there was no evidence submitted of permanent physical injury. In his separate opinion in the Ireland v. U.K. Case, n.21 above, Judge Zekia argued that whether the injuries were transitory or permanent in duration was one of the relevant factors to be taken into account in determining whether the conduct concerned constituted torture. Many modern torture techniques leave no permanent signs of injury, see Amnesty International Danish Medical Group, Evidence Of Torture (1977).

⁸⁹ Grille Motta v. Uruguay, Doc.A/35/40 p.132.

⁹⁰ Lopez Burgos v. Uruguay, Doc.A/36/40 p.176.

⁹¹ See J.L.Massera v. Uruguay, pr.9.13 above.

⁹² Lopez Burgos v. Uruguay, Doc.A/36/40 p.176.

⁹³ Bleir v. Uruguay, Doc.A/37/40 p.130; Estrella v. Uruguay. Doc.A/38/40 p.150; E.Quinteros v. Uruguay, Doc.A/38/40 p.216.

amputations;⁹⁴ beatings, electric shocks and mock executions.⁹⁵ Despite a number of opportunities the HRC has failed to state explicitly that mental or psychological suffering can amount to torture.⁹⁶

9.14.1 In other cases of seemingly comparable severity, however, the HRC have refrained from using the term torture. In Lanza v. Uruguay⁹⁷ L was almost constantly kept blindfolded with her hands tied and subjected to various forms of mistreatment such as "caballete", "submarino seco", "picano", and "planton".⁹⁸ The HRC expressed the view that there had been violations of articles 7 and 10(1) because of the "treatment" received during detention.⁹⁹ In Weinberger v. Uruguay¹⁰⁰ the allegations were of torture, being kept blindfolded with hands tied, and treatment leaving the detainee with serious physical injuries (one arm paralyzed, leg

⁹⁴ Estrella v. Uruguay, *ibid.* The EUCT has held that, "provided it is sufficiently real and immediate, a mere threat of conduct prohibited by article 3 [ECHR] may itself be in conflict with it", see Campbell and Cosans v. U.K, EUCT, Series A, vol.48, pr.26 (1982).

⁹⁵ See Muteba v. Zaire, Doc.A/39/40 p.182. See also Gilboa v. Uruguay, Doc.A/41/40 p.128. Mock executions were among the treatments features in the Greek Case, n.21 above, p.500, 504.

⁹⁶ However, this does seem to be the clear implication from Estrella v. Uruguay, see pr.9.18 below. See also the Quinteros Case, pr.9.23 below. In the Greek Case, n.21 above, the Sub-Commission of the EUCM defined non-physical torture as, "the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault", and gave as one of their examples, mock executions, pp.461-463.

⁹⁷ Doc.A/35/40 p.111.

⁹⁸ *Ibid.*, pr.9. See Rodley, n.1 above, p.87-88.

⁹⁹ *Ibid.*, pr.16. Similarly in Ramirez V. Uruguay, Doc.A/35/40 p.121.

¹⁰⁰ Doc.A/36/40 p.114.

injuries and infected eyes). The HRC used the expression "severe treatment".¹⁰¹ In Izquierdo v. Uruguay¹⁰² similar allegations were termed "ill-treatment".¹⁰³ "Severe treatment" was again used in Conteris v. Uruguay¹⁰⁴ This was accompanied by a finding that article 14 (3)(g) ICCPR had been violated because C had been "forced by means of torture to confess guilt". Why the article 7 finding does not also refer expressly to torture is not explained. Finally, in other cases the HRC has combined expressions basing its views on evidence of "torture and inhuman treatment"¹⁰⁵ and the 'treatment (including torture) suffered'.¹⁰⁶

9.14.2 In no case then has the HRC sought to define or delineate the boundaries between "torture" and "inhuman treatment" or to explain why certain allegations have been designated torture while others of similar severity have not.¹⁰⁷ A remarkable view is that in Acosta v. Uruguay¹⁰⁸ The HRC found the allegations of torture to be unsubstantiated but, nevertheless, expressed the view that the information before it evidenced that A had been subjected to inhuman treatment and that Uruguay had thereby violated articles 7 and 10(1). This view is extraordinary since the only evidence identified by the

¹⁰¹ Ibid., pr.16.

¹⁰² Doc.A/37/40 p.179.

¹⁰³ Ibid., pr.9.

¹⁰⁴ Doc.A/40/40 p.196, pr.10.

¹⁰⁵ Grille Motta v. Uruguay, Doc.A/35/40 p.132, pr.16.

¹⁰⁶ Lopez Burgos v. Uruguay, Doc.A/36/40 p.176, pr.13.

¹⁰⁷ See G.C.7(16), n.3 above, pr.2, cited in pr.9.5 above. See also n.36 above.

¹⁰⁸ Doc.A/39/40 p.169.

HRC was A's being held incommunicado for various periods.¹⁰⁹

9.15 The term "degrading treatment" has only appeared in a small number of cases. In De Bouton v. Uruguay¹¹⁰ B alleged that she was subjected to "moral and physical ill-treatment" including once being forced to stand for thirty-five hours with minor interruptions, that her wrists were bound causing pain and that her eyes were continuously kept bandaged. The conditions of detention grew worse with B allegedly kept sitting on a mattress, blindfolded, not allowed to move for many days and only being allowed to take a bath every ten or fifteen days. The HRC expressed the view that there had been violations of articles 7 and 10(1) on the basis of evidence of "inhuman and degrading treatment".¹¹¹ There was no discussion or explanation of the term "degrading treatment" or how it was to be distinguished from inhuman treatment¹¹² or why other cases concerning similar factual allegations have been designated only as "inhuman treatment", "severe treatment" or "ill-treatment" but not "degrading treatment". It is only possible to speculate that the distinctions between the cases may turn on particular evidential details which remain unexplained. No explanation of "moral" ill-treatment was offered.

¹⁰⁹ Ibid., prs.13.2-15.

¹¹⁰ Doc.A/36/40 p.143.

¹¹¹ Ibid., pr.13.

¹¹² In Ireland v.U.K., n.21 above, the finding of the EUCT was that the use of the five techniques constituted a practice of "inhuman and degrading treatment" (finding 3). Another finding was that there existed at Palace Barracks a practice of "inhuman treatment" (finding 6). See Sieghart, n.1 above, pp.167-170.

9.15.1 Similar comments can be made regarding the only other view in which the expression degrading treatment appears, which also contains the HRC's only use of the expression "cruel treatment". In Gilboa v. Uruguay¹¹³ the HRC expressed the view that G had been subjected to "torture and to cruel and degrading treatment". In its statement of facts the HRC refers to the torture (beatings, 'electric prod', stringing up) to which G had been subjected. There is no explanation of "cruel and degrading treatment". The allegations included, "various forms of continuous degradation and violence, such as always having to remain naked with the guards and torturers, threats and insults and promises of further acts of cruelty".¹¹⁴ Finally in one view, Conteris v. Uruguay¹¹⁵ the HRC referred to "harsh" conditions of detention. This expression does not appear in articles 7 or 10(1).

9.16 The basic thrust of the argument above is that the HRC has failed to define or establish criteria for distinguishing between the terms in article 7. This accords with the approach of the HRC in its general comment on article 7 in which it stated its view that, "It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment and punishment. These distinctions depend on the kind, purpose and severity of the particular treatment".¹¹⁶ Similarly it can be argued that the criticism is

¹¹³ Doc.A/41/40 p.128.

¹¹⁴ Ibid., pr.4.3. Cf. In Tyrer v. U.K., n.45 above, the EUCT stated that for a punishment to be degrading the humiliation or debasement must be more than that which exists in the case of generally accepted forms of punishment imposed by courts for criminal offences. See also the Greek Case, n.21 above, p.186.

¹¹⁵ Doc.A/40/40 p.196.

¹¹⁶ G.C.7(16) pr.2. See pr.9.5 above, text to n.30.

academic because violation of any element of article 7 is totally and unequivocally prohibited. It must also be recognized that on the basis of the experience under parallel article 3 ECHR the boundaries of article 7 ICCPR are likely to be complex and fluid and may change over time.¹¹⁷ Nonetheless, communications under the O.P. afford the HRC opportunity to give content to articles 7 and 10(1) by permitting analysis of the "kind, purpose and severity of the particular treatment" in individual, concrete cases. In response the HRC have failed to draw intelligible and comprehensible distinctions between the various limbs of article 7. Even apart from the contribution that would make to developing the content of the ICCPR from the point of view of States parties, the distinctions between the prohibitions are crucial in terms of reputation, international standing, the level of reparation to be afforded, and propaganda value.¹¹⁸ It may then be very important for a State party to avoid having their actions categorized as torture as distinct from a lesser violation of article 7. Conversely, findings of torture from a body of international human rights experts like the HRC should carry great weight and moral force. Unfortunately, the HRC has not afforded to States parties a clear understanding of the scope of the respective prohibitions. The resulting categorization of findings as "torture", or as

¹¹⁷ "Movement and development in article 3 [ECHR] is obvious and will likely grow more intense and more frequent. However basic this human right may seem, it is most complex indeed", Clovis.C.Morrisson, *The Dynamics Of Development In The European Human Rights Convention System*, p.72 (1981).

¹¹⁸ Hence the importance for the U.K. of the EUCT's decision, n.21 above, that it had not 'tortured' detainees. On compensation for torture see *Filartiga II-The Damages Opinion*, 7 HRQ (1985) pp.245-253; Anon., *Torture: Prosecution And Compensation In Colombia*, 35 Rev.ICJ (1985) pp.5-6.

"inhuman", "ill", or "severe" treatment thus appears to have an element of arbitrariness attached to it which must inevitably reduce the potency and standing of the HRC's views. In practical terms the absence of definition is particularly important with respect to the lower reaches of the article 7 prohibitions because that is where the difficult line must be drawn between permissible and impermissible treatment and conduct by States.¹¹⁹ Common State practices on which the HRC could have provided more guidance include solitary confinement, incommunicado detention and prison conditions.¹²⁰

As a living instrument of human rights protection the ICCPR will only develop as a guide to States parties and an effective recourse to individuals if in its general comments and its views under the O.P. the HRC gives much more of an indication of its understanding of the terms used in the Covenant. Even if accepted that the formulation of definitions is a difficult task in the early years of a human rights body, what must at least be demanded is that the HRC articulate a much more intelligible link between the facts it finds and the violations which in its view they reveal. For example, which of a number of findings of fact constitutes the essential element in the view that there has been a violation of article 7? Or is it a particular combination of findings?¹²¹ What renders a particular set of facts serious enough to constitute torture as distinct from any other prohibited form of treatment? As noted in chapter 4 these criticisms are not confined to

¹¹⁹ See Meron, n.1 above, p.114.

¹²⁰ See Ackerman, n.1 above, pp.682-683 on U.S. law.

¹²¹ "The language of the Human Rights Committee has been especially inconsistent in its many cases dealing with violations of article 7", Rodley, n.1 above, p.87.

views concerning article 7. The form and substance of many of the HRC's views are such that it is difficult to state exactly what, if anything, the HRC has decided and interpretation is often reduced to speculation.¹²²

9.17 In a line of cases the HRC has expressed the view that conditions of detention can violate articles 7 and 10(1).¹²³ The alleged conditions in particular cases have included solitary confinement for three months and denial of medical treatment;¹²⁴ incommunicado detention in a small cell (1m by 2m) in solitary confinement for eighteen months;¹²⁵ solitary confinement for several months in a cell almost without natural light;¹²⁶ detention in a garage with open doors, sleeping uncovered on the floor, with no change of clothing, blindfolded, hands bound, having only two coups of soup per day;¹²⁷ detention in overcrowded cells with 5cm. to 10cm. of water on the floor, being kept indoors all day, insufficient sanitary conditions, hard labour, poor food,¹²⁸ periods of incommunicado detention, chained to a bed spring on the floor with minimal clothing, and

¹²² See ch.4, pr.4.38 above.

¹²³ See e.g. *Ambrosini v. Uruguay*, Doc.A/34/40 p.124; *Carballal v. Uruguay*, Doc.A/36/40 p.125; *Massiotti v. Uruguay*, Doc.A/37/40 p.187; *Marais v. Madagascar*, Doc.A/38/40 p.141; *Antonaccio v. Uruguay*, Doc.A/37/40 p.114. Cf. *Estrella*, pr.9.18 below. See also the *Greek Case*, n.21 above, p.489.

¹²⁴ *Antonaccio v. Uruguay*, Ibid.

¹²⁵ *Marais v. Madagascar*, Doc.A/38/40 p.141.

¹²⁶ *De Voituret v. Uruguay*, Doc.A/39/40 p.164.

¹²⁷ *Carballal v. Uruguay*, Doc.A/36/40 p.125.

¹²⁸ *Massiotti v. Uruguay*, Doc.A/37/40 p.187. See also *Muteba v. Zaire*, Doc.A/38/40 p.182.

severe rationing of food. The HRC described these as inhuman conditions.¹²⁹

9.18 In Estrella v. Uruguay¹³⁰ the HRC found that the "inhuman conditions of detention" violated article 10(1) but no reference was made to article 7 with respect to the conditions of detention. Why conditions in one case violate articles 7 and 10(1) when in another they violate only article 10(1) is not explained.¹³¹ The Estrella case is important in other respects and bears more detailed consideration.

Estrella, a concert pianist, was allegedly kidnapped by fifteen strongly armed individuals and subjected to physical and psychological torture and other ill-treatment which had lasting effects particularly on his arms and hands. He was threatened with death and denied necessary medical attention. In January 1978 he was taken to Libertad prison. He spent the first ten days in a cell which was a kind of a cage. He remained imprisoned there until February 1980. At Libertad E was subjected to further ill-treatment and to arbitrary punishments including thirty days solitary confinement in a punishment cell and seven months without mail or recreation. He was also subjected to harassment. His mail was subjected to severe censorship. E provided a detailed description of prison conditions at Libertad.¹³²

The HRC expressed the view that Uruguay had violated article 7 because E was subjected to torture during his

¹²⁹ Wight v. Madagascar, Doc.A/40/40 p.171.

¹³⁰ Doc.A/38/40 p.150.

¹³¹ A possible rationalization could have been that article 7 would concern individual cases while article 10(1) would concern situations or practices. However, the HRC's views do not accord with such an explanation.

¹³² E was expelled from Uruguay in February 1980.

first few days of detention.¹³³ The HRC's view refers only "torture" but its statement of facts refers to "physical and psychological torture".¹³⁴ The HRC's views contained a very important statement with respect to the alleged prison conditions at Libertad,

"On the basis of the detailed information submitted by the author (see in particular paras.1.10 to 1.16 above) the Committee is in a position to conclude that the conditions of imprisonment to which Miguel Angel Estrella was subjected at Libertad were inhuman. In this connection the Committee recalls its consideration of other communications (see for instance its views on R.16/66 adopted at its seventh session) which confirm the existence of a practice of inhuman treatment at Libertad".¹³⁵

9.18.1 The HRC repeated this view concerning a practice at Libertad in Nieto v. Uruguay¹³⁶ and stated that it had come this conclusion, "on the basis of specific accounts by former detainees themselves".¹³⁷ In both Estrella and Nieto the inhuman prison conditions were held to constitute a violation of article 10(1). Again there is no explanation of the absence of a reference to article 7 in this respect which would have been a more potent finding.

The concept of a practice does not appear in the ICCPR. It has, however, figured in the jurisprudence

¹³³ Doc.A/38/40 p.150, pr.10.

¹³⁴ Ibid., pr.8.3. See also the Quinteros Case, pr.9.23 below.

¹³⁵ Ibid., pr.9.1 (my emphasis). The communication referred to is Schweizer v. Uruguay, Doc.A/38/40 p.117 in which the HRC expressed the view that article 10(1) had been violated because S had been detained under inhuman prison conditions.

¹³⁶ Doc.A/38/40 p.201.

¹³⁷ Ibid., pr.10.4.

under the ECHR.¹³⁸ In terms of the practice of the HRC Uruguay might justifiably have some complaint with the HRC's introduction of this concept. E had not expressly claimed that there was a practice of inhuman treatment at Libertad in violation of the Covenant. Therefore, the Uruguayan authorities were not afforded the opportunity to deny that a practice of inhuman treatment existed, as distinct from violations of E's rights under the ICCPR.¹³⁹ Moreover, the Committee's decision appears to be based on a relatively small number of cases. The European Commission has by contrast demanded, for example, "a substantial number of acts of torture or ill-treatment which are the expression of a general situation".¹⁴⁰ The HRC also makes no reference to the additional element identified in ECHR jurisprudence of "official tolerance". The finding of a practice might have implications as regards the exhaustion of domestic remedies under article 5 of the O.P. This has been noted in chapter 4.¹⁴¹

9.19 In Estrella the HRC also expressed a view concerning the restriction and censorship of E's mail. The HRC stated that,

"With regard to the censorship of (E's) correspondence, the Committee accepts that it is normal for prison authorities to exercise measures of control and censorship over prisoners' correspondence. Nevertheless, article 17 of the

¹³⁸ See the literature cited in ch.4, pr.4.115, n.474 above. See also Klayman, n.1 above, pp.509-512.

¹³⁹ Similar criticisms have been made of the International Court of Justice on occasions. See J.Dugard, *The Nuclear Tests Cases and the South West Africa Cases: Some Realism About The International Judicial Decision*, 16 Virg.JIL (1975-76) pp.463-504.

¹⁴⁰ The Greek Case 12 YBECHR (1969) pp.194-196.

¹⁴¹ See ch.4, pr.4.115 above.

Covenant provides that "no one shall be subjected to arbitrary or unlawful interference with his correspondence". This requires that any measures of control or censorship shall be subjected to satisfactory legal safeguards against arbitrary application (see para.21 of the Committee's views of 29 October 1981 on communication No.R.14/63). Furthermore the degree of restriction must be consistent with the standard of humane treatment of detained persons required by article 10(1) of the Covenant. In particular, prisoners should be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, by correspondence as well as receiving visits. On the basis of the information before it, the Committee finds that (E's) correspondence was censored and restricted at Libertad prison to an extent which the State party has not justified as compatible with article 17 read in conjunction with article 10(1) of the Covenant".¹⁴²

9.20 In its general comment on article 10 the HRC established some important points concerning the conditions of detention and the humane treatment of detainees,

"3. The humane treatment and the respect for the dignity of all persons deprived of their liberty is a basic standard of universal application which

¹⁴² Doc.A/38/40 p.150, pr.9.2. The communication referred to by the HRC is Antonaccio v. Uruguay, Doc.A/37/40, p.114 although the cross reference appears mistaken. The reference should presumably have been to Pinkey v. Canada, Doc.A/38/40 p.101, pr.34, in which the HRC stated that, "[a] legislative provision in the very general terms of this section did not...in itself provide satisfactory legal safeguards against arbitrary application...". Cf. Golder v. U.K., EUCT, Series A, vol.18 (1975); Silver v. U.K., EUCT, Series A., vol.61, (1983); Boyle and Rice v. U.K., EUCT, Series A, vol.131 (1988).

cannot depend entirely on material sources. While the Committee is aware that in other respects the modalities and conditions of detention may vary with the available resources, they must always be applied without discrimination, as required by article 2(1).

4. Ultimate responsibility for the observance of this principle rests with the State as regards all institutions where persons are lawfully held against their will, not only in prisons but also, for example, hospitals, detention camps or correctional institutions".¹⁴³

Paragraph 3 of the comment represents a clear recognition by the HRC of the resource implications of article 10(1). That the HRC can envisage a variable, but non-discriminatory, standard as regards the "modalities and conditions of detention" would support the argument of those who suggest that the Covenant contains progressive obligations.¹⁴⁴ Paragraph 4 of the comment is a clear statement of the "ultimate responsibility" of the State and reaffirms the wide application of article 10(1) noted above.¹⁴⁵ So the treatment of detainees in private prisons, hospitals, clinics and other institutions remains the responsibility of the State.

9.21 No final view to date has dealt with the interpretation and application of the expressions "cruel punishment", "inhuman punishment" or "degrading punishment". The issue of whether corporal punishment as

¹⁴³ G.C. 9(16), prs.3, 4. On article 2 of the Covenant see ch.6 above. In *Bleir v. Uruguay*, Doc.A/37/40 p.130, it was alleged that B was singled out for especially cruel treatment because he was a Jew, *ibid.*, pr.2.3. The HRC found, *inter alia*, a violation of articles 7 and 10(1) but made no reference to the alleged discriminatory treatment.

¹⁴⁴ See ch.6, pr.6.11-6.13 above.

¹⁴⁵ See pr.9.2 above.

a judicial punishment or as a disciplinary measure constitutes degrading treatment has been considered by the EUCT.¹⁴⁶ We have noted the anti-corporal punishment approach of some HRC members during the consideration of article 40 reports and the HRC's statement in its general comment on article 7 that, "In the view of the Committee the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure".¹⁴⁷ Whether corporal punishment constitutes a violation of article 7 depends on whether this statement in the general comment is read as an outright prohibition or only as a prohibition on corporal punishment which constitutes "excessive chastisement".¹⁴⁸ Consideration of article 10(1) might also be relevant in the context of corporal punishment administered to detainees.

9.22 Two communications have raised some interesting points concerning article 7 that are worthy of comment. In Valcada v. Uruguay¹⁴⁹ it was alleged that V has been tortured, ill treated and subjected to conditions of detention which violated the Covenant.¹⁵⁰ In its final views the HRC stated that,

"11. As regards the allegations of ill-treatment, the Committee noted that in his communication the author named the senior officers responsible for the ill-treatment which he alleged he received. The State party adduced no evidence that his allegations of ill-treatment have been duly investigated in accordance with the laws to which

¹⁴⁶ See n.45 above.

¹⁴⁷ See pr.9.7 above.

¹⁴⁸ Ibid.

¹⁴⁹ Doc.A/35/40 p.107.

¹⁵⁰ Ibid., pr.2.

it drew attention... A refutation of these allegations in general terms is not enough. The State party should investigate the allegations in accordance with its laws.

12....As regards article 7 of the Covenant the Committee cannot find that there has not been any violation of this provision. In this respect the Committee notes that the State party has failed to show that it had ensured to the person concerned the protection required by article 2 of the Covenant".¹⁵¹

The evidential points of the HRC's finding and its decision on article 2 ICCPR are dealt with elsewhere.¹⁵² Of interest to article 7 is the individual opinion in this case of Mr. Tarnopolsky to which five other members associated themselves. That opinion reads, in full,

"Although I agree with the view of the Committee that it could not find that there has not been any violation of article 7 of the Covenant, I also concluded, for the reasons set out in paragraph 11 of the Committee's views, that there has been a violation of article 7 of the Covenant".¹⁵³

In this opinion the minority appear to have found a violation of article 7 in the failure of the State party to investigate in accordance with its laws the allegations made against named senior officers. In a number of cases under the O.P. the HRC have established the obligation of a State party under the O.P. to investigate in good faith all allegations of violation of the Covenant made against it and its authorities.¹⁵⁴

¹⁵¹ Ibid., prs.11, 12.

¹⁵² See ch.4, pr.4.30 above and ch.6, pr.6.25 on article 2.

¹⁵³ Doc.A/35/40 p.110.

¹⁵⁴ See ch.4, prs.4.27-4.33 above.

The minority view that the failure to investigate allegations of a violation of article 7 itself constitutes a violation of article 7 contrasts then with the view consistently taken by the HRC of the obligation imposed by the Covenant and the O.P. to investigate. The minority finding could be based on the notion of presumed complicity. If so, such an approach was rejected in the arbitral opinion in the Janes Claim¹⁵⁵ although that concerned the responsibility of the state with respect to the actions of a private killer. There the Commission held the government concerned liable for its failure to measure up to its duty to diligently prosecute and properly punish the offender.¹⁵⁶ It is submitted that this approach of holding the State responsible for the breach of its obligation to investigate rather than of the substantive prohibition in article 7 (or any other article concerned for that matter) is preferable to the view adopted by the minority. The minority view has not appeared in any subsequent decision. It would have been more helpful if the minority opinion was set out in more detail with an accompanying explanation.

9.23 The second case of note concerning article 7 is E.Quinteros and M.C.Almeida de Quinteros v. Uruguay.¹⁵⁷

A.Q. submitted the communication on behalf of her daughter E.Q. and on her own behalf. It was alleged that E.Q. was arrested by military personnel in the grounds of the Venezuelan Embassy in Montevideo and

¹⁵⁵ U.S. v. Mexico, 4 R.I.A.A. 82 (1926).

¹⁵⁶ Ibid., pr.20. See also the Noyes Claim, U.S. v. Panama, 6 R.I.A.A. 308 (1933).

¹⁵⁷ Doc.A/38/40 p.216. See the Note by Camille Jones, 25 Harv.ILJ (1984) pp.440-477; Anon., 37 Rev.ICJ p.42 at p.46 (1986).

systematically tortured.¹⁵⁸ The Uruguayan authorities denied that the government had any part in the episode and stated that the authorities were still searching for E.Q. throughout Uruguay.¹⁵⁹

The HRC found that on 28 July 1976 E.Q. 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.¹⁶⁰ The HRC expressed the view that there had been violations of articles 7, 9 and 10(1) of the Covenant (as regards E.Q.).¹⁶¹ A.Q. had also claimed, inter alia, that that she was a victim of violations of article 7 (psychological torture because she did not know where her daughter was) and of article 17 because of interference with her private and family life.¹⁶² The HRC stated that,

"With regard to the violations alleged by the author on her own behalf, the Committee notes that, the statement that she was in Uruguay at the time of the incident regarding her daughter, was not contradicted by the State party.¹⁶³ The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and the continuing uncertainty concerning her fate and whereabouts. The author has a right to know what

¹⁵⁸ It was alleged by the author that due to this event Venezuela suspended its diplomatic relations with Uruguay, *ibid.*, pr.1.3.

¹⁵⁹ *Ibid.*, pr.6.

¹⁶⁰ *Ibid.*, pr.12.3.

¹⁶¹ *Ibid.*, pr.13.

¹⁶² *Ibid.*, prs.1.9 and 7.3.

¹⁶³ See ch.4, pr.4.34 above.

has happened to her daughter. In these respects, she too is a victim of the violations suffered by her daughter in particular, of article 7".¹⁶⁴

The HRC appears to state that the violations were suffered by E.Q. but that A.Q. is also a victim of them.¹⁶⁵ On this approach the requirement in article 1 O.P. that the communication comes from an individual claiming to be a "victim of a violation" of a right set forth in the Covenant does not necessarily mean that the violation must have been suffered by that individual but only that the individual was a "victim" of that violation whether suffered by himself or someone else.¹⁶⁶ One commentator has noted that,

"The most important aspect of the Quinteros decision is that it recognizes as a violation of the Covenant a State's acts which cause anguish and suffering to the immediate relatives of disappeared persons. This has never been done before in a human rights case. By expanding the class of victims of human rights violations by State parties to the Covenant, the decision increases the number of persons who may be afforded a remedy by the Committee".¹⁶⁷

¹⁶⁴ Doc.A/38/40 p.216, pr.14.

¹⁶⁵ This is the literal reading of the last sentence of the quoted paragraph. The comma after "particular" is ungrammatical. However, even if a comma is placed after "daughter" the sentence would still state that A.Q. is a victim of the violations "suffered by her daughter" rather than clearly stating that A.Q. is herself a victim of violations of the Covenant.

¹⁶⁶ See ch.4, pr.4.75-4.81.1 on the 'victim' requirement. Note that the HRC had already decided that A.Q. was entitled to act on behalf of E.Q., Doc.A/38/40 p.216, pr.3. Cf. the concept of the indirect victim under the ECHR, see Mikaelson, pp.79-82.

¹⁶⁷ Jones, n.97 above, p.476. In the Greek Case,
(Footnote Continued)

This commentator appears to assume that A.Q. was a victim of violations of the Covenant herself as distinct from the violations suffered by E.Q.¹⁶⁸ It is certainly possible to read the HRC's view in this way on the basis that the "anguish and stress" caused to A.Q. by the disappearance come within the prohibitions in article 7.¹⁶⁹ Another aspect of this may be that this anguish and stress resulted from the denial to A.Q. of her "right to know" of E.Q.'s whereabouts.¹⁷⁰ The last sentence quoted begins, "In these respects", perhaps suggesting that this was a second aspect of the case. The HRC's view is open to criticism in that it gives no indication of the nature of this right, legal or moral, or its source, perhaps any one or more of articles 7, 10(1), 17 or 23 ICCPR.¹⁷¹ In Simones v. Uruguay¹⁷² the HRC expressed the view that article 10(1) has been violated because S had been held incommunicado for three months and during this period the authorities, "wrongfully denied that she was detained".¹⁷³ If "wrongfully" is understood as in violation of the Covenant this gives further support to the view that a right to know of a relatives whereabouts if they are in

(Footnote Continued)

n.21 above, the Sub-Commission of the EUCM stated that deliberate or unnecessary emotional suffering caused to the families of detainees was prohibited by article 3 ECHR, p.466. See also Anon., n.58 above.

¹⁶⁸ Ibid.

¹⁶⁹ Perhaps as psychological torture as A.Q. had alleged or inhuman treatment.

¹⁷⁰ Jones, n.97 above, makes no comment on this point.

¹⁷¹ For the texts of these articles see Apx.I.

¹⁷² Doc.A/37/40 p.174.

¹⁷³ Ibid., pr.12.

the custody of the State is protected by the Covenant.¹⁷⁴

If the correct reading of the HRC's view is that there was a violation of article 7 with respect to A.Q. then that is certainly a positive step by the HRC and represents a wide interpretation of the ICCPR and the O.P. In previous communications raising questions of suffering to detained relatives because of the alleged failure to acknowledge detention, the application of torture or ill-treatment, and the absence or denial of medical treatment, the HRC has refrained from any ruling other than as regards the violations of the Covenant suffered by the direct victims of these acts or omissions thought his may simply be because the relatives submitting the case have not claimed to be victims themselves.¹⁷⁵

The HRC's view could simply be limited to the phenomenon of disappeared persons on the basis that the failure of the State to acknowledge detention necessarily causes anguish and distress to relatives. Alternatively, the HRC's view may be open to extensive development if read literally as covering the the suffering caused to an immediate person by the violation of any right in the Covenant. Imprisonment following the denial of the right to a fair trial or for the expression of political or religious views offer obvious examples. It is difficult to speculate where the HRC might draw the line if it pursues this analysis at all. No subsequent decision has discussed this issue.

¹⁷⁴ Cf. the customary international law duty to account for persons held in custody, see ch.8, n.116. See also The Draft Principles On Detention And Imprisonment, n.1 above, in particular principles 14, 17-18.

¹⁷⁵ See e.g., Bleir v. Uruguay, Doc.A/37/40 p.130; Nieto v. Uruguay, Doc.A/38/40 p.201.

It remains to note that, unfortunately, the HRC made no express comment on A.Q.'s allegation of violation of article 17 because of interference with her private and family life. It is only possible to speculate that either the HRC rejected the allegation, found it unnecessary to decide the point in the light of its view that there had been a violation of article 7 in respect of A.Q. or found any possible violation of article 17 to be subsumed within the article 7 violation.

9.24 It has already been noted that the HRC have found violations of both articles 7 and 10(1) in a large number of cases.¹⁷⁶ In over a dozen cases the HRC has found a violation of article 10(1) alone. A number of these have already been noted. The most common violation of article 10(1) has been incommunicado detention for periods ranging from six weeks to many months.¹⁷⁷ In one case the HRC commented on how incommunicado detention can prevent the effective exercise of other rights.¹⁷⁸ In other findings of violation of article 10(1) the HRC has specifically referred to the denial of visits by family members,¹⁷⁹ wrongful denial of the fact of detention,¹⁸⁰ and possibly also the denial of medical

¹⁷⁶ See pr.9.17 above.

¹⁷⁷ Ambrosini, J.L.Massera and M.V.Massera v. Uruguay, Doc.A/34/40 p.124 ("months"); Pietrarola v. Uruguay, Doc.A/36/40 p.153 ("many months"); De Casariego v. Uruguay, Doc.A/36/40 p.185 ("four months"); Simones v. Uruguay, Doc.A/37/40 p.174 ("three months"); Caldas v. Uruguay, Doc.A/38/40 p.192 ("six weeks"); Machato v. Uruguay, Doc.A/39/40 p.148 ("five months"); Romero v. Uruguay, Doc.A/39/40 p.159 ("several months").

¹⁷⁸ Caldas v. Uruguay, *ibid.* See ch.10, pr.10.34.3 below.

¹⁷⁹ In Ambrosini v. Uruguay, pr.9.12 above, the HRC referred to the "right" to be visited by a family member. Similarly in Massera v. Uruguay, Doc.A/34/40 p.124, pr.10 (ii).

¹⁸⁰ Simones v Uruguay, pr.9.23 above.

treatment.¹⁸¹ In Mpandanjila and Others v. Zaire¹⁸² the HRC expressed the view that article 10(1) had been violated because the authors had been subjected to "ill-treatment" during their period of banishment but no view is expressed as regards the deprivation of adequate medical attention which the HRC found as fact.¹⁸³ Similar comments can be made of the view in Solorzano v. Uruguay.¹⁸⁴ In Izquierdo v. Uruguay¹⁸⁵ the "ill-treatment" founded a violation of article 7. Again there is no explanation of the material distinctions between the cases. The important views in which the HRC found that a practice of inhuman treatment existed at Libertad prison in Uruguay which violated article 10(1) has already been noted.¹⁸⁶

9.25 The final view to note on article 10 is that in Pinkey v. Canada.¹⁸⁷ P alleged, inter alia, that article 10(2)(a) had been violated on the grounds that during his pre-trial detention he was not segregated from convicted prisoners and that his treatment as an unconvicted prisoner was worse than that given to convicted prisoners.¹⁸⁸ The State party submitted that,

"The practice at the Lower Mainland Regional Correction Centre is for some sentenced prisoners

¹⁸¹ Antonaccio v. Uruguay, pr.9.12.2 above.

¹⁸² Doc.A/41/40 p.121.

¹⁸³ Ibid., prs.8.2, 10. The administrative banishment was held to violate the freedom of movement in article 12(1) of the Covenant.

¹⁸⁴ Doc.A/41/40 p.134.

¹⁸⁵ Doc.A/37/40 p.179.

¹⁸⁶ See pr.9.18 above.

¹⁸⁷ Doc.A/37/40 p.101. See also ch.10, prs.10.36-37 below.

¹⁸⁸ Ibid., pr.23.

in protective custody to serve as food servers and cleaners in the remand area of the prison. This arrangement is designed to keep them away from other sentenced prisoners who might cause them harm. The sentenced prisoners in the remand unit are not allowed to mix with the prisoners on remand except to the extent that it is inevitable from the nature of their duties. They are accommodated in separate tiers of cells from those occupied by remand prisoners.

The Government of Canada is of the view that lodging convicted prisoners in the same building as remand prisoners does not violate article 10, paragraph 2, of the ICCPR. This was recognized in the annotations on the text of the draft international covenant on human rights prepared by the Secretary-General of the United Nations. In paragraph 43 of the said annotations, it was indicated that,

'Segregation in the routine of prison life and work could be achieved though all prisoners might be detained in the same building. A proposal that accused prisoners should be placed 'in separate quarters' was considered to raise practical problems; if adopted, States parties might be obliged to construct new prisons'.

Further, the Government of Canada does not consider that casual contact with convicted prisoners employed in the carrying out of menial duties in a correction centre results in a breach of the provisions of the Covenant".¹⁸⁹

P replied that the contacts resulting from such employment of convicted prisoners were by no means "casual" but were "physical and regular" since they did

¹⁸⁹ Ibid., pr.28 at B.

in fact bring unconvicted and convicted prisoners together in physical proximity on a regular basis.¹⁹⁰
In its final view the HRC stated that,

"The Committee is of the opinion that the requirement of article 10(2)(a) of the Covenant that 'accused persons shall, save in exceptional circumstances, be segregated from convicted persons' means that they shall be kept in separate quarters (but not necessarily in separate buildings). The Committee would not regard the arrangements described by the State party whereby convicted persons work as food servers and cleaners in the remand area of the prison as being incompatible with article 10(2)(a), provided that contacts between the two classes of prisoners are kept strictly to a minimum necessary for the performance of those tasks".¹⁹¹

As the HRC did not express the view that article 10(2)(a) had been violated it seems to have taken the view that accommodation "in separate tiers of cells" constitutes "segregation" for the purposes of article 10(2)(a). The end result comes close to reading into article 10 (2)(a) the requirement of "separate quarters" that the drafters did not adopt. That this does not "necessarily" mean in separate buildings leaves open the possibility that in some circumstances it might be necessary to have separate buildings. The decision on contacts between the two classes of prisoners appears to set a sensible and practical standard for States parties. Unfortunately, the HRC expressed no view on P's allegations that his treatment as an unconvicted prisoner was worse than that given to convicted

¹⁹⁰ Ibid., pr.29. .

¹⁹¹ Ibid., pr.30.

prisoners.¹⁹² Finally, it is interesting to note that the case represents one of the few occasions on which a State party has referred to the travaux préparatoires in its submissions. The recent publication of a 'Guide To the Travaux Préparatoires of the ICCPR' may help to make this a more frequent practice.¹⁹³

¹⁹² For the submissions of the State party on this point see, *ibid.*, pr.28 at A.

¹⁹³ See Bossuyt, n.1 above.

APPRAISAL.

9.26 The HRC's work on article 7 under the reporting procedure has provided a useful opportunity for obtaining information on and critically probing and examining how States parties apply the prohibition in article 7 in their domestic systems. The members individually and the HRC collectively have recognised and emphasized the vital importance of some domestic "machinery of control" through procedural safeguards and the need for an effective remedy, through investigation and compensation in the event of a violation.¹⁹⁴ Having obtained the basic information during the consideration of first and second periodic reports allows the HRC to proceed to practical implementation and effectiveness of these procedures.¹⁹⁵ We have also suggested that the HRC could have been more dynamic in its consideration of the second sentence of article 7 which covers matters of continuing contemporary concern.¹⁹⁶

9.27 The effectiveness of a reporting procedure ultimately depends on the cooperation and good faith of the States parties. Similarly, national and international publicity for the work of the HRC is of immense importance. It is very difficult to assess whether the HRC's consideration of article 7 have had any effect. Certainly the States parties could take account of the constructive comments and criticisms of the HRC and reappraise their relevant domestic laws and practices. The dialogue between the HRC and the representatives of States parties focuses on more specific and detailed matters with the consideration of each subsequent periodic report. While judgement may be reserved in an institutions early years, as time passes

¹⁹⁴ See prs.9.4-9.4.1 above.

¹⁹⁵ See Torture In The Eighties, n.1 above, ch.6.

¹⁹⁶ See prs.9.9-9.10 above.

the effectiveness or otherwise of the HRC's work will become more apparent.

9.28 Certainly there has been much to commend in the HRC's work to date. It has subjected State representatives and their reports to testing and critical examination. Moreover, it has managed to do so without unduly offending or antagonizing State sensitivity.¹⁹⁷ It is unfortunate that national and international publicity for the HRC's work in this area has been sadly lacking. Such publicity is often a potent force for change and progress.¹⁹⁸

9.29 Similar considerations apply in assessing the effectiveness of the HRC's work under the O.P. on article 7 and 10. The vast majority of these have concerned Uruguay which has manifested an attitude of non-cooperation with the HRC.¹⁹⁹ Again publicity for the HRC's views has been minimal. There is no real evidence to date that any of the HRC's recommendations as to remedies for violations of article 7 or 10(1) have been followed.²⁰⁰ We have considered a number of constructive aspects of the HRC's jurisprudence on these provisions while criticizing others. The final views are often unhelpful, incomprehensible or ambiguous.²⁰¹ In some the HRC has, without explanation, failed to comment on important allegations. The HRC has failed to develop a consistent, intelligible categorization of its views leading to a certain element of arbitrariness in its findings. Incommunicado detention, solitary confinement and denial of medical treatment have been the object of

¹⁹⁷ See pr.9.3 above.

¹⁹⁸ See generally ch.2, pr.2.9 above.

¹⁹⁹ See n.65 above.

²⁰⁰ See n.65 above.

²⁰¹ See the cases cited in prs.9.12.1-9.12.3 above.

violations of the Covenant but there has been no clear statement on exactly which provisions of the Covenant they violate or any accompanying explanation. Similarly, there has been no clear statement on mental or psychological as distinct from physical torture. More constructive developments have been the views that conditions of detention can violate articles 7 and 10(1), the finding of a "practice of inhuman treatment" at Libertad prison in Uruguay, and possibly also the finding of a violation of an article 7 violation in the stress and anguish caused by the disappearance of a relative and the continuing uncertainty of their fate and whereabouts. The HRC's experience in examining communications concerning articles 7 and 10 (1) can also inform and improve its consideration under the reporting procedure. However, in the final analysis, it seems difficult to conclude otherwise than that the views of the HRC on these provisions have only been of marginal significance in terms of effective human rights protection.

9.30 There exists a panoply of national and international measures directed to the suppression and elimination of torture. These include national criminal and civil laws and administrative provisions, a range of national institutions for protecting human rights, an array of international instruments and codes, a large number of international governmental and non-governmental organizations which consider and monitor torture and similar practices. The watershed decision of the United States Court of Appeals in Filartiga v. Pena-Irala has highlighted another method of human rights protection, namely the use of international human rights standards by national courts.²⁰²

²⁰² 630 F. 2d. 876 (1980), 19 ILM 966 (1980). See generally ch.1, pr.1.37 above.

The considerations of the HRC under the reporting procedure and its views under the O.P. represents further developments in this seemingly impressive regime of protection. The reality, however, is that the complex phenomenon of torture and related practices continues to flourish and survive in every geographic region of the world. In its report "Torture In The Eighties", Amnesty International cites reports of torture and ill-treatment from ninety-eight countries for the period January 1980 to mid-1983.²⁰³ The need for more effective protection was recognised within the United Nations, the Council of Europe and the Organization of American States. Each organization has now produced a Convention on torture and related practices.²⁰⁴

9.31 The United Nations Convention (U.N.C.A.T.) contains a definition of torture and a series of obligations and undertakings.²⁰⁵ These provisions address in detail the principal features of a domestic regime which can play an effective role in facilitating the prevention and suppression of torture and other practices of ill-treatment. Many of these provisions cover matters raised by the HRC under the reporting process. The Convention also provides for the establishment of a Committee Against Torture.²⁰⁶ Under a reporting procedure the Committee may make such "comments and suggestions on the report as it may consider

²⁰³ See n.1 above.

²⁰⁴ See n.1 above.

²⁰⁵ U.N.C.A.T., n.1 above, articles 1-16. See J.Donnelly, The Emerging International Regime Against Torture, 33 NILR (1986) pp.1-23.

²⁰⁶ The Committee has now been elected and includes one member of the HRC, Ms.Christine Chanet (France), see 2 Interights Bulletin p.31 (1987).

appropriate".²⁰⁷ This provision would appear to give the new Committee more scope to directly address particular deficiencies in specific States parties than the HRC has assumed to date under in its general comments under article 40(4).²⁰⁸ The U.N.C.A.T. also provides optional procedures for inter-state and individual communications to the Committee Against Torture.²⁰⁹ The major advance in the U.N. Convention, however, was to have been a mandatory confidential inquiry system to be operated by the Committee in co-operation with the state party and on the basis of "any reliable information" received by the Committee "which appears to it to contain well-founded indications that torture is being systematically practiced".²¹⁰ Unfortunately, the final text permits State parties to opt out of the visiting procedures.²¹¹ The European Convention against Torture marks the most important advance in that it provides for compulsory visits with no provision for opting out, making reservations or derogation.²¹² Whether the work of the HRC on torture and ill-treatment will be effectively be overtaken by that of the new Committee Against Torture depends on the interpretation by that Committee to its jurisdiction, the level of ratification of the U.N. Convention, whether States parties opt out of the visiting procedures, and whether they opt into the individual and inter-state communication procedures.

²⁰⁷ Article 19, U.N.C.A.T.

²⁰⁸ See ch.3, prs.3.29-3.35 above.

²⁰⁹ Articles 21 and 22 U.N.C.A.T. respectively.

²¹⁰ Article 20 U.N.C.A.T. With the agreement of the State party the inquiry could include a visit to the State concerned, article 20(3).

²¹¹ Article 28 U.N.C.A.T.

²¹² See n.1 above and the accompanying Explanatory Report (1987).

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CH-10

CHAPTER 10: ARTICLE 14.¹

10.1

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

¹ For similar provisions see arts.10, 11 UDHR; art.6 ECHR; art.XXVI ADRD; arts.8, 10 AMR; arts.7, 26 AFR. For the drafting history of article 14 see Docs.A/2929 pp.42-44; A/4299 pp.9-17 (1959); and Bossuyt, 'Guide', pp.277-319. See Noor Mohammed, Due Process Of Law For Persons Accused Of Crime, in Henkin (ed.), The International Bill Of Rights- The ICCPR, pp.138-165; Ibid., Guarantees For An Accused Person Under The U.N. Human Rights Covenants, 20 Ind.JIL (1980) pp.177 at 198-211; R.Lillich, Civil Rights, in T.Meron (ed.), Human Rights In International Law - Legal And Policy Issues, pp.115 at 139-145; F.Newman, Natural Justice, Due Process And The New International Covenants On Human Rights: Prospectus, (1967) Public Law pp.274-313; P.Sieghart, The International Law Of Human Rights, pp.268-285, 291-307 (1983); P.Van Dijk, The Right Of An Accused To A Fair Trial Under International Law (1983).

For further material and recent studies in this area see D.J.Harris, The Right To A Fair Trial In Criminal Proceedings As A Human Right, 16 ICLQ (1967) pp.352-378; J.A.Andrews (ed.), Human Rights In Criminal Procedure - A Comparative Study (1982); S.Hertzberg and C.Zammuto, The Protection of Human Rights In The Criminal Process Under International Instruments And National Constitutions (1981); I.D Duchacek, Rights And Liberties In The World Today, ch.4, (1973). See also the following U.N. studies: M.A.Rannat, Study Of Equality In The Administration Of Justice, Doc.E/CN.4/Sub.2/296/Rev.1

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 own presence, and to defend himself 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;

(Footnote Continued)

(1972); L.Joinet, Amnesty Laws And Their Role In The Safeguard And Promotion Of Human Rights, Doc. E/CN.4/Sub.2/1985/16 (1985); L.M. Singvi, Independence And Impartiality Of The Judiciary, Jurors And Assessors And The Independence Of Lawyers, Doc.E/CN.4/Sub.2/1985/18 And Add.1-6; Study On Discriminatory Treatment Of Members Of Racial, Ethnic, Religious Or Linguistic Groups At The Various Levels In The Administration Of Criminal Justice, Such As Police, Military, Administrative And Judicial Investigations, Arrest, Detention, Trial And Execution Of Sentences, Including The Ideologies Or Beliefs Which Contribute Or Lead To Racism In The Administration Of Criminal Justice, Docs.E/CN.4/ Sub.2/L.766, introduction and ch.1 and E/CN.4/Sub.2./ 1982/7.

(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 14 Under The Reporting Procedure

10.2 Introduction.

Article 14 is not covered by the non-derogation provision in article 4(2) ICCPR.² It has been the

² On derogation see ch.7 above. It has been argued that at least some parts of article 14 should be
(Footnote Continued)

subject of a general comment under article 14(4).³ During the consideration of State reports it has generally been dealt with alone although its relationship with article 9 has often been noted.⁴ The right to a fair hearing has long been regarded as a central feature of the rule of law and in its general comment the HRC stated that the provisions of article 14 are, "aimed at ensuring the proper administration of justice".⁵

It is not surprising, therefore, that members of the HRC have attached great importance to article 14. The appropriate parts of State reports and the relevant texts of accompanying Constitutions, penal codes, civil codes and procedural codes have been closely and critically examined for compliance with the complex of rights guaranteed by article 14.⁶ HRC members have sought to understand how practical effect is given to its various aspects in the domestic law of the State concerned.⁷

The HRC has noted that the "article 14 of the Covenant is of a complex nature and that different aspects of its provisions will need specific comments", but that, "Not all reports provided details on the

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non-derogable, see International Commission of Jurists, Study of States of Emergency, (1983), p.426 where it is suggested that, "Some progress in this direction has already been made by international law".

³ General Comment 13/21, adopted on 12th April 1984 (SR 516) and 23 July 1984 (SR 537), Doc.A/39/40 pp.143-147. Also in Doc.CCPR/C/21/Add.3.

⁴ Article 9 covers the right to liberty and security of the person.

⁵ G.C.13/21, n.3 above, pr.1.

⁶ The ICJ Study, n.2 above, identifies 20 distinct rights within article 14, pp.424-426.

⁷ See e.g. SR 366 pr.12 (Tomuschat on Iran).

legislative and other methods adopted specifically to implement each of the provisions of article 14".⁸ The HRC's considerations of article 14 have involved an enormous number of questions and comments of which only a schematic outline and a few illustrative examples can be given. It is instructive, though somewhat artificial, to break down the HRC's work into a paragraph by paragraph analysis.

⁸ G.C.13/21, n.3 above, pr.1. It is important to note that information relevant to article 14 is also often contained in the general introductions to and in the sections on article 2 of States parties reports. On article 2 see ch.6 above.

Article 14 (1).

10.3 Members of the HRC have sought to ascertain how the equality of "all persons" before courts and tribunals and the entitlement to a "fair and public hearing" are guaranteed in the domestic law of the States parties.⁹ Particular scrutiny has been directed to the terms of any distinctions between citizens and aliens¹⁰ and any discrimination against political offenders¹¹ or on grounds of political opinion.¹² Similarly, questions have been put concerning restrictions on legal capacity.¹³ Members have stressed the difficulty in securing equality before courts and tribunals and emphasized the need to take practical steps. For example,

"With reference to article 14 of the Covenant, equality before the courts was not achieved simply by avoiding discrimination in legislation as mentioned in paragraph 46 of the report. There were many serious social, cultural and language barriers that could make access to the courts extremely unequal and there was also the question of cost. It would be interesting to hear, therefore, what Iceland had done and was doing to ensure that

⁹ See e.g. SR 67 pr.19 (Tarnopolsky on GDR).

¹⁰ See e.g. SR 65 pr.34 (Graefrath on Czechoslovakia); SR 188 pr.24 (Dieye on Sweden) concerning the requirement for a deposit cautio judicatum solvi. Reply at SR 188 pr.31. See also paragraph 2 of the general comment of the HRC on, "The position of aliens under the Covenant", G.C.15(27), Doc.A/41/40 pp.117-119 (1986).

¹¹ See e.g. SR 51 pr.63 (Tomuschat on Libya); SR 293 pr.32 (Lallah on Portugal).

¹² See e.g. SR 116 pr.24 (Mora-Rojas on Byelorussian SSR); SR 213 pr.94 (Sadi on Senegal).

¹³ See e.g. Doc. A/41/40 pr.330 (on Czechoslovakia).

equality before the courts really meant equal access to those courts and to the legal profession".¹⁴

Some members of the HRC have indicated their view that the principle of equality before the law, "meant not merely equality between one citizen and another but also the equality of the citizen vis-a-vis the executive".¹⁵ There has though been little specific discussion in terms of the procedural equality of parties.¹⁶ In its general comment the HRC stated that it would find useful, "more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the conditions governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislature".¹⁷ The final sentence of this comment is

¹⁴ SR 392 pr.6 (Graefrath on Iceland). For Iceland's report see Doc.CCPR/C/10/Add.4 (1981). Similarly see SR 117 pr.50 (Graefrath on Byelorussian SSR), SR 221 pr.31 (Vincent-Evans on Colombia).

¹⁵ SR 187 pr.26 (Tomuschat on Poland). See also Ibid., pr.50 (Tarnopolsky on Poland).

¹⁶ See the decision of the EUCT in the Delcourt Case, EUCT, Series A, vol.11, (1970).

¹⁷ G.C.13/21, n.3 above, pr.3.

clearly in terms of the classic separation of powers doctrine.¹⁸

10.4 There has also been little specific discussion under the reporting procedure of the key terms "criminal charge" and "rights and obligations in a suit at law".¹⁹ This is perhaps surprising bearing in mind the jurisprudence under article 6 of the ECHR where parallel expressions have been developed as "autonomous concepts" but this is probably simply a reflection on the nature of article 40 as a reporting process rather than a petitions procedure.²⁰ The scope of the latter

¹⁸ Cf. The comments of Graefrath in text to n.50 below. For a recent U.K. perspective see C.R.Munro, Constitutional Law, ch.9, (1987).

¹⁹ During the consideration of the report of the FRG Mr.Opsahl referred to the Konig Case, EUCT, Series A, vol.27 (1978), and asked whether labour, finance and social courts would be covered by article 14, SR 92 pr.37. See n.20 below.

²⁰ As regards the expression 'civil rights and obligations' the EUCT has declined to give an abstract definition but has established a set of applicable principles. Members of the EUCT still differ, however, on the application of those principles, see e.g. Bentham v. Netherlands, EUCT, Series A, vol.97, (1985): article 6 ECHR held applicable by 11 votes to 6. Recently the EUCT has considered for the first time the applicability of article 6(1) ECHR to social security matters. It has reaffirmed the principles established in its case law and decided the cases by determining whether the private or public law elements involved predominated. See Feldbrugge v. Netherlands, EUCT, Series A, vol.99 (1986); Deumeland v. FRG, EUCT, Series A, vol.100 (1986). The EUCT is similarly divided on the expression "criminal charge", see e.g., Campbell and Fell v. U.K., EUCT, Series A, vol.80 (1984): article 6 held applicable by 4 votes to 3. Generally on the scope of article 6 ECHR see Fawcett, pp.133-147; Van Dijk and Van Hoof, (Footnote Continued)

expression has indeed been the subject of an important decision under the Optional Protocol.²¹

The HRC did, however, address the issues in its general comment,

"In general, the reports of states parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Laws and practices dealing with these matters vary widely from State to State. This diversity makes it all the more necessary for States parties to provide all relevant information and to explain in greater detail how the concepts of 'criminal charge' and 'rights and obligations in a suit at law' are interpreted in relation to their respective legal systems".²²

This comment is open to the obvious criticism that it fails to give any criteria or definition to the key concepts in article 14(1). If practices vary widely from State to State the HRC should indicate its understanding of the concepts so that compliance with article 14(1) can be more meaningfully assessed not only by the HRC itself but also by States parties. This criticism would appear to be valid even if it is recognised that the problems occasioned by the interpretation of article 6 ECHR at the regional level might be greatly compounded at the universal level in giving autonomous content to article 14(1).

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pp.238-247; D.J.Harris, The Application Of Article 6(1) Of The ECHR To Administrative Law, (1974) BYIL pp.157-200; A.W.Bradley, The ECHR And Administrative Law - First Impressions, 21 Osgoode Hall.L.J. (1983) pp.609-635; C.J.F.Kidd, Disciplinary Proceedings And The Right To A Fair Trial Under The European convention On Human Rights, 36 ICLQ (1987) pp.856-872.

²¹ See Y.L. v. Canada, pr.10.26 below.

²² G.C.13/21, n.3 above, pr.2.

10.5 Two important matters of general relevance to a fair hearing that have been raised by members concern the legal profession and the availability of legal aid. They have sought information on how the legal profession is organized, the restrictions and limitations applicable or operating in practice and their freedom to exercise their profession.²³ A typical approach is that of Mr. Tomuschat, who,

"wished to know how the legal profession was organized. Was it free and independent, or were lawyers public servants who required State authorization before practicing their profession? Were they required only to have certain qualifications or was there any discretionary control on the grounds of public interest?"²⁴

With regard to legal aid members have sought information on its availability, the conditions necessary to secure it and the problems the application of a legal aid scheme raised.²⁵ For example, during consideration of the report of France Sir Vincent-Evans commented that,

In connection with article 14 of the Covenant, which applied to both civil and criminal proceedings, he observed that the costs involved in a court case might sometimes prevent a person from obtaining justice not only in a criminal case but even more so with regard to the recognition of a

²³ See e.g. SR 282 pr.50 (Tomuschat on Tanzania), SR 366 pr.13 (Tomuschat on Iran). If in a given situation, that crucial freedom was interfered with, the entire judicial system became warped", SR 431 pr. 72 (Aguilar on Peru).

²⁴ SR 132 pr.53 (Tomuschat on Bulgaria).

²⁵ See the decision of the EUCT in Airey v. Ireland, Series A, vol.32 (1979). See also A.8158/78 v. U.K., 21 D.& R. p.95; A.11714/85 v. v. U.K., (refusal of legal aid concerning minor charges).

civil right. Mr. Guillame had referred to legal aid in France but that was often not granted except to the very poorest and it would be interesting to know what the current situation was in France for a middle class individual.²⁶

Matters concerning the legal profession and legal aid systems have also been raised in connection with paragraph 3 of article 14.²⁷ HRC members have recognised, however, that mechanisms other than an individual's lawyer may be useful in securing respect for article 14. For example, the representative of the Dominican Republic was asked whether the offices of the Ombudsman or the defensor del pueblo could be used to improve the administration of justice particularly in rural areas.²⁸

10.6 The requirement of a 'fair and public hearing by a competent, independent and impartial tribunal established by law' has attracted detailed attention. Discussion and comment has primarily focused on (a) the nature and jurisdiction of courts and tribunals; (b) the separation of powers; (c) the judiciary in all its forms; and (d) the 'public hearing' guarantee and the limitations thereon.

(a) The nature and jurisdiction of courts and tribunals.

10.7 Members have sought to determine the existence, organisation, nature and jurisdiction of special or extraordinary courts²⁹ or tribunals that dealt, for

²⁶ SR 439 pr.44. The French report is Doc.CCPR/C/22/ Add.2 (1982). Similar questions were put to U.K. representatives.

²⁷ See pr.10.12 below.

²⁸ See Doc.A/40/40 pr.396.

²⁹ Although the ICCPR does not use the term 'court' in the second sentence of article 14 members have generally used the term in preference to 'tribunals'.

example, with labour disputes or economic, social or administrative matters,³⁰ or that applied special rules or procedures.³¹ Of particular concern has been the operation of military or revolutionary tribunals.³² Members have sought details of their jurisdiction, particularly in respect of civilian matters, and assurances that such tribunals operated in accordance with the guarantees in article 14.³³ If such tribunals did exercise civilian jurisdiction members have requested explanations of the removal of that jurisdiction from civilian authorities and asked whether the possibility of returning the matter concerned to the civilian authorities was being considered.³⁴ Among the kind of bodies that have attracted close and often critical attention have been 'Special Courts',³⁵ 'Public Security Committees',³⁶ 'Self-Management Courts',³⁷

³⁰ See e.g. SR 77 pr.29 (Hanga on Norway). See n.18 above.

³¹ See e.g. SR 51 pr.63 (Tomuschat on Libya); SR 328 pr.36 (Tomuschat on Morocco).

³² This concern has also been noted in the consideration of article 2 in ch.6 above.

³³ See e.g. SR 89 pr.17 (Vincent-Evans on Iran); SR 199 pr.25 (Bouziri on Iraq); SR 475 pr.19 (Opsahl on Guinea). Many of the communications under the Optional Protocol have concerned the operation of military tribunals.

³⁴ See e.g. SR 221 pr.30 (Vincent-Evans on Colombia).

³⁵ See e.g. SR 84 pr.28 (Vincent-Evans on Madagascar).

³⁶ See e.g. SR 90 pr.13 (Tarnopolsky on Iran).

³⁷ See e.g. SR 98 prs.51-52 (Vincent-Evans on Yugoslavia).

'Comrades Courts',³⁸ 'Sharia Courts',³⁹ 'State Security Courts',⁴⁰ and 'Gun Courts'.⁴¹

Consideration of the situation in Suriname raised the question of the compatibility with the Covenant of the establishment of special courts to try members of the previous administration.⁴² One member of the Committee clearly thought that such a step would contravene the Covenant,

"With regard to article 14..he had noted, in the aforementioned Declaration by the Government, that it was planned to set up special courts, outside the judicial order, to try members of the previous administration charged with corruption. Any Government had, of course, the right to punish such crimes, but the creation of tribunals foreign to the judicial order would certainly be contrary to the provisions of the Covenant, and he would like to have further details about those plans".⁴³

³⁸ See e.g. SR 155 pr.15 (Tomuschat on Ukrainian SSR).

³⁹ See e.g. SR 200 pr.8 (Graefrath on Iraq).

⁴⁰ See e.g. SR 283 pr.22 (Opsahl on Mali).

⁴¹ See e.g. SR 291 pr.44 (Vincent-Evans on Jamaica).

⁴² This information was contained in a Government Declaration of 1 May 1980 which was circulated to members of the HRC.

⁴³ SR 224 pr.15 (Mr.Tarnopolsky). The replies of the State representative are in SR 227. He did not reply specifically to the point raised by Mr.Tarnopolsky but he did inform the HRC that, "On 14 June 1980 the Military Council had transferred to the jurisdiction of the civilian judicial authorities all persons in its custody", Ibid., pr.2. Note the comments of Professor Lillich, "Whether such independence and impartiality can be assured when a State resorts to ad hoc or special tribunals, as frequently occurs after revolutions or in national emergencies, is a doubtful proposition: for this reason, it is disappointing that article 10 [of

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In its general comment the concern of the HRC at the operation of special courts and tribunals was expressed at length,

"The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and should take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper

(Footnote Continued)

UDHR] does not speak directly to this point. In contrast, article 14 (1) of the Political Covenant and article 8 (1) of the American Convention add the requirement that the tribunal be 'competent', a word which, according to the travaux preparatoires of the former, 'was tended to ensure that all persons should be tried in courts whose jurisdiction had been previously established by law, and arbitrary action so avoided'. Article 8(1) of the American Convention goes one step further, specifically stating that a trial must be conducted by a tribunal 'previously established by law"', Lillich, n.1 above, p.141 (footnotes omitted). See also Sieghart, Ibid., pp.283-4; ICJ Study, n.2 above, p.459, recommendation 8.

administration of justice in accordance with the requirement of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required by article 14, they should ensure that such situations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14".⁴⁴

This aspect of the HRC general comment represents a useful response to the HRC's experience under the article 40 process and is a clear recognition of the abuses commonly practiced by such special courts. Although it is possible to derogate from article 14 failure to comply with article 14 may result in violations of provisions of the Covenant from which it is not possible to derogate, for example, article 6.⁴⁵ Although the comment only expressly deals with the problem of the trial of civilians by special courts and tribunals, during the discussion of the draft comment concern was also expressed at the lack of fair trial guarantees for military personnel in such bodies.⁴⁶

(b) The Separation Of Powers And (c) The Judiciary.

10.8 These matters are clearly related and will be dealt with together. HRC members have been quick to express serious concern when the lines of demarcation between executive and judicial power have appeared

⁴⁴ G.C.13/21, n.3 above, pr.4. See n.40 above.

⁴⁵ See the decision in Mbenge v. Zaire, ch.8, pr.8.25 above and 10.40 below.

⁴⁶ See SR 537 prs.61-64. See R.B.Ellert, N.A.T.O. Fair Trial Safeguards (1963).

indiscernible.⁴⁷ For example, during consideration of the report of Nicaragua Mr.Opsahl commented that,

" Under the Sandinista Police Jurisdiction Act the police were granted the jurisdiction to apply the police regulations and laws through police examining magistrates. He asked whether in that event the police functioned as courts and why offenders could not be brought before ordinary courts".⁴⁸

Similarly Sir Vincent-Evans asked the Yugoslavian representatives,

"Could one hope to obtain a fair trial when the Courts were so closely integrated in the political system, especially in cases of political offences? Was a Judge liable to be dismissed or disciplined if other agencies of the system felt he had adjudicated in a manner detrimental to its interests, for example, in a political case?".⁴⁹

By contrast on a number of occasions Mr.Graefrath has indicated a somewhat different conception of the separation of powers,

"He did not think that the separation of powers and the establishment of professional and irremovable Judges were of themselves guarantees for the establishment of an independent judiciary. Furthermore, the irremovability of Judges could be seen as a kind of discrimination and privilege vis-a-vis other professions on the grounds of

⁴⁷ See e.g. SR 199 pr.40 (Prado-Vallejo on Iraq); SR 391 pr.10 (Opsahl on Denmark); SR 475 pr.38 (Aguilar on Guinea).

⁴⁸ SR 422 pr.33. Reply at SR 428 pr.32. The Nicaraguan Report is Docs.CCPR/C/14/Add.2 and 3 (1982-83).

⁴⁹ SR 98 pr.51. See also SR 67 pr.46 (Prado-Vallejo on GDR).

social status and could be dangerous to the establishment of a democratic society".⁵⁰

Another matter consistently raised has been the role of the Official Public Prosecutor,⁵¹ Procurator,⁵² or People's Advocate,⁵³ and his precise powers in terms of investigation, prosecution and adjudication.

10.9 A lengthy catalogue of questions have been developed in respect of the judiciary in all its forms. What rules and procedures governed the appointment,⁵⁴ election,⁵⁵ nomination,⁵⁶ dismissal, recall,⁵⁷ suspension,⁵⁸ transfer,⁵⁹ and retirement⁶⁰ of judges? What were the terms and conditions of tenure? Who or which authority or institution applied the appropriate rules?⁶¹ How was the judiciary organized and composed? Were particular qualifications or legal training

⁵⁰ See e.g. SR 214 pr.57 (on Senegal). Similarly at SR 142 pr.107 (on Spain), SR 155 pr.54 (on Ukrainian SSR). Mr.Graefrath was an expert from the GDR.

⁵¹ See e.g. SR 131 pr.19 (Tarnopolsky on Bulgaria).

⁵² See e.g. SR 109 pr.71 (Hanga on USSR). See C.T.Reid, *The Ombudsman's Cousin: The Procuracy In Socialist States*, [1986] P.L. pp.311-326.

⁵³ See e.g. SR 142 pr.67 (Hanga on Spain).

⁵⁴ See e.g. SR 346 pr.22 (Prado-Vallejo on Rwanda); SR 431 pr.71 (Aguilar on Peru).

⁵⁵ See e.g. SR 132 pr.58 (Dieye on Bulgaria).

⁵⁶ See e.g. SR 421 pr.58 (Errera on Nicaragua).

⁵⁷ See e.g. SR 131 pr.32 (Bouziri on Bulgaria).

⁵⁸ See e.g. SR 142 pr.12 (Tarnopolsky on Spain).

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ See e.g. SR 11 pr.22 (Esperson on Mauritius).

required?⁶² What was the nature and extent of the role played by the lay judiciary and assessors? What disciplinary regime was applicable and was it possible for a judge to commit offences in his official capacity?⁶³ What general and specific legal and other guarantees existed to ensure the independence and impartiality of the judiciary?⁶⁴ Could the legislative or the executive set aside judicial decisions?⁶⁵ How could the impartiality of judges be ensured?⁶⁶ Was access to the judiciary limited by, for example, social origin, the educational process or financial constraints?⁶⁷ Was the independence or impartiality of Judges affected by the need to follow a particular party line,⁶⁸ an ideological limitation such as 'socialist justice',⁶⁹ or a government conception of public order.⁷⁰ During consideration of the report of Nicaragua Mr. Bouziri warned against the dangers of abuse of

⁶² See e.g. SR 109 pr.38. (Hanga on USSR).

⁶³ See e.g. SR 99 pr.8 (Opsahl on Yugoslavia); SR 365 pr.14 (Tarnopolsky on Iran).

⁶⁴ See e.g. SR 98 pr.35 (Mora-Rojas on Yugoslavia); SR 132 pr.24 (Hanga on Bulgaria); SR 137 pr.23 (Dieye on Romania); SR 154 pr.49 (Tarnopolsky on Ukrainian SSR).

⁶⁵ See e.g. SR 32 pr.37 (Tomuschat on Hungary). Hungary subsequently supplied additional information, Doc.CCPR/C/1/Add.44, parts.II and V, (1979).

⁶⁶ See e.g. SR 89 pr.40 (Esperson on Iran).

⁶⁷ See e.g. SR 69 pr.24 and SR 148 pr.58 (Graefrath on U.K.); SR 92 pr.54 (Graefrath on FRG).

⁶⁸ See e.g. SR 156 pr.15 (Dieye on Ukrainian SSR).

⁶⁹ See e.g. SR 154 pr.26 (Bouziri on Ukrainian SSR); SR 67 pr.46 (Prado-Vallejo on GDR), reply at SR 68 pr.5.

⁷⁰ See e.g. SR 354 pr.34 (Dieye on Guyana).

extensive discretionary powers vested in Judges and its implications for their impartiality.⁷¹

In its General Comment the HRC stated that, "States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the conditions governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive and legislative branch".⁷²

A question which has occasionally been put by members but rarely accorded the importance it deserves is how, in practice, an individual could actually challenge the independence or impartiality of a judge or tribunal.⁷³ Similarly, only rarely have questions of structural limitations and deficiencies, for example,

⁷¹ SR 421 pr.61, reply at SR 422 pr.37. For the Nicaraguan report see n.48 above.

⁷² G.C.13/21, n.3 above, pr.3.

⁷³ See G.C.13/21, n.3 above, pr.15. In the Piersack Case the EUCT stated that, "Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under article 6 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....it is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance", EUCT, Series A, vol.53 (1982), prs.30-31. See also Campbell and Fell v. U.K., EUCT, Series A, vol.80 (1984); Sramek v. Austria, EUCT, Series A, vol.84 (1984); De Cubber v. Belgium, EUCT, Series A, vol.86 (1984).

lack of resources and shortage of judicial power,⁷⁴ access to and the administration of justice in small communities been put.⁷⁵

The willingness of members to try and discern the actual practices of States rather than be content with general assurances and explanations is well illustrated in the the comments of Mr.Opsahl during consideration of the report of El Salvador,

"With regard to the present state of the judicial system in El Salvador, a fact-finding mission from the New York Bar had stated that the system of Penal justice in El Salvador was in general disarray and that senior members of the judiciary were corrupt. Such statements compelled the Committee to raise certain questions especially concerning the intimidation of judges, jurors and witnesses. He pointed out that insufficient resources were allocated to education and training in the legal profession which, consequently, left much to be desired".⁷⁶

⁷⁴ See e.g. SR 475 pr.31 (Vincent-Evans on Guinea). When the representative from Rwanda appeared before the HRC he stated that his country was poor and had limited resources for the training of judges. He suggested that a training grant from the HRC would assist Rwanda in training its judges and would concretize the HRC's desire to apply the Covenant, SR 348 pr.32. On the approach under the ECHR to structural problems see *Buchholz v. Germany*, EUCT, Series A, vol.42 (1981); *Zimmerman and Steiner v. Switzerland*, EUCT, Series A, vol.66 (1984); *Guincho v. Portugal*, EUCT, Series A, vol.81 (1983); *Marijnissen v. Netherlands*, EUCM, (12th March, 1984); *Dores and Silviera v. Portugal*, EUCM, (6th July, 1986).

⁷⁵ See e.g. SR 392 pr.69 (Tomuschat on Iceland); SR 430 pr.47 (Tomuschat on Peru). See also the Australian position on article 14 (3)(c) noted in pr.10.15 below.

⁷⁶ SR 469 pr.3. For El Salvador's report see Doc.CCPR/C/14/ Add.5 (1983).

From this comment it is possible to note both the use of outside information by a HRC member and a clear recognition that the implementation of the Covenant requires the allocation of resources by the State.⁷⁷

(d) The public hearing guarantee and its limitations.⁷⁸
10.10 Members of the HRC have not, under the article 40 process, subjected the guarantee and its limitations to detailed analyses and there has been little real discussion of the meaning of the specified grounds of limitation.⁷⁹ Similarly no assistance on this matter is provided by the HRC's general comment.⁸⁰ This perhaps reflects the fact that the nature of the article 40 process is not one of precise definition but one of general content and meaning. Members have requested detailed clarification on the given grounds of limitation in a particular State both in law and in practice.⁸¹ They have asked how those grounds are defined or understood and as to their compatibility with the limitations in the covenant.⁸² The United Kingdom

⁷⁷ See the decision of the EUCT in Airey, n.25 above, in which the EUCT rejected Ireland's view that the ECHR should not be interpreted in a way that would impose financial obligations on the contracting parties.

⁷⁸ Cf. Le Compte, Van Leuven and De Meyere v. Belgium, EUCT, vol.43 (1981); H. v. Belgium, EUCT, Series A, vol.127 (1987); Ekbatani v. Sweden, EUCT, (26 May 1988).

⁷⁹ A similar comment with respect to the terms "criminal charge" and "rights and obligations in a suit at law" has been made above, pr.10.4. For an isolated example on the "public order" limitation see the comment of Tomuschat at SR 109 pr.59 (on USSR).

⁸⁰ See n.3 above.

⁸¹ See e.g. SR 64 pr.44 (Tarnopolsky on Czechoslovakia); SR 116 pr.34 (Prado-Vallejo on Byelorussian SSR).

⁸² See e.g. SR 64 pr.60 (Tarnopolsky on (Footnote Continued)

representative was asked whether the, "concept of public security had evolved in any way since 1920, particularly from the point of view of jurisprudence and administrative practice".⁸³ The representative of the U.S.S.R. was asked how a limitation to cover cases of 'State Secrets' was consistent with the Covenant.⁸⁴ The representative of Czechoslovakia was asked,

"Could proceedings be closed to the public for reasons of State security in general and not only for reasons of national security as mentioned in article 14".⁸⁵

The representative of Romania was asked to define the limitation in terms of cases prejudicial to socialist morality.⁸⁶ The Swedish representative was asked about the frequency of the use of the in camera procedure.⁸⁷ What restrictions, if any, were there on the admission of the mass media to court hearings.⁸⁸ Members have

(Footnote Continued)

Czechoslovakia); SR 98 pr.68 (Tomuschat on Yugoslavia); SR 258 pr.61 (Bouziri on Italy).

⁸³ SR 69 pr.56 (Hanga), referring to the Official Secrets Act 1920. The U.K. government announced in 1987 that it proposes to reform the Official Secrets Acts. See the Sunday Times, 12th June 1988, p.1.

⁸⁴ SR 109 pr.46 (Prado-Vallejo). Reply at SR 112 pr.27. The USSR report is Doc.CCPR/C/1/Add.22 (1978).

⁸⁵ SR 65 pr.26 (Opsahl). Reply in SR 66 pr.16.

⁸⁶ SR 135 pr.41 (Bouziri). In reply the State representative explained that the expression meant "acts contrary to public policy", SR 141 pr.10. Similarly on 'Socialist Justice' see SR 155 pr.15 (Tomuschat on Ukrainian SSR).

⁸⁷ SR 189 pr.4 (Opsahl). The State representative replied that it was difficult to gather accurate information on the application of such proceedings, SR 189 pr.7.

⁸⁸ See e.g. Doc.A/39/40 pr.509 (on GDR). Cf.A.11552/85, 11553/85 and 11658/85 v. U.K. on reporting restrictions under the Contempt of Court Act 1981.

occasionally asked whether it was possible for members of an accused's family to be present during trial,⁸⁹ and, more rarely, of the possibility of foreign observers or non-governmental organizations attending trials.⁹⁰

During consideration of the report of Uruguay Mr. Tomuschat made use of the HRC's experience with regard to communications concerning Uruguay under the Optional Protocol to indicate the extent of a State party's obligations under article 14(1),

"It was implicit in the right to a fair trial that sentences of long periods of detention should be handed down in writing. In that connection, the Committee had never been provided with the text of any court decisions despite repeated requests".⁹¹

In its general comment on article 14 the HRC stated that,

"The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time, article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for

⁸⁹ See e.g. SR 136 pr.47 (Tarnopolsky on Romania).

⁹⁰ See e.g. SR 132 pr.64 (Dieye on Bulgaria). See also on the question of publicity for trials SR 154 pr.50 (Tarnopolsky on Ukrainian SSR); SR 187 pr.49 (Tarnopolsky on Poland).

⁹¹ SR 357 pr.11. The State representative replied, inter alia, that, "it was untrue that prisoners had been convicted without any written judgement and no evidence could be produced in support of that allegation", SR 373 pr.22.

instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must , with certain strictly defined exceptions, be made public".⁹²

It is notable that the HRC regards the public hearing requirement as an "important safeguard". As such it would have been helpful if the HRC had provided some criteria for the assessment of the permissible limitations. The reference to particular categories of persons may be inspired by the alleged practice in some States of packing the courts with persons paid by the State. Admission of members of the press is obviously of particular importance in terms of bringing effective publicity to bear on possible deficiencies in court proceedings. A number of recent applications to the EUCM have concerned exclusion of the press from or restrictions on the reporting of proceedings in the U.K.⁹³ Finally, even where the trial legitimately does not take place in public there is a backup safeguard in the form of a requirement of a public judgement.⁹⁴

It remains to note that in its general comment the HRC stated that in order to safeguard the rights of accused persons under, inter alia, article 14(1), judges

⁹² G.C.13/21, n.3 above, pr.6.

⁹³ See e.g., A.10038/82, *Harman v. U.K.*, 7 E.H.R.R. 146; A.10243/83, *Times Newspapers and Others v. U.K.*, 8 E.H.R.R. 54.

⁹⁴ Note that article 14 of the Covenant requires that the judgement "shall be made public", whereas article 6 ECHR requires that the, "judgement shall be pronounced publicly". See the decisions of the EUCT in *Pretto v. Italy*, EUCT, Series A, vol.71 (1983); *Axen v. FRG*, EUCT, Series A, vol.72 (1983); *Albert and Le Compte v. Belgium*, EUCT, Series A, vol.58 (1983); *Sutter v. Switzerland*, EUCT, Series A, vol.74 (1984); *Campbell and Fell v. U.K.*, EUCT, Series A, vol.80 (1984).

should have the authority to consider any allegations made of violations of these rights during any stage of the prosecution.⁹⁵ It is difficult to understand why the comment does not expressly extend to alleged violations of article 14 (1) in the determination of "rights and obligations in a suit at law".

⁹⁵ G.C.13/21, n.3 above, pr.15.

Article 14(2):the presumption of innocence.⁹⁶

10.11 Members have inquired as to how the presumption of innocence is given effect in domestic law. Was it expressly provided for in the Constitution, Penal Code or in other legislation?⁹⁷ In any event, how was the presumption given effect in practice, for example, with respect to restrictions on the media?⁹⁸ Generally members have confined their considerations to the basic matters of the burden and standard of proof⁹⁹ and the operation of statutory exceptions to the burden of proof.¹⁰⁰ The related issue of the use of confessions has also been raised.¹⁰¹ They have pointed to apparent

⁹⁶ Note also article 10(2)(a) ICCPR which provides that, "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". In its General Comment on article 10 the HRC noted the presumption of innocence in the context of the segregation of accused prisoners from convicted ones, G.C.9(16), Doc.A/37/40 p.96-97, pr.8.

⁹⁷ See e.g. SR 64 pr.44 (Tarnopolsky on Czechoslovakia).

⁹⁸ See e.g. Doc.A/41/40 pr.392 (on Hungary); Doc.A/42/40 pr.658 (on Afghanistan), reply at pr.663.

⁹⁹ See e.g. Doc.A/39/40 pr.344 (on Gambia); reply at pr.353.

¹⁰⁰ See e.g. SR 402 pr.21 (Prado-Vallejo on Australia), reply at SR 407 pr.52. The operation of statutory exceptions is controversial in the U.K., see P.Healy, Proof And Policy: No Golden Threads, 1987 CLR pp.355-366; D.J.Birch. Hunting The Snark: The Elusive Statutory Exception, [1988] CLR 221-232 and reply by P.Mirfield at pp.233-235, all commenting on R. v. Hunt [1987] 2 A.C. 352.

¹⁰¹ See e.g. A/39/40 pr.151 (on Guinea).

inconsistencies and requested further explanation¹⁰²
In its general comment on article 14 the HRC noted the lack of information from States parties on article 14(2) and stated that it, "in some cases, has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective".¹⁰³

Occasionally it has been stated or suggested that the presumption of innocence has a wider significance than the matters of the burden and standard of proof. during consideration of the report of Canada Mr.Opsahl commented that,

"The provision might be considered to have other implications than those concerning the burden of proof. It might be asked for example, whether an accused person who had been acquitted had to pay the costs of the proceedings; whether the public prosecutor should refrain from taking legal action but declare publicly that he considered the person guilty; whether an accused person could accept a penalty in order to avoid being sent to trial; and whether authorities other than the courts respected the presumption of innocence".¹⁰⁴

Mr.Janca has pointed to the possibility of the regime of detention under which an accused is held violating the presumption of innocence,

¹⁰² See e.g. SR 65 pr.26 (Opsahl on Czechoslovakia); SR 386 pr.18 (Prado-Vallejo) and 35 (Graefrath on Mexico); SR 402 pr.46 (Hanga on Australia); SR 473 pr.23 (Tomuschat on Sri Lanka), reply at SR 477 pr.44.

¹⁰³ G.C.13/21, n.3 above, pr.7. See n.100 above.

¹⁰⁴ SR 205 pr.30. A number of these points would clearly seem to be inspired by experience under the ECHR. See also SR 110 pr.24 (Opsahl on Mauritius).

"He did not fully understand the information provided in the report on article 10.¹⁰⁵ It seemed that not only convicted persons but also persons under preliminary investigation could be placed in corrective labour institutions and subjected to corrective labour measures, although they had not been sentenced. If that was so, such a measure would be in contradiction with article 14, paragraph 2, of the Covenant...".¹⁰⁶

Mr. Tomuschat has even gone so far as to suggest that the terms of a criminal offence may itself be a violation of the presumption of innocence,

"The vague and general definition of such criminal offences as subversive association might violate the presumption of innocence required by article 14(2) of the Covenant in as much as any individual hostile to the government would be liable to criminal sanction merely by discussing political issues with friends. Much fuller information was needed on the scope of such offences and on the practice of the courts in dealing with them. It needed to be demonstrated that such broadly framed provisions were truly necessary and not intended solely to criminalize political dissent".¹⁰⁷

In its general comment the HRC as a whole adopted a broader interpretation of article 14(2) than simply

¹⁰⁵ See n.96 above.

¹⁰⁶ SR 198 pr.5 (on Mongolia).

¹⁰⁷ SR 357 pr.12 (on Uruguay). A number of decisions under the Optional Protocol concerning article 19 have related to prosecutions for "subversive activities", see ch.11 below. See also SR 475 pr.51 (Tomuschat on Guinea) concerning the use of confessions and SR 413 pr.29 (Tomuschat on Austria) on the possibility of arrest on the ground that an individual might repeat the offence.

matters relating to proof but did not expressly go as far as Mr. Janca or Mr. Tomuschat. The HRC commented,

"By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused had the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is therefore a duty for all public authorities to refrain from prejudging the outcome of a trial".¹⁰⁸

This broad approach to the presumption of innocence is to be welcomed as the presumption, which in the words of the HRC "is fundamental to the protection of human rights",¹⁰⁹ is increasingly under attack and the subject of a growing number of cases under the ECHR.¹¹⁰

¹⁰⁸ G.C.13/21, n.3 above, pr.7. Cf. Fawcett, pp.179-183.

¹⁰⁹ Ibid.

¹¹⁰ See Minelli v. Switzerland, EUCT, Series A, vol.62 (1983); Adolf v. Austria, EUCT, Series A, vol.49 (1984); Lutz v. FRG, Nolkenbockoff v. FRG, EUCT, Series A, vol.123 (1987); Salabiaku v. France, EUCM, (16th July 1987). See also R. v. Alladice, The Times 11th May 1988 (C.A.).

Article 14(3): minimum guarantees in criminal cases.

10.12 As with the first sentence of article 14(1), members have sought to determine whether the "minimum guarantees" of article 14(3) are secured in "full equality".¹¹¹ Clearly paragraphs 1 and 3 are related, the latter being the minimum, though not exhaustive, pre-conditions of a fair criminal trial. As the HRC stated in its general comment, "the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by article 1".¹¹² In this sense then the concept of a fair hearing is ultimately a residual one.¹¹³ In its general comment the HRC also stated that, "In order to safeguard the rights of the accused under paragraph 3 of article 14, judges should have authority to consider any allegations made of violations of the rights of the accused during any stage of the prosecution".¹¹⁴

Some important general matters such as procedural equality, the legal profession and the legal aid system which have been raised under article 14(3), have already been noted above under article 14(1).¹¹⁵ Members have often indicated to State representatives the desirability of dealing with article 14(3) on a point by point basis.¹¹⁶ They have pointed to apparent gaps or

¹¹¹ See e.g. SR 187 pr.50 (Tarnopolsky on Poland).

¹¹² G.C.13/21, n.3 above, pr.5.

¹¹³ See Fawcett p.148; Nielson v. Austria, EUCM, 4 YBECHR 494 at 548-550.

¹¹⁴ G.C.13/21, n.3 above, pr.15.

¹¹⁵ See pr.10.5 above.

¹¹⁶ See e.g. SR 475 pr.31 (Vincent-Evans on Guinea).

inconsistencies, expressed doubts, and asked for further clarifications.

10.13 Article 14(3) (a) has attracted little attention or discussion. Members have done little more than note the relevant provisions of domestic law and point to any possible inadequacies. In its general comment the HRC stated that,

"State reports often do not explain how this right is respected and ensured. Article 14, subparagraph 3 (a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed 'promptly' requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based".¹¹⁷

The reference to the taking of "procedural steps" against a person suspected of a crime as constituting a charge is obviously important as exactly when a person is charged can be a difficult question to determine.¹¹⁸ However, it may still be difficult to determine what in practice constitutes a 'procedural step', particularly in States with inquisitorial systems of procedure. The requirement that the information given relate to both

¹¹⁷ G.C.13/21, n.3 above, pr.8.

¹¹⁸ See Fawcett pp.145-147, 184; Van Dijk and Van Hoof, pp.254-256.

the law and the alleged facts parallels the jurisprudence under the ECHR.¹¹⁹

10.14 In respect of article 14(3)(b) members have requested clarification and justification of any general or specific limitations on the preparation of the defence.¹²⁰ For example, during consideration of the report of Poland Mr. Janca commented,

"The report indicated that the accused had the right to counsel of his own choosing and could communicate with him directly without any other person being present. However, that freedom was limited by the fact that, during the preparatory proceedings, the Prosecutor, while authorising the accused to confer with his lawyer, could nonetheless reserve the right to be present at the meeting or to designate another person to attend it and that, in exceptional cases, he could even refuse such authorization. That limitation of the right of the accused did not seem to be in conformity with the spirit of article 14, paragraph 3 (b), of the Covenant".¹²¹

Similarly members have asked whether the right to communicate was secured at the stage of preliminary hearings¹²² and whether there were circumstances when only written communication was permissible.¹²³ A serious restriction on the right to communicate was indicated in

¹¹⁹ See Fawcett pp.186-188.

¹²⁰ See e.g. SR 51 pr.35 (Vincent-Evans on Libya); SR 92 pr.39 (Opsahl on FRG).

¹²¹ SR 186 pr.47. The Polish report is Doc.CCPR/C/4/Add.2 (1979). See also SR 327 pr.49 (Tarnopolsky on Morocco). Cf. R. v. Samuel, [1988] 2 W.L.R. 920.

¹²² See e.g. SR 357 pr.14 (Tomuschat on Uruguay).

¹²³ See e.g. SR 93 pr.40 (Tarnopolsky on FRG).

the report of Romania concerning article 172 of its Criminal Code,

"An accused person may contact defence counsel. where the interests of the investigation so require, the prosecuting authority may, by an order stating the reasons on which it is based, prohibit an accused person under arrest from contacting his defence counsel for a period of not less [sic] than thirty days. If necessary, the prohibition may be extended for a period of not more than thirty days. Contact with defence counsel may not be prohibited where the period of detention is extended by the court or once the prosecutions material has been submitted".¹²⁴

A number of HRC members expressed concern about this provision and doubted its compatibility with article 14 (3) (b) and (d).¹²⁵

10.14.1 Only rarely has the difficulty of securing the right to communicate with counsel when the accused is held in some form of isolation been touched upon.¹²⁶ The scope and meaning of "facilities" has not been discussed in terms during the consideration of State reports notwithstanding some clear opportunities do so so, for example, in response to a reservation by Australia concerning the provision of "adequate facilities" to prisoners.¹²⁷ Fortunately, the HRC's general comment was more helpful,

¹²⁴ Doc.CCPR/C/1/Add.33, p.18 (1978).

¹²⁵ See SR 135 pr.43 (Bouziri), pr.59 (Vincent-Evans), SR 136 pr.22 (Opsahl). Reply at SR 140 pr.60. Cf. Police And Criminal Evidence Act 1984, s.58.

¹²⁶ See Caldas v. Uruguay, pr.10.35 below.

¹²⁷ Doc.CCPR/C/14/Add.1 prs.256-257 referring to the decision of the United States Supreme Court in *Bounds v. Smith* (1977) 97 S.Ct. 1491

"What is 'adequate time' depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue influences from any quarter".¹²⁸

The requirements of access to documents and evidence and communication with counsel parallels the jurisprudence under the ECHR.¹²⁹ Obvious problems of public interest privilege and professional privilege present themselves. The reference to legal representation without undue interference is a key aspect of the protection afforded by article 14. Many of the communications under the Optional Protocol concerning article 14 have referred to the difficulties and restrictions faced by defence lawyers, particularly in political cases.¹³⁰ It is interesting to note though that the representation must be in accordance with "established professional standards" so that abuses by defence lawyers could legitimately lead to restrictions by the State with respect to those lawyers.

¹²⁸ G.C.13/21, n.3 above, pr.8.

¹²⁹ See Fawcett p.188.

¹³⁰ See pr.10.14 below.

10.15 Members have asked how the requirement of article 14(3)(c) is guaranteed in the practice of its domestic courts. Concern has been expressed both over unduly lengthy trial procedures and over accelerated procedures.¹³¹ One member even suggested to the State representative from the Federal Republic Of Germany the advisability of streamlining its procedures, for example, by introducing a system whereby the prosecution might pursue certain charges and drop others which caused particular difficulties with regard to investigation and proof.¹³² State representatives have been asked to indicate the average and maximum periods of pre-trial detention and, more rarely, to give statistics on the normal duration of trials.¹³³

The Australian report raised an interesting problem concerning the interpretation of article 14(3)(c) as it applied to remote areas,

"In the more remote and sparsely populated areas of Australia, a special problem of delay before trial arises in that a court may not always be immediately available to hear charges and language difficulties may present a barrier to commencement of proceedings. However, every effort is made to keep such delays to a minimum ...Although this delay before trial is longer than would be the ideal, in these special circumstances the delays

¹³¹ See e.g. Doc.A/41/40 pr.292 (on Finland); Doc.A/42/40 pr.79 (on Poland).

¹³² SR 92 pr.40 (Opsahl on FRG). The question of delay was also raised during consideration of the second periodic report of the FRG, see Doc.A/41/40 pr.292; reply at pr.294. See the decision of the EUCT in the *Wemhoff v. FRG*, EUCT, Series A, vol.7, pp.11-15, (1968), on the simplification of proceedings.

¹³³ See e.g. SR 293 pr.34 (Lallah on Portugal); SR 439 pr.44 (Vincent-Evans on France); SR 413 pr.33 (Tomuschat on Austria).

are not considered to be unreasonable or 'undue' and are considered therefore not to be inconsistent with the requirements of this paragraph".¹³⁴

Again members of the HRC failed to take a golden opportunity to indicate their views on a matter of some importance bearing in mind the wide geographical spread of States parties to the ICCPR.¹³⁵

In its general comment the HRC stated that,

"This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first instance and on appeal".¹³⁶

The HRC does not indicate when the period begins. If it runs from the point of the charge then according to the HRC this will be when the court or the prosecution authorities take procedural steps against the suspected person or publicly names him as such.¹³⁷ As for the end of the relevant period this would clearly seem to be at the end of any possible appeal.¹³⁸ It appears that not only must the whole period be 'without undue delay' but that each individual stage must take place 'without

¹³⁴ See Doc.CCPR/C/14/Add.1 pr.263 (1981) and Doc.CCPR/C/42/Add.2,p.78 (1987).

¹³⁵ See the Introduction to this thesis.

¹³⁶ G.C.13/21, n.3 above, pr.10.

¹³⁷ See pr.10.13 above.

¹³⁸ So too under the ECHR, see the Wemhoff v.FRG, EUCT, Series A, vol.7, pr.18 (1968); Fawcett pp.164-170; Van Dijk and Van Hoof, pp.256-257.

undue delay'. If so this again follows the practice under the ECHR.¹³⁹

10.16 Article 14(3)(d) has attracted consistent attention and various members have stressed its vital role and importance.¹⁴⁰ Members have asked for details of any rules or procedures excluding or restricting a defendants presence at trial.¹⁴¹ Doubts have been raised about trials in absentia before military tribunals and appeals in absentia.¹⁴² One member has taken the view that the right to be tried in his presence also applies to juveniles.¹⁴³

A number of matters have been raised concerning the right to legal assistance.¹⁴⁴ Were there restrictions or limitations on the choice of legal assistance?¹⁴⁵ Could a foreign lawyer be chosen?¹⁴⁶ Could the chosen person be rejected and, if so, on what grounds?¹⁴⁷ What

¹³⁹ For recent examples see *Baggetti v. Italy*, *Milasi v. Italy*, EUCT, Series A, vol.119 (1987).

¹⁴⁰ Particularly so in the case of serious offences, see e.g. SR 271 pr.29 (*Tarnopolsky on Kenya*). See also the decision in *Mbenge v. Zaire*, pr.10.40 below.

¹⁴¹ See e.g. SR 93 pr.40 (*Tarnopolsky on FRG*); SR 84 pr.28 (*Vincent-Evans on Madagascar*).

¹⁴² See e.g. SR 357 pr.16 (*Tomuschat on Uruguay*); SR 78 pr.14 (*Tomuschat on Norway*). See also the *Mbenge Case*, pr.10.40 below; *Colozza v. Italy*, EUCT, Series A, vol.89 (1985)...

¹⁴³ SR 222 pr.53 (*Koulishev on Colombia*).

¹⁴⁴ See e.g. SR 64 pr.20 (*Esperson on Czechoslovakia*).

¹⁴⁵ See e.g. SR 108 pr.53 (*Vincent-Evans on USSR*); SR 67 pr.40 (*Esperson on GDR*). See Fawcett pp.190-191.

¹⁴⁶ See e.g. SR 250 pr.24 (*Graefrath on Denmark*); SR 475 pr.19 (*Opsahl on Guinea*).

¹⁴⁷ See e.g. SR 250 pr.35 (*Tomuschat on Denmark*).

remedies existed for a denial of access?¹⁴⁸ Was it possible to contact a legal assistant before proceedings had commenced,¹⁴⁹ for example, in respect of a preliminary hearing?¹⁵⁰ The approach of Mr. Tomuschat during consideration of the report of Guinea is typical of that taken by many members,

"Further information on the institutional aspect of assistance by legal counsel would be welcome. The fact that the Covenant spoke of such assistance presupposed the existence of independent lawyers not acting under Government instructions but responsible only to accused persons. According to some reports, lawyers in Guinea were organized as public officials. If that were the case, and if they were placed under the instructions of the Government, that would be a serious obstacle to providing accused persons with the services required for the defence of their rights under the Covenant?".¹⁵¹

Members have inquired as to who bore the responsibility for paying for legal assistance. Some members have stressed the desirability of the cost being met by the State even when the defendant has been convicted.¹⁵² Others have suggested that a practice under which the defendant was liable for costs would be

¹⁴⁸ See e.g. SR 69 pr.36 (Tarnopolsky on U.K.).

¹⁴⁹ See e.g. SR 31 pr.42 (Tarnopolsky on Ecuador).

¹⁵⁰ See e.g. SR 99 pr.12 (Lallah on Yugoslavia). This question is also important with respect to article 14(3)(b), see e.g. SR 132 pr.9 (Janca on Bulgaria).

¹⁵¹ SR 475 pr.50. The Guinean report is Doc.CCPR/C/6/ Add.5 (1980).

¹⁵² See e.g. SR 92 pr.41 (Opsahl on FRG).

inconsistent with article 14(3) (d).¹⁵³ It is interesting to note that Australia made an interpretative declaration regarding the consistency of means-tested legal aid with the obligation in article 14(3) (d).¹⁵⁴

In its general comment the HRC stated that,

Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3(d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary".¹⁵⁵

Again the HRC stresses the key role of lawyers in the implementation of article 14.¹⁵⁶

¹⁵³ See e.g. SR 92 pr.54 (Graefrath on FRG). For the applicable provisions of the law of the FRG see its report, Doc.CCPR/C/1/Add.18 p.19 (1977). Shortly after the consideration of the initial report of the FRG the EUCT found the applicable practice in the FRG violated article 6 (3) (e) ECHR, see Luedicke, Belkacem and Koc v. FRG, EUCT, Series A, vol.29 (1978).

¹⁵⁴ Subsequently withdrawn, see Human Rights - Status Of International Instruments, pp.86-87 (1987).

¹⁵⁵ G.C.13/21, n.3 above, pr.11.

¹⁵⁶ See also G.C.13(21), *ibid.*, pr.8 cited in pr.10.14.1 above.

10.17 With regard to article 14(3)(e) members have asked for information concerning the grounds for rejecting, or restricting¹⁵⁷ the witnesses on behalf of the defence and whether the State met their expenses.¹⁵⁸ Again members have pointed to inconsistencies or inadequacies.¹⁵⁹ For example, during consideration of the report of Uruguay Mr. Tomuschat commented,

"The guarantee provided in article 14(3)(e) of the Covenant had to be interpreted broadly, as expending to all stages in the taking of evidence. There were considerable difficulties in enforcing the right in Uruguay since evidence was taken primarily in the preliminary investigation when the accused had little opportunity in influencing the proceedings. The provisions of article 176 of the Code of Military Penal Procedure (CCPR/C/1/ Add.57, p.5) were dangerous in that they seriously limited the opportunity given to the accused to challenge evidence gathered by the prosecution".^{159A}

It has been asked whether the authorities could rely on written evidence alone.¹⁶⁰ It is difficult to see how such a situation could comply with article 14(3)(e) or indeed the general fair hearing requirement in article 14(1).¹⁶¹

¹⁵⁷ See e.g. SR 135 pr.59 (Vincent-Evans on Romania); SR 440 pr.29 (Herdocia-Ortega on France).

¹⁵⁸ See e.g. SR 440 pr.29 (Herdocia-Ortega on France).

¹⁵⁹ See e.g. SR 327 pr.49 (Tarnopolsky on Morocco); SR 387 pr.36 (Vincent-Evans on Mexico), reply at SR 404 pr.62.

^{159A}. SR 357 pr.17.

¹⁶⁰ See e.g. SR 89 pr.40 (Esperson on Iran). See also the decision in Sutter v. Switzerland, EUCT, Series A, vol.74 (1984).

¹⁶¹ See A.768/60 Recueil, i, (1962), cited by Fawcett pp.196-7; Pfunders v. Austria, A.788/60, 6 (Footnote Continued)

In its general comment the HRC stated that article 14(3)(e) was, "designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution".¹⁶² There is no comment on who may be a witness, any right to be confronted with witnesses, restrictions on calling witnesses or the admittance of different classes of evidence, for example, hearsay evidence.¹⁶³

10.18 With respect to article 14(3)(f) members have laid great stress on the importance of the assistance of an interpreter being "free".¹⁶⁴ Members have stated that if a defendant is obliged to pay that practice is contrary to the Covenant.¹⁶⁵ For example, the Hungarian report stated that,

"The expenses on interpreter's service shall be advanced by the prosecuting authority and shall be charged as cost to the defendant if found guilty".¹⁶⁶

(Footnote Continued)

YBECHR 490. See also A.11454/85 v. Netherlands, EUCM, 10 EHRR 145.

¹⁶² G.C.13/21, n.3 above, pr.12. Cf. Bonisch v. Austria, EUCT, Series A, vol.92 (1985); Artico v. Italy, EUCT, Series A, vol.37 (1980); Goddi v. Italy, EUCT, Series A, vol.76 (1984); A.11170/84, B. v. Austria, EUCM, admiss.decn., (14 July 1987).

¹⁶³ See n.162 above.

¹⁶⁴ See the decisions of the EUCT in Luedicke, Belkacem and Koc v. FRG, Series A, vol.23 (1978) prs.40-42; Ozturk v. FRG, ibid., vol.73 (1984).

¹⁶⁵ See e.g. SR 92 pr.41 (Opsahl on FRG); SR 186 pr.37 (Opsahl on Poland); SR 320 pr.20 (Tomuschat on Japan). See also the Icelandic State representative at SR 251 pr.10.

¹⁶⁶ Doc.CCPR/C/1/Add.11, p.5 (1977).

Mr. Opsahl questioned whether this was still the position.¹⁶⁷ The reply of the State representative did not cover the specific point.¹⁶⁸

In its general comment the HRC stated that, "This right is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence".¹⁶⁹

10.19 With respect to article 14(3)(g) members have done little more than satisfy themselves that this right is embodied in the Constitution, penal code or criminal practice and inquired as to the existence of a remedy for a violation of this right.¹⁷⁰ Mr. Dimitrijevic has raised the question of convictions based on confessions and the possible relevance of violations of the right to privacy in article 17. He,

"Wondered whether there were any cases in which a conviction could be based solely on the basis of confessions and whether evidence could be obtained by means which constituted a violation of privacy (surveillance methods)".¹⁷¹

In its general comment the HRC appointed to the relevance of other provisions of the Covenant,

¹⁶⁷ SR 228 pr.4.

¹⁶⁸ Ibid., pr.18.

¹⁶⁹ G.C.13/21, n.3 above, pr.13.

¹⁷⁰ See e.g. SR 142 pr.13 (Tarnopolsky on Spain); SR 187 pr.26 (Tomuschat on Poland). See A.1083/61, Recueil i, cited in Fawcett, p.197.

¹⁷¹ SR 441 pr.13 (on France). For limited provision in this area in the U.K. see the Interception of Communications Act 1985 enacted to meet the decision *Malone v. U.K.*, EUCT, Series A, vol.82 (1984).

"In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable".¹⁷²

This invocation of other articles accords with the HRC's practice of raising questions of confessions under articles 7 and 10 during the reporting procedure.¹⁷³

¹⁷² G.C.13/21, n.3 above, pr.14.

¹⁷³ See ch.9, pr.9.6 above.

Article 14 (4): Procedure For Juveniles.¹⁷⁴

10.20 In general terms members have engaged in relatively little comment or discussion of article 14(4). They have largely confined themselves to requesting further details of the information provided in State reports concerning, for example, the composition and nature of any specialized institutions in operation and the kind of social rehabilitation measures taken.¹⁷⁵ The limited consideration is perhaps surprising given the obvious importance of the subject and the no doubt varied practice of States parties.¹⁷⁶

In its general comment the HRC stated that,

"Not many reports have furnished sufficient information concerning such relevant matters as the minimum age at which a juvenile may be charged with a criminal offence, the maximum age at which a person is still considered to be a juvenile, the existence of special courts and procedures, the laws governing procedures against juveniles and how all these special arrangements for juveniles take account of 'the desirability of promoting their rehabilitation'. Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14".¹⁷⁷

The last sentence of this comment might suggest that in some circumstances extra safeguards and procedures

¹⁷⁴ Other provisions of the ICCPR that specifically concern juveniles or children are articles 6(5), 10(2)(b) and (3), 14(1), 18(4), 23(4) and 24.

¹⁷⁵ See e.g. SR 132 pr.4 (Graefrath on Bulgaria); SR 482 pr.5 (Cooray on New Zealand); SR 249 pr.5 (Hanga on Venezuela); SR 319 pr.58 (Hanga on Japan).

¹⁷⁶ Cf. K.Tomasevski, *Children In Adult Prisons: An International Perspective* (1986). On the U.K. law affecting juveniles under the Police and Criminal Law Act 1984 see J.O'Driscoll, [1986] JSWL pp.32-41, 65-76.

¹⁷⁷ G.C.13/21, n.3 above, pr.16.

for juveniles will be necessary to comply with article 14(4).

Article 14(5): right of review.¹⁷⁸

10.21 HRC members have sought further information on the appeal or review procedures of States parties, for example, concerning whether the review was limited to the law or extended to the facts and the sentence imposed,¹⁷⁹ the composition of the reviewing body¹⁸⁰ and whether there were any exclusions, exceptions or limitations on those procedures.¹⁸¹ They have pointed to apparent inadequacies or non-compliance.¹⁸²

During the consideration of the report of Iraq attention was focused on the practice and procedure of its Revolutionary Court.¹⁸³ The State representative stated that,

"The revolutionary Court, created in 1969 to protect the Revolution was not a truly exceptional

¹⁷⁸ The right is also now provided for in the Seventh Protocol to the ECHR, article 2. Under the ECHR a Contracting party is not compelled to set up courts of appeal or cassation but if it does then article 6 applies to such proceedings, see the Delcourt Case, EUCT, Series A, vol.11, pr.25 (1970).

¹⁷⁹ See e.g. Doc.A/40/40 pr.56 (on Chile).

¹⁸⁰ See e.g. SR 356 pr.13 (Tarnopolsky on Uruguay).

¹⁸¹ See e.g. SR 223 pr.9 (Vincent-Evans on Colombia); SR 328 pr.13 (Dieye on Morocco). See the decision in Monnell and Morris v. U.K., EUCT, vol.115 (1987).

¹⁸² See e.g. SR 89 pr.18 (Vincent-Evans on Iran); SR 319 pr.20 (Graefrath on Japan); SR 355 pr.20 (Prado-Vallejo on Uruguay). The report of Costa Rica acknowledged that, "Unfortunately the Costa Rican Code of Criminal Procedure establishes some sentences against which there is no appeal, that is to say, cases which are heard in the sole instance. In this connexion, legislative reforms are called for.", Doc.CCPR/C/1/Add.46, p.11 (1979). For some comments see SR 235 pr.12 (Prado-Vallejo), SR 236 pr.27 (Hanga), pr.52 (Janca); reply at SR 240 pr.23.

¹⁸³ For Iraq's report see Doc.CCPR/C/1/Add.45 (1979). See also G.C.13/21, n.3 above, pr.4.

court...the Court offered from the ordinary courts, however, in that its findings were final and not subject to appeal. there was no recourse except in the case of capital punishment; the death sentence must in fact be ratified by a presidential decree. In practice, however, the person condemned could request the President of the Republic to review the sentence, and in such a case the President of the Republic referred the matter to a special legal commission which looked into the case and made recommendations".¹⁸⁴

Mr.Tomuschat immediately pointed to the "contradiction" between this information and the terms of article 14(5) and requested an explanation.¹⁸⁵ The representative replied that any Iraqi citizen could appeal to the President who thus served in a way as a court of appeal.¹⁸⁶ Mr.Tomuschat replied that,

"despite the replies provided by the representative of Iraq, it still appeared that Iraqi legislation failed to provide the full coverage and protection of the rights of the accused and convicted persons under article 14, paragraph 5, of the Covenant. He hoped that the Committee would soon obtain further information of Iraqi efforts to improve that situation".¹⁸⁷

¹⁸⁴ SR 203 pr.29.

¹⁸⁵ SR 203 pr.30.

¹⁸⁶ SR 230 pr.31.

¹⁸⁷ SR 204 pr.7. Noor Mohammed in Henkin (Ed.), n.1 above, comments, "Review 'by a higher tribunal according to law' suggests that the form of the review might differ from State to State. It suggests also that the review must be 'according to law' both in procedure and substance, not merely by the will or whim of an official", p.155-156. The importance of the right of review has been highlighted in recent years by
(Footnote Continued)

This question was again turned to during consideration of Iraq's second periodic report.¹⁸⁸ This process of information, comment, request for explanation and further information, reply and comment is highly typical of the workings of the article 40 process.

During the consideration of the report of Austria, Sir Vincent-Evans suggested that Austria reconsider its reservation to article 14(5) because it undermined a very important humanitarian principle of criminal law.¹⁸⁹

In its general comment on article 14 the HRC stated as regards paragraph 5 that,

"Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences. In this connection, not enough information has been provided concerning the procedures of appeal, in particular the access to and powers of reviewing tribunals, what requirements must be satisfied to appeal against a judgement and the way in which the procedures before review tribunals take account of the fair

(Footnote Continued)

allegations before the U.N. Human Rights Commission of summary executions in certain States including Iraq, see Reports of the Special Rapporteur, ch.8, notes 1, 28 above.

¹⁸⁸ Doc.CCPR/C/37/Add.3. See Doc.A/42/40 prs.373, 374. It appears that the situation has not been altered.

¹⁸⁹ SR 413 pr.10. The Austrian reservation provided that Article 14 would be applied provided that, "paragraph 5 is not in conflict with legal regulations which stipulate that after an acquittal or a lighter sentence passed by a court of first instance, a higher tribunal may pronounce conviction or a heavier sentence for the same offence, while they exclude the convicted person's right to have such conviction or heavier sentence reviewed by a still higher tribunal", Human Rights - Status, n.154 above, pp.29-31.

and public hearing requirements of paragraph 1 of article 14".¹⁹⁰

The comment is helpful in explicitly referring to the applicability of the fair and public hearing guarantees in article 14(1) to appeal and review proceedings.¹⁹¹

¹⁹⁰ G.C.13/21, n.3 above, pr.17. See also the decision in *Fanali v. Italy*, pr.10.52 below.

¹⁹¹ See n.178 above on the situation under the ECHR.

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Article 14(6): compensation for miscarriages of justice.¹⁹²

10.22 Members have sought details of how the right to compensation for miscarriages of justice is given effect in domestic law, if at all?¹⁹³ Was the right specifically established, for example, in the constitution or the Penal Code?¹⁹⁴ Was there some form of extra-statutory scheme in operation?¹⁹⁵ Could information be supplied on specific cases of the

¹⁹² This provision complements article 9(5) ICCPR which provides for an enforceable right to compensation for victims of unlawful arrest or detention. It is interesting to note that article 9(5) provides for an "enforceable right to compensation", whereas article 14(6) provides only that the sufferer, "shall be compensated". This wording was preferred to the former because the majority of the HRCion felt that each State should be left to choose between an administrative or judicial remedy according to its own preference, see remarks at E/CN.4/SR... See also now article 3 of the Seventh Protocol to the ECHR which provides for compensation according to the law "or practice of the State concerned". See G.Ganz, [1983] Public Law p.517.

¹⁹³ See e.g. SR 111 pr.25 (Esperson on Mauritius); SR 291 pr.27 (Bouzirri on Jamaica).

¹⁹⁴ See e.g. SR 213 pr.21 (Tarnopolsky on Senegal).

¹⁹⁵ It is interesting to note that Australia made a reservation to article 14(6) that compensation "may be by administrative procedures rather than pursuant to specific legal provision", Human Rights - Status, n.154 above, p.28. The Australian report stated that, "this is considered to be a satisfactory as making specific legislative provision", Doc.CCPR/C/14/Add.1, pr.302 (1981). Despite withdrawing most of its reservations this reservation has been maintained, see Australia's
(Footnote Continued)

application of the compensation laws?¹⁹⁶ Were there any means of moral compensation?¹⁹⁷

A number of members have expressed doubts as to whether the United Kingdom system of ex gratia payments was in conformity with article 14(6).¹⁹⁸ The United Kingdom representative replied, inter alia, that,

"Although the scheme was an extra-statutory one, the Home Secretary did not in practice refuse to make payment. His Government therefore considered that the practice accorded with the spirit of the Covenant, and it would see whether it could not be made to accord more closely with the letter also".¹⁹⁹

HRC members again raised the issue during consideration of the U.K.'s second periodic report. Subsequently the U.K. resisted domestic calls for institutional reforms, though it did concede a number of important procedural reforms.²⁰⁰ The U.K. Government has now agreed to the

(Footnote Continued)
second periodic report Doc.CCPR/C/42/Add.2, p.84 (May 1987).

¹⁹⁶ See e.g. SR 327 pr.51 (Tarnopolsky on Morocco).

¹⁹⁷ See e.g. SR 482 pr.12 (Hanga on New Zealand); reply at SR 487 pr.43 (as corrected). For an interesting provision on the publicity to be given to a judgment or decision establishing innocence see Article 621 of the Moroccan Code of Criminal Procedure, Doc.CCPR/C/10/Add.2 p.25.

¹⁹⁸ SR 69 pr.24 (Graefrath), pr.36 (Tarnopolsky), pr.92 (Tomuschat) and during 2nd per report. For the U.K. reports see Doc.CCPR/C/1/Add.17 (1977), Add.35 (1978). It is interesting to note that New Zealand expressly reserved "the right not to apply article 14(6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice", Human Rights - Status, n.154 above,

¹⁹⁹ SR 148 pr.73 (Mr.Cairncross).

²⁰⁰ See 'Miscarriages Of Justice', Sixth Report of
(Footnote Continued)

establishment of a statutory scheme to cover compensation for miscarriages of justice.²⁰¹

In its general comment the HRC stated that,

"It seems from many State reports that this right is often not observed or insufficiently guaranteed by domestic legislation. States should, where necessary, supplement their legislation in this area to bring it into line with the provisions of the Covenant".²⁰²

(Footnote Continued)

the Home Affairs Committee, Session 1980-81, H.C.421. For the Governments reply see Cmnd.8856 (1983). See also two reports by JUSTICE, 'Home Office Reviews of Criminal Convictions' (1968), 'Compensation For Wrongful Imprisonment' (1982); A.T.H. Smith, The Prerogative Of Mercy, The Power Of Pardon And Criminal Justice, Public Law (1983) p.398 at pp.436-9.

²⁰¹ See the Criminal Justice Bill 1988 [H.L.].

²⁰² G.C.13/21, n.3 above, pr.18.

Article 14(7):non bis in idem.²⁰³

10.23 With respect to article 14(7) members have asked whether the domestic rules were compatible with it and whether practical examples of its effect could be given. They have pointed to apparent inconsistencies and requested details of relevant case law.²⁰⁴ For example, the view was expressed that the power of the President or Prime Minister of Egypt to order a retrial before another court of persons acquitted by a State Security Court was contrary to article 14(7) and should be reviewed.²⁰⁵ The Netherlands report raised the question of whether article 14(7) had international or only domestic application but no conclusive reply was received.²⁰⁶ The point has now been resolved in a communication under the Optional Protocol.²⁰⁷

In response to the Australian report HRC members raised the interesting question of the application of punishment under both criminal law and Aboriginal customary law.²⁰⁸

Article 14(7) has been the subject of reservations by a number of States including Austria, Denmark, Finland, France, Iceland, Netherlands, Norway and Sweden.²⁰⁹ This is not surprising as the provision in article 14(7) was not included in the Human Rights Commissions text and proved controversial when proposed

²⁰³ Cf.ECHR, Protocol 7, article 4.

²⁰⁴ See e.g. SR 207 pr.13 (Movchan on Canada).

²⁰⁵ See Doc.A/39/40 pr.299.

²⁰⁶ See Doc.CCPR/C/10/Add.3.

²⁰⁷ See A.P. v. Italy, pr.10.57 below.

²⁰⁸ See Doc.A/38/40 prs.148, 169. See also ch.9, n.36 above.

²⁰⁹ For the texts of these reservations see Human Rights - Status, n.154 above.

in the Third Committee.²¹⁰ On a number of occasions during the consideration of reports HRC members have expressed concern at these reservations and suggested that they should be reconsidered.²¹¹ The HRC as a body responded to these reservations in its general comment,

"In considering State reports differing views have often been expressed as to the scope of paragraph 7 of article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a retrial prohibited pursuant to the principle of ne bis in idem as contained in paragraph 7. This understanding of the meaning of ne bis in idem may encourage States parties to reconsider their reservations to article 14, paragraph 7".²¹²

It is very useful for the HRC to respond in this way to reservations made by States parties as it continues the dialogue under article 40 ICCPR and should encourage States parties to reconsider and withdraw reservations which may now appear unnecessary in the light of the HRC's expressed understanding of article 14(7).

²¹⁰ See Doc.A/4299 prs.46-63 (1959).

²¹¹ See e.g. SR 30 pr.13 (Graefrath on Finland).

²¹² G.C.13/21, n.3 above, pr.19.

Article 14 Under The Optional Protocol.Introduction.

10.24 The breadth of the HRC's considerations of article 14 under the reporting process has testified to its central importance in the view of members of the HRC.²¹³ That importance is further attested to by the frequent invocation of article 14 under the O.P. The vast majority of the HRC's views on article 14 have concerned Uruguay. In a substantial number of views the HRC has expressed the view that one or more of the provisions of article 14 have been violated.

The scope of article 14.

10.25 Although the determination of the scope of the parallel expressions in article 6 ECHR have had a dominant role in the jurisprudence of the EUCM and the EUCT no decision on the merits under the O.P. has occasioned any discussion of the scope of the expressions "criminal charge" and "rights and obligations in a suit at law".²¹⁴ However, three admissibility decisions do offer some assistance.

10.26 The most important of these is undoubtedly that in Y.L. v. Canada.²¹⁵ Y.L. was dismissed from the Canadian army on the basis of alleged medical disorders. His application for a disability pension was rejected by a Pension Commission which held that Y.L.'s disability

²¹³ See prs.10.1-10.23 above.

²¹⁴ The French text reads "droits et obligations de caractere civil". The identical French expression appears in article 6 ECHR. Until the day before the ECHR was signed in 1950 the two draft English texts had used the terms "rights and obligations in a suit at law". The English text was then altered to "civil rights and obligations" to make it conform more closely to the French text. See Newman, n.1 above; ECHR - Travaux Preparatoires, vol.iv, pp.1007-1119. On article 6 ECHR see n.20 above.

²¹⁵ Doc.A/41/40 p.145.

neither arose out of, nor was directly connected with, his military service, as required by the Pension Act (1952). That decision was confirmed on appeal. Two subsequent applications were rejected. An application to an Entitlement Board of the Commission was unsuccessful. Finally, the author appealed to the Pension Review Board which confirmed the earlier rulings.

The author alleged that the proceedings before the Pension Review Board violated the guarantees in article 14(1) in a number of respects. The State party argued that the communication was inadmissible ratione materiae because the proceedings did not constitute a "suit at law" as envisaged by article 14(1). In addition the State party claimed that domestic remedies had not been exhausted because the decision of the Board had not been challenged before the Federal Court of Appeal.²¹⁶

The HRC's Working Group on Communications (WGC) decided that it needed further information from the author and the State party. It noted,

"That the decision might require a finding as to whether the claim which the author pursued in the last instance before the Pension Review Board was a "suit at law" within the meaning of article 14(1) of the Covenant".²¹⁷

To assist it the WGC requested answers, inter alia, to the following questions,

"(a) How does Canadian domestic law classify the relationship between a member of the Army and the Canadian State? Are the rights and obligations deriving from such a relationship considered to be civil rights and obligations or rights and obligations under public law?

²¹⁶ Ibid.,pr.4.

²¹⁷ Ibid.,pr.5.

(b) Are there different categories of civil servants? Does Canada make a distinction between a statutory regime (under public law) and a contractual regime (under civil law)?

(c) Is there a distinction, in Canadian domestic law, between persons employed by private employers under a labour contract, and persons employed by the Government?²¹⁸

There are strong echoes here from the jurisprudence under the ECHR and clearly some importance was attached to the classification and regulation of the relationship by the domestic Canadian law.²¹⁹

With reference to the expression "suit at law" the HRC stated that,

"The...expression is formulated differently in the various language texts of the Covenant and each and every one of those texts is, under article 53, equally authentic.

The travaux preparatoires do not alone resolve the apparent discrepancy in the various language texts. In the view of the Committee the concept of a "suit at law" or its equivalent in the other language 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 and

²¹⁸ Ibid. Further questions related to domestic remedies.

²¹⁹ Recent decisions under the ECHR have taken the approach of examining the public and private law aspects of a particular situation. See the *Feldbrugge* and *Deumeland* cases, n.20 above.

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.

In the present communication, the right to a fair hearing in relation to the claim for a pension by the author must be looked at globally, irrespective of the different steps which the author had to take in order to have his claim for a pension finally adjudicated".²²⁰

On the facts of the case the HRC concluded that Y.L.'s basic allegations "do not reveal the possibility of any breach of the Covenant" because in the HRC's view, "it would appear that the Canadian legal system does contain provisions in the Federal Court Act to ensure to the author the right to a fair hearing in the situation".²²¹

10.26.1 Again the HRC's decision echoes the jurisprudence of the ECHR in stressing the "nature of the right" or the particular adjudication forum as the dominant factors. It is interesting to note that three members of the HRC added an individual opinion in which they argued that the dispute did not constitute a "suit at law". They seem, however, to accept that the nature of the right or obligation concerned and the adjudication forum are the "two criteria which would appear to determine conjunctively the scope of article 14".²²² Their individual opinion is based on the view that in this case neither criteria was met. Firstly,

²²⁰ Ibid., prs.9.1-9.3.

²²¹ Ibid., pr.9.5. Cf. Le Compte, Van Leuven and De Meyere v. Belgium, EUCT, Series A, vol.43, pp.22-23 (1981).

²²² Doc.A/41/40 p.150.

because in Canada the relationship between a soldier and the Crown had many specific features differing essentially from a labour contract under Canadian law. Secondly, the Pension Review Board was an administrative body functioning within the executive branch of the Government in Canada, lacking the quality of a court. The latter argument would have given article 14 a much narrower scope than has been given to article 6 ECHR. It is submitted the majority opinion in the better one. On the facts of the case the critical factor in the HRC's determination appears to be that the claim was of a kind subject to judicial supervision and control.²²³

10.27 In C.A. v. Italy²²⁴ C.A. had sought to challenge the limited authority given to him to teach under a certificate issued by an education office. C.A. chose to appeal to the President of the Republic under an exceptional (administrative) recourse procedure. C.A. alleged that article 14 had been violated on various grounds, inter alia, that the relevant legislation excluded the possibility for those who chose to use the exceptional procedure of having their rights determined in a suit at law by a judicial tribunal. The HRC took the view that,

²²³ See the important decision of the EUCM in the Kaplan Case, D.& R. 21 (1981) p.5, concerning the application of article 6 to executive decisions, "An interpretation of article 6(1) under which it was held to provide a full right of appeal on the merits of every administrative decision affecting private rights would therefore lead to a result which was inconsistent with the existing, and long-standing, legal position in most of the Contracting States", p.32. Article 6 did, however, guarantee a right to judicial review of executive decisions before a body complying with its terms. Recent decisions of the EUCT have concerned the degree of supervision necessary to comply with the requirements of article 6, see e.g., W. v. U.K., EUCT, Series A, vol.121, prs.80-83, (1987).

²²⁴ Doc.A/38/40 p.237.

"According to the author's own submission, it was open to him to pursue his case by means of proceedings before domestic courts. Instead, he chose to avail himself of the procedure by way of appeal to the President of the Republic. In these circumstances, the author cannot validly claim to have been deprived of the right guaranteed under article 14 (1) of the Covenant to have the determination of "rights..in a suit at law" made by a competent, independent and impartial tribunal".²²⁵

The decision suggests that if a State party provides an alleged victim with two mutually exclusive recourse procedures, one of which may well satisfy the requirements of article 14, and the alleged victim chooses the alternative procedure, he cannot thereafter claim to have been deprived of the rights guaranteed by article 14(1). By electing for the administrative remedy C.A. effectively waived his right to the article 14(1) guarantee. It is submitted that the waiver must not be tainted by constraint although his ignorance of the exclusionary nature of the remedies may not be a bar.²²⁶ Thus the HRC held the communication inadmissible, "without having to determine whether article 14(1) is at all applicable to a dispute of the present nature".²²⁷

²²⁵ Ibid., pr.12.

²²⁶ On waiver under the ECHR see *De Weer v. Belgium*, EUCT, Series A, vol.35, (1980); *H. v. Belgium*, EUCT, Series A, vol.127, pr.54, (1987); *Colozza v. Italy*, n.142 above; A.1197/61, 5 YBECHR p.88. On ignorance of domestic remedies see *Y.L. v Canada*, pr.10.26, including the individual opinion thereto, pr.10.26.1 above.

²²⁷ Doc.A/38/40 p.237, pr.6.

10.28 Finally, in Pinkey v. Canada²²⁸ P, a citizen of the United States, claimed, inter alia, that he had been denied a fair hearing and review of his case in regard to a deportation order which was to come into effect on his release from prison.²²⁹ The State party argued that the case did not involve the determination of a criminal charge but there is no indication as to whether it could involve the determination of rights or obligations in a suit at law.²³⁰ The allegations concerning deportation were held inadmissible on the ground of non-exhaustion of domestic remedies.²³¹

Fair Hearing; Competent, independent and impartial tribunal.

10.29 In many communications under the O.P. there have both general and specific allegations of violation of the "fair hearing" guarantee. In Pinkey v. Canada²³² P's argument mainly concerned an allegedly missing briefcase containing vital defence evidence. The HRC expressed the view that it had not found any support for P's allegation that material evidence had been withheld.²³³ We noted in chapter 4 that the HRC has taken the view that it is not its function under the O.P. to provide a

²²⁸ Doc.A/37/40 p.101; S.D. p.12.

²²⁹ S.D. p.12, prs.12-13.

²³⁰ Ibid., pr.14. Cf. A.2991 and 2992/66, Alam, Khan and Singh v. U.K., 10 YBECHR (1967) p.478 at pp.500-504. For recent EUCM decisions that decisions on expulsion and deportation do not normally involve the determination of civil rights and obligations see A.8244/78, Uppal and Others v. U.K., 3 EHRR 319; A.12122/86, Lukka v. U.K., 9 EHRR 512.

²³¹ Ibid., prs.12-16.

²³² S.D. p.12.

²³³ Doc.A/37/40 p.101 pr.21.

judicial appeal from or judicial review of the decisions of national authorities.²³⁴

In Conteris v. Uruguay²³⁵ the HRC expressed the view that there had been a violation of article 14(1) because there had been no fair and public hearing. Along with the lack of public hearing there were also violations of, inter alia, article 14(3)(b)(c)(d) and (g). The only seeming additional violation which grounded the article 14(1) finding was perhaps that C's own statements to the military court at first instance were ignored and not entered into the court records.²³⁶ Alternatively the HRC may simply be using the fair hearing violation as a residual concept.²³⁷

General allegations of the absence of a fair hearing in the operation of military tribunals have not, per se, founded article 14 violations. However, in Cariboni v. Uruguay²³⁸ the HRC found a violation of article 14 (1) on the basis that C had been denied a fair and public hearing, without undue delay, by an

²³⁴ On the function of the HRC under the O.P: see ch.4, prs.4.44-4.45 above.

²³⁵ Doc.A/40/40 p.196.

²³⁶ Ibid., pr.9. Cf. A.911/60, EUCM, 4 YBECHR p.198 at p.222.

²³⁷ In Mpandanjilla and Others v. Zaire, Doc.A/41/40 p.121, the trial was not held in public; no summonses were served on two of the accused; and in three cases the accused were not heard at the pre-trial stage. The HRC expressed the view, inter alia, that article 14(1) was violated because they were denied a fair and public hearing. The position adopted under the ECHR is that no abstract definition of criteria for a fair hearing can be given and that in each individual case the course of the proceedings as a whole has to be assessed, see the Nielsen Case, A.343/57, IV YBECHR (1961) p.494 at pp.548-550.

²³⁸ Doc.C/31/D/159/1983 (27 Oct 1987). This view will be published in the HRC's 1988 Annual Report (A/43/40).

independent and impartial tribunal.²³⁹ The only specific matter raising the question of the independence and impartiality of the military tribunal was perhaps that although the prosecutor requested a nine year sentence he was in fact sentenced to fifteen years' imprisonment. We have already noted that the HRC expressed strong concern about the operation of military or special courts in its general comment on article 14.²⁴⁰

'Public hearing' and 'Public judgement'.²⁴¹

10.30 It is convenient to consider these two requirements together. Most of the alleged violations of these requirements have concerned the operation of military tribunals in Uruguay.²⁴² They reveal a consistent pattern of alleged violations of article 14: closed trials, conducted in writing with neither the alleged victim, his counsel, if any, or close relatives allowed the right to be present, and a failure to make the judgement public. In Touron v. Uruguay²⁴³ T had been charged with offences of conspiracy and subversion. There were no public hearings during the whole procedure at first instance. T was not allowed to be present or to defend himself. The judgement was not made public. The State party made the following submission to the HRC,

"It must be explained that public hearings do not exist under the Uruguayan legal order. The trial

²³⁹ Ibid., pr.10.

²⁴⁰ See pr.10.7 above. For ECHR cases on military tribunals see Engel and Others v. Netherlands, EUCT, Series A, vol.22 (1976); Sutter v. Switzerland, EUCT, Series A, vol.74 (1984).

²⁴¹ Cf. The decisions under the ECHR cited in notes 78 and 94 above.

²⁴² See e.g. Conteris v. Uruguay, Doc.A/40/40 p.196; Weinberger v. Uruguay, Doc.A/36/40 p.114; Pietraroia v. Uruguay, Doc.A/36/40 p.153.

²⁴³ Doc.A/36/40 p.120.

Article

is conducted in writing and the accused has the opportunity to express himself through his counsel and by means of formal statements before the judge".²⁴⁴

The HRC did not specifically refer to this submission but simply expressed the view that, inter alia, article 14 (1) had been violated because T had no public hearing. The submission of the state party seems to assume that a trial in writing does not amount to a public hearing. If so, the submission suggests an institutionalized violation of article 14 in the operation of the Uruguayan legal order. If the HRC were of this view they could include a statement to this effect in their expression of views under the O.P. If members thought this inappropriate²⁴⁵ it would still be open to them to raise such questions of institutional violations during the article 40 reporting process in respect of the state party concerned and indeed this has happened. In this way the HRC's experience under the O.P. can inform and guide its approaches under the article 40 procedure. In its final views on the Touron²⁴⁶ case the HRC commented that,

"The State party has not responded to the Committee's request that it should be furnished with the texts of any court orders or decisions

²⁴⁴ Ibid., pr.5. In *Gilboa v. Uruguay*, Doc.A/41/40 p.128, the author alleged that, pursuant to a decree of June 1973 the publication of any judgement of military courts was expressly prohibited. The HRC made no findings on alleged article 14 violations because the trial had not been completed, *ibid.*, pr.7.2.

²⁴⁵ In *Gilboa v. Uruguay*, *Ibid.*, the author alleged that, "The entire procedure before the military courts is in violation of article 14". The HRC made no response to this allegation, pr.7.2. Cf. The finding of a practice of inhuman treatment at Libertad prison in Uruguay, ch.9, prs.9.18-9.18.1 above.

²⁴⁶ Doc.A/36/40 p.120.

relevant to the matter. The Committee is gravely concerned by this omission. Although similar requests have been made in a number of other cases, the Committee has never yet been furnished with the texts of any court decisions. This tends to suggest that judgements, even of extreme gravity, as in the present case, are not handed down in writing. In such circumstances, the Committee feels unable, on the basis of the information before it, to accept...that the proceedings against Luis Tournon amounted to a fair trial..".²⁴⁷

Members of the HRC took up this rather cautiously phrased allegation of a failure to hand down judgements in writing with the state representative of Uruguay when he appeared before the Committee during the reporting process.²⁴⁸

10.31 In Estrella v. Uruguay²⁴⁹ E was told by an official whom he met at the prison where he was detained that he had been sentenced to four and a half years imprisonment for "conspiracy to subvert action to upset the Constitution and criminal preparations". The HRC expressed the view that the facts disclosed, inter alia, a violation of article 14 (1) because E was tried without a public hearing and no reason had been given by the State party to justify this in accordance with the Covenant.²⁵⁰ In fact, to date, no State party has ever raised any of the exceptions to the public hearing requirement in answer to an allegation against it.

²⁴⁷ Ibid., pr.11.

²⁴⁸ The State representative promised that his Government would in future cooperate with the HRC, see SR 355-357, 359 and 373. See also n.335 below.

²⁴⁹ Doc.A/38/40 p.150.

²⁵⁰ Ibid., pr.10.

The presumption of innocence (A.14(2))

10.32 It appeared from two early decisions²⁵¹ taken by the HRC that it took the view that violations of article 14(1) and (3) which deprive an accused person of the safeguards of a fair trial also constitute a violation of the presumption of innocence although there is no attempt to explain the reasoning behind this.²⁵² However, in subsequent similar cases in which the Committee has held there to have been violations of article 14(1) and (3) there has been no suggestion that these violations also constituted a violation of the presumption of innocence.²⁵³ We have already noted the broad approach of the HRC to the presumption of innocence evident in its general comment.²⁵⁴

'To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him' A.14(3)(a).

10.33 The Antonaccio v. Uruguay²⁵⁵ A was tried in July 1980 and sentenced to thirty years imprisonment plus fifteen years of special security measures. The HRC simply expressed the view that article 14(3)(a)

²⁵¹ Ambrosini, de Massera and Massera v. Uruguay, Doc.A/34/40 p.124; Perdoma and De Lanza v. Uruguay, Doc. A/35/40 p.111.

²⁵² See the Nielsen Case, 2 YBECHR p.412 at pp.446-448, admiss.decn. Under the ECHR no inquiry is made as to a possible violation of article 6(2) when a violation of the fair trial requirement in article 6(1) has already been found, see De Weer v. Belgium, n.226 above. See also the decision of the German Federal Court noted in 1 HRLJ (1980) p.339.

²⁵³ See e.g. Sequeira v. Uruguay, Doc.A/35/40 p.127.

²⁵⁴ See pr.10..11 above.

²⁵⁵ Doc.A/37/40 p.114.

had been violated. Similarly, in Mbenge v. Zaire²⁵⁶ M, while living in Belgium, was twice tried and sentenced to capital punishment by Zairian Tribunals. He learned about these trials through the press. In its views the HRC gave some indication of the obligation on a state party to contact and inform an accused,

"The Committee acknowledges that there must be certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused. With regard to the present communication, however, those limits need not be specified. The State party has not challenged the author's contention that he had known of the trials only through press reports after they had taken place. It is true that both judgements state explicitly that summonses to appear had been issued by the clerk of the court. However, no indication is given of any steps actually taken by the State party in order to transmit the summonses to the author, whose address in Belgium is correctly reproduced in the judgement of 17 August 1977 and was therefore known to the judicial authorities. The fact that, according to the judgement in the second trial of March 1978, the summons had been issued only three days before the beginnings of the hearings before the court, confirms the Committee in its conclusion that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus enabling him to prepare his defence".²⁵⁷

Thus, if there is prima facie evidence of a failure to comply with article 14(3)(a) there is a burden on the

²⁵⁶ Doc.A/38/40 p.134.

²⁵⁷ Ibid., pr.14.2.

State party to show the steps it has actually taken and those steps must amount to a "sufficient effort" to inform the alleged victim. The failure to comply with article 14(3)(a) may then result in other violations of article 14(3) as happened in the Mbenge case.²⁵⁸

'To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing' (A.14(3)(b)).

10.34 The matter of access to counsel is clearly covered by both article 14 (3)(b) and (d) at least. In Perdomo and de Lanza v. Uruguay²⁵⁹ the HRC expressed the view that there was a violation of article 14(3) on the ground, inter alia, that P and de L had no effective access to legal assistance. In Antonaccio v. Uruguay²⁶⁰ it was alleged that A was denied the rights of defence as he had never been able to contact the lawyer assigned to him and that although A's relatives had appointed M.C. to be A's lawyer, M.C. was twice denied the right to examine A's dossier and to visit him. The HRC expressed the view that Article 14(3)(b) was violated because he was unable either to choose his own counsel or communicate with appointed counsel and was, therefore, unable to prepare his defence.²⁶¹ The HRC made no comment on the question of the right of access

²⁵⁸ See pr.10.40 below. Cf. Resolution (75) 11 of the Committee of Ministers of the Council Of Europe, "On the criteria governing proceedings held in the absence of the accused", Resolutions Adopted By The Committee Of Ministers Relating to Crime Problems, vol.III, (1977).

²⁵⁹ Doc.A/35/40 p.111.

²⁶⁰ Doc.A/37/40 p.114.

²⁶¹ Ibid., pr.20. Similarly, in Simones v. Uruguay, Doc.A/37/174. That case is also interesting on the failure of a court-appointed counsel to invoke alleged domestic remedies. See ch.4, pr.4.108, n.706.

to the court file.²⁶² In O.F. v. Norway²⁶³ O.F. alleged, inter alia, that he had been denied adequate access to and copies of documents relevant to his case. The HRC noted that, "The Covenant does not explicitly provide for a right of a charged person to be furnished with copies of all relevant documents in a criminal investigation...Even if all the allegations of the author were to be accepted as proven, there would be no ground for asserting that a violation of article 14, paragraph 3(b), occurred".²⁶⁴ It is submitted that whether a denial of access to relevant documents violates the Covenant will depend on whether in the particular case it unfairly deprives the accused of adequate facilities to prepare his defence. Denial of access to certain documents may be permissible under national laws relating to public interests, privilege and confidentiality.²⁶⁵ As noted, in its general comment on article 14 the HRC stated that "facilities", "must include access to documents and other evidence which the accused requires to prepare his case".²⁶⁶

10.35 Allegations have been made in communications to the HRC of the harassment of defence lawyers in Uruguay and Zaire but most of the allegations have concerned

²⁶² Under the equivalent provision of the ECHR (art.6(3)(b)) the EUCM has held that the facilities granted to an accused person do not include an absolute right of access to the court file, although it may be implied that in certain circumstances he or his lawyer must have reasonable access to it, A.7138/75, X v. Austria, D.& R. 9, p.50. See also A.5282/71, X v. U.K., C.D. 42, p.99; A.8427/78, Hendriks v. Netherlands, 5 EHRR 223, prs.140-144.

²⁶³ Doc.A/40/40 p.204.

²⁶⁴ Ibid., pr.5.5.

²⁶⁵ For a recent U.K. case see Taylor v. Anderton, The Times, October 21, 1986, Scott J.

²⁶⁶ See pr.10.4.1 above.

situations prior to the entry into force of the O.P. in the State party concerned.²⁶⁷ We have already noted the clear statements of the HRC on the importance of unhindered access to the it for individuals²⁶⁸ and States not taking exception to anyone acting as legal counsel for alleged victims.²⁶⁹ In Scarrone v. Uruguay²⁷⁰ S did not have counsel of his own choice, but a court appointed lawyer, who did not visit him nor inform him of developments in the case.²⁷¹ The HRC expressed the view that article 14(3)(b) had been violated because S did not have adequate legal assistance for the preparation of his defence.²⁷²

10.35.1 In Estrella v. Uruguay²⁷³ E's choice was limited to one of two officially appointed defence lawyers. E saw him only four times in over two years. The HRC expressed the view that there had been a breach of article 14(3)(b) but it did not make any express comment on the inadequacy of E's opportunity to communicate with his lawyer. A more helpful finding is that in Marais v. Madagascar²⁷⁴ where the HRC expressed the view that M was "denied adequate opportunity to communicate with counsel".²⁷⁵ This finding clearly suggests that the

²⁶⁷ See e.g. Izquierdo v. Uruguay, Doc.A/37/40 p.179. See, however, Marais v. Madagascar, pr.10.43 below.

²⁶⁸ See ch.4, pr.4.11 above.

²⁶⁹ See ch.4, pr.4.11 at n.143 above.

²⁷⁰ Doc.A/39/40 p.154.

²⁷¹ Ibid., prs.5.1, 9.2.

²⁷² Ibid., pr.11.

²⁷³ Doc.A/38/40 p.150.

²⁷⁴ Doc.A/38/40 p.141.

²⁷⁵ Ibid., pr.19. For the facts of the case see pr.10.43 below.

opportunity afforded to communicate with counsel must be adequate enough to allow for the preparation of his defence.²⁷⁶

10.35.2 In Vasilskis v. Uruguay²⁷⁷ the court had appointed V a defence counsel who was not a lawyer. The HRC expressed the view that there had been a violation of article 14(3)(b) and (d) because V did not have adequate legal assistance for the preparation of her defence.²⁷⁸

10.35.3 The decision in Caldas v. Uruguay²⁷⁹ is important because it highlights the difficulty of securing the rights in article 14(3)(b) when the accused person is detained incommunicado. The HRC stated that in formulating its views it had taken account of the following consideration,

"The Committee observes that the holding of a detainee incommunicado for six weeks after his arrest is not only incompatible with the standard of humane treatment required by article 10(1) of the Covenant, but it also deprives him, at a critical stage, of the possibility of communicating with counsel of his own choosing as required by article 14(3)(b) and, therefore, of one of the most

²⁷⁶ In De Voituret v. Uruguay, Doc.A/39/40 p.164, the author alleged that her daughter, the alleged victim, could expect very little assistance from her defence lawyer because, "She is prevented from consulting him freely. The conversations have to take place by telephone while the defence lawyer and her daughter are separated by a glass wall and continuously watched by guards standing at their side", pr.2.8. The HRC expressed no view on the alleged article 14 violations.

²⁷⁷ Doc.A/38/40 p.173.

²⁷⁸ Ibid., pr.11.

²⁷⁹ Doc.A/38/40 p.192.

important facilities for the preparation of his defence".²⁸⁰

In Machado v. Uruguay²⁸¹ M was held incommunicado from November 1980 to May 1981. The HRC expressed the view that there had been a violation of article 14(3)(b) because the conditions of detention during this period effectively barred M from access to legal assistance.

Not surprisingly, the HRC has expressed the view that there is a breach of article 14(3)(b) when trial proceedings take place without the alleged victim's knowledge²⁸² or without notification to his counsel.²⁸³

The right to be tried without undue delay. (A.14(3)(c)).

10.36 The HRC has expressed the view that article 14(3)(c) has been violated in a number of communications mostly concerning the operation of military tribunals in Uruguay. It is unfortunate that despite a number of opportunities to do so the HRC has neither clearly spelt out the precise time period covered by article 14(3)(c) nor indicated how it relates to the period covered by article 9(3) ICCPR.²⁸⁴ For example, in de Casariego v. Uruguay²⁸⁵ C was arrested in Brazil in November 1978 by Uruguayan agents with the connivance of two Brazilian police officials. He was forcibly abducted to Uruguay

²⁸⁰ Ibid., pr.13.3.

²⁸¹ Doc.A/39/40 p.148.

²⁸² See Mbenge v. Zaire, pr.10.33 above.

²⁸³ See Nieto v. Uruguay, Doc.A/38/40 p.201. In Goddi v. Italy, the EUCT held that the failure of the Italian Court of Appeal to notify the lawyer acting for Goddi, "was instrumental in depriving the applicant of a 'practical and effective' defence", EUCT, Series A, vol.76 (1984).

²⁸⁴ See pr.10.15 above text to n.136.

²⁸⁵ Doc.A/36/40 p.185.

where his arrest was publicly confirmed in the same month. In March 1979 C was charged. On 29 July 1981 the HRC expressed the view that there had been a violation of article 14(3)(c) because C had not been tried without undue delay. The HRC did not express the view that article 9(3) had been violated. If the period up to a trial at first instance is covered by article 14(3)(c) then what is the scope of article 9(3)? Most of the HRC's other views give no clue to the relative scope of the two provisions because the HRC has almost invariably been of the view that the facts as found constitute violations of both provisions.²⁸⁶ Another case where the HRC has expressed the view that article 14(3)(c) alone had been violated was in Pinkey v. Canada²⁸⁷ where P's appeal against conviction could not be heard for thirty-four months because the transcript of the original trial was not made available. This decision would suggest that article 14(3)(c) would cover the period up to the final appeal judgement. This view seems to be confirmed in the HRC's general comment.²⁸⁸

10.37 In Pinkey P alleged that the delay in the hearing was a deliberate attempt by the State Party to block the exercise of his right of appeal.²⁸⁹ The State Party rejected this allegation and any allegation of wrong doing, negligence or carelessness on the part of the Ministry of the Attorney-General.²⁹⁰ It acknowledged

²⁸⁶ For the practice under the ECHR see Van Dijk and Van Hoof, pp.224-228 and 254-259.

²⁸⁷ Doc.A/37/40 p.101.

²⁸⁸ See pr.10.15 above, text to n.136. See also Acosta v. Uruguay, Doc.A/39/40 p.169; Lluberas v. Uruguay, Doc.A/39/40 p.175.

²⁸⁹ Doc.A/37/40 p.101.

²⁹⁰ Ibid. The Government of British Colombia described the delay as "unusual and unsatisfactory", *ibid.*, pr.10.

that the delay was due to "administrative mishaps in the Official Reporters Office", but submitted that responsibility must nevertheless rest with P in that he failed to seek an order from the Court of Appeal requiring production of the transcripts as he was entitled to do under the Criminal Code and the Rules of the British Columbia Supreme Court.²⁹¹

In reply it was submitted on P's behalf that the Government of British Columbia must be held responsible for the delay resulting from mishaps in producing the trial transcripts and that the Court of Appeal itself, being aware of the delay, should of its own motion have taken steps to expedite their production.²⁹²

The HRC considered that "the authorities of British Columbia must be considered objectively responsible. Even in the particular circumstances this delay appears excessive and might have been prejudicial to the effectiveness of the right of appeal. At the same time, however, the Committee has to take note of the position of the Government that the Supreme Court of Canada would have been competent to examine the complaints. This remedy, nevertheless, does not seem likely to have been effective for the purpose of avoiding delay."²⁹³

Matters of organization and administration will generally be the responsibility of the State.²⁹⁴ However, the meaning of the expression "objective responsibility" is not spelt out.²⁹⁵ It could indicate that there must have been some fault and that the State

²⁹¹ Ibid., pr.15.

²⁹² Ibid., pr.17.

²⁹³ Ibid., pr.22 (my emphasis).

²⁹⁴ See I.Brownlie, Systems Of The Law Of Nations - State Responsibility, pp.72-73, 144.

²⁹⁵ Ibid., pp.38-40. See the Caire Claim, 5 R.I.A.A., p.516 at pp.529-531 (1929).

authorities were responsible because they should have taken the initiative to obtain the transcripts. Alternatively, it could indicate that the State is to be held liable on a no-fault based system simply because the delay was excessive. It is submitted that the first of these is the better view. It is also interesting to contrast the view of the HRC with the approach under the ECHR which takes a much more subjective approach to the examination of the responsibility of the relevant authorities, courts or individuals involved at the various stages.²⁹⁶ On the facts of the case, however, the result may well have been the same under either approach. An approach based on objective responsibility in the no-fault sense might make it difficult to accommodate the various legal systems of States parties and unduly limit the margin of appreciation for States in this respect.²⁹⁷ The decision on the need for the alleged domestic remedy to be effective accords with the general approach of the HRC to the matter of domestic remedies.²⁹⁸

10.38 Many of the HRC's decisions have concerned time periods spanning the date of the entry into force of the ICCPR and the O.P. for the State concerned.²⁹⁹ For example, in Sequeira v. Uruguay³⁰⁰ S was arrested in September 1975 and detained until he escaped custody on 4 June 1976. The O.P. entered into force in Uruguay on 23 March 1976. The HRC expressed the view that the facts, in so far as they occurred or had effects which

²⁹⁶ See n.301 below.

²⁹⁷ See e.g. the majority and dissenting opinions in the *Wemhoff v. FRG*, EUCT, Series A, vol.7 (1968).

²⁹⁸ See ch.4, prs.4.103-4.104 above.

²⁹⁹ See ch.4, prs.4.49-4.52 above.

³⁰⁰ Doc.A/35/40 p.127. See also *Machado v. Uruguay*, Doc. A/39/40 p.148.

themselves constituted a violation after that date disclosed violations of, inter alia, article 14(3) because he was not brought to trial without undue delay. The decision also represents the shortest period of time held by the HRC to violate article 14(3)(c). S was in detention for nine months in total and for less than three months after the O.P. entered into force.³⁰¹

10.39 There has been little attempt by any State Party to date to justify any alleged delay in holding a trial.³⁰² Exceptionally, in Vasilskis v. Uruguay³⁰³ the submission of the State party under article 4(2) O.P. referred to "the extraordinary load placed on the Uruguayan judicial system by the numerous proceedings during the period of high seditious activity".³⁰⁴ Unfortunately the HRC made no comment on this point and simply expressed the view that article 14(3)(c) had been violated. Presumably this approach was taken because the State Party had not supplied any specific or detailed information to substantiate its claim.³⁰⁵ To date no view of the HRC has indicated the responsibility of the State for delays attributable to the structural or administrative problems in legal systems. The EUCT has taken a strict approach to such factors.³⁰⁶ Similarly the HRC have made no comment on the responsibility of

³⁰¹ Cf. The approach of the EUCT in the Baggetti and Milasi cases, n.139 above.

³⁰² See e.g. G.Barbato v. Uruguay, Doc.A/38/40 p.124, pr.9.5.

³⁰³ Doc.A/38/40 p.173.

³⁰⁴ Ibid., pr.7.1.

³⁰⁵ See ch.4, prs.4.27-4.36 on the general approach of the HRC.

³⁰⁶ See the decisions of the EUCT in n.74 above.

individuals for delays.³⁰⁷ The HRC has not yet developed criteria for the determination of what is "undue delay" in a particular case.³⁰⁸

In a number of communications concerning Uruguay the HRC has concluded by way of default that article 14(3)(c) has been violated because Uruguay had simply failed to supply any information or documentation as to the outcome of criminal proceedings.³⁰⁹

Trial in own presence, counsel of own choosing, right to legal assistance. (A.14(3)(d)).

10.40 It is instructive to begin with the HRC's views in a case in which the HRC stressed the vital importance of the safeguards in article 14(3) of the Covenant. In Mbenge v. Zaire³¹⁰ M, a Zairian citizen and former Governor of the province of Shaba, had left Zaire in 1974 and was living in Belgium. He was twice tried and sentenced to capital punishment by Zairian tribunals. M learned of the trials through the newspapers. He had received no summons to appear before the tribunals. The HRC observed that,

³⁰⁷ For the approach of the EUCT see e.g., *Eckle v. FRG*, Series A, vol.51, (1982).

³⁰⁸ Cf. Fawcett, pp.164-170 (though note that the text is misprinted in parts). The established criteria used by the EUCT are the complexity of the factual or legal issues raised by the case; the applicants own conduct and the manner in which the competent national authorities have dealt the case, see *Buchholz v. FRG*, EUCT, Series A, vol.42, pr.49, (1981); *Zimmerman and Steiner v. Switzerland*, EUCT, Series A, vol.66, pr.24 (1983). For a recent application of the criteria see *Erkner and Hofauer v. Austria*, EUCT, Series A, vol.117, (1987).

³⁰⁹ See e.g. *Caldas v. Uruguay*, Doc.A/38/40 p.192; *Nieto v. Uruguay*, Doc.A/38/40 p.201.

³¹⁰ Doc.A/38/40.p.134.

"According to article 14(3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused's person's absence. Indeed, proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him (art.14(3)(a)). Judgement in absentia requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art.14(3)(b), cannot defend himself through legal assistance of his own choosing (art.14(3)(d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art.14(3)(e)".³¹¹

On the facts the HRC expressed the view that Zaire had violated article 14(3)(a)(b)(c)(d) and (e) because M was charged, tried and convicted in circumstances in

³¹¹ Ibid., pr.14.1.

which he could not effectively enjoy the safeguards of due process enshrined in those provisions.³¹²

10.41 Most of the allegations in the communications submitted to the HRC have concerned the same pattern of violations in the operation and practice of military tribunals in Uruguay: closed trials, no choice of counsel or a limited choice, no access or no effective access to legal assistance, neither the alleged victim, his counsel or close relatives allowed the right to be present at the trial.³¹³ Many of those communications raise the problem of conflicting submissions by from the author and the State party.³¹⁴

In Burgos v. Uruguay³¹⁵ B was arrested, allegedly tortured, and after a delay of fourteen months his trial began. He was sentenced in March 1979 but the sentence was reduced on appeal. It was alleged, inter alia, that B was denied the right to have legal defence counsel of his own choice and that a military "ex officio" counsel, Colonel M.R., was appointed by the authorities. Four witnesses asserted that B and others were forced under threat to refrain from seeking any legal counsel other than Colonel M.R.

In its reply the State party submitted that B had legal assistance at all times and that he had lodged an appeal. The State party also rejected the allegation that B was denied the right to have defence counsel of his own choosing asserting that he was not prevented

³¹² Ibid., pr.21. It is interesting to note the use of the term "due process" which does not appear in the Covenant. The decision in Mbenge is also considered in ch.8, pr.8.25 above. See also Goddi v. Italy, EUCT, Series A, vol.76, (1984).

³¹³ See the cases cited in pr.10.30 above.

³¹⁴ For the approach of the HRC to these problems see ch.4, prs.4.27-4.36 above.

³¹⁵ Doc.A/36/40 p.176.

from having one and that accused persons themselves and not the authorities choose from the list of court-appointed lawyers.³¹⁶ In reply the author indicated that, "since accused persons can only choose their lawyers from a list of military lawyers drawn up by the Uruguayan Government", her husband (B) had no access to a civilian lawyer, unconnected with the Government, who might have provided a "genuine and impartial defence" and that he did not enjoy the proper safeguards of a fair trial.³¹⁷

In its expression of views the HRC indicated that it had taken account of the fact that although the State party had stated that B was prevented from choosing his own counsel,

"It has not, however, refuted witness testimony indicating that Lopez Burgos and others arrested with him, including M.S. and I.Q., whose parents are attorneys, were forced to agree to ex officio legal counsel".³¹⁸

The HRC expressed the view that article 14(3)(d) had been violated because B was forced to accept Colonel B.R. as legal counsel.³¹⁹ It is unfortunate that the HRC did not take this opportunity to spell out the extent of the obligation on a State party to permit the free choice of counsel, for example, whether it is permissible for a State party to preclude the possible choice of a civilian counsel.³²⁰

³¹⁶ Ibid., prs.7.1, 7.4.

³¹⁷ Ibid., pr.8.

³¹⁸ Ibid., pr.11.5.

³¹⁹ Ibid., pr.13.

³²⁰ In *Machado v. Uruguay*, the State party argued that ex officio defence counsels, "Are independent lawyers who are not subject to the military hierarchy in
(Footnote Continued)

10.42 Some of the difficulties of securing the rights of defence when a person is detained incommunicado have already been noted.³²¹ In a number of cases the HRC has had to consider the effect of detention on the right to have access to legal assistance. For example, in Carballal v. Uruguay³²² the allegations included more than five months incommunicado detention, much of the time tied and blindfolded, and subjection to an extremely harsh regime of detention. The HRC expressed the view that there had been a violation of article 14(3) because "the conditions of his detention effectively barred him from access to legal assistance".³²³ It would be more helpful if the HRC in its views indicated which of the alleged conditions, or perhaps all of them, "effectively barred" C from access to legal assistance.

10.43 As noted there have been allegations of harassment of defence lawyers in cases before military tribunals in Uruguay but the HRC has not yet expressed any views on these allegations.³²⁴ A case where the harassment of defence lawyers was more directly considered by the HRC was the decision in Marais v. Madagascar.³²⁵ M, a South African national, was a passenger on a chartered aircraft which en route to Mauritius, made an emergency landing in Madagascar. M was tried and sentenced for

(Footnote Continued)
the performance of their technical functions. These were in strict conformity with the principles that should regulate any counsel of a technical and legal nature", Doc.A/39/40 p.148, pr.8.

³²¹ See pr.10.35.3 above.

³²² Doc.A/36/40 p.125.

³²³ Ibid., pr.13. Similarly in Machado v. Uruguay, Doc.A/39/40 p.148, pr.13.

³²⁴ See pr.10.35 above.

³²⁵ Doc.A/38/40 p.141.

overflying the country without authority and thereby endangering the national security of the country. The HRC's statement of facts outlines the difficulties faced by M's lawyer.

"Dave Marais' first attorney, Jean-Jacques Natai, left Madagascar; he was subsequently refused re-entry into Madagascar. Later Maitre Eric Hamel became the defence attorney for Dave Marais. Although Maitre Hamel obtained a permit from the examining Magistrate to see his client, he was repeatedly prevented from doing so. From December 1979 to May 1981, Dave Marais was unable to communicate with Maitre Hamel and to prepare his defence, except for two days during the trial itself. On 11 February 1982, Malagasy political police authorities arrested Maitre Hamel, detained him in the basement of the Ambohibao political police prison and, subsequently, expelled him from Madagascar, thereby further impairing his ability effectively to represent Dave Marais".³²⁶

In an interim decision the HRC requested information and clarification on, inter alia, "the means of communication between the alleged victim, his family and legal counsel, in particular his access to Maitre Eric Hamel".³²⁷ In the light of the failure of the State party to provide the information and clarification requested the HRC noted that the failure had hampered its consideration of the communication and it "requested the State party, should there hitherto have been any obstacles barring Maitre Eric Hamel from access to ensure that the lawyer and his client had the proper facilities for effective access to each other. The State

³²⁶ Ibid., pr.17.1. Maitre Hamel subsequently brought a communication to the HRC in his own right, see ch.4, pr.4.11 above.

³²⁷ Ibid., pr.5.1.

party should inform the Committee of the steps taken by it in this connection".³²⁸ These requests and subsequent ones went unheeded except for a copy of a letter purportedly written by M requesting a remission of sentence.³²⁹ The HRC expressed the view that the facts as found disclosed violations of article 14(3)(b) and (d) because M had been denied adequate opportunity to communicate with his counsel, Maitre Hamel, and because his right to the assistance of his counsel to represent him and prepare his defence has been interfered with by the Malagasy authorities.³³⁰ The decision is important in finding a violation of M's rights to effective legal assistance, representation and preparation in the interferences of the Malagasy authorities. The freedom of lawyers to defend without interference, intimidation or harassment is a most important principle of the rule of law and often a pre-condition to securing the rights in Article 14.³³¹

10.44 It has already been noted above how the experience of the HRC under the O.P. can assist its deliberations under the article 40 reporting procedure.³³² Another example of this process in operation can be seen in respect of the matter of pre-trial access to counsel.

³²⁸ Ibid., pr.7 at (b).

³²⁹ Ibid., prs.15.1-15.2.

³³⁰ Ibid., pr.19.

³³¹ See prs.10.34-10.35.3 above. The "IACM has expressed the view that fundamental human rights are violated in a State where lawyers who assume responsibility for defending individuals detained for political reasons are subjected to threats and acts of intimidation, including such measures as withholding their licences to practice; a fortiori where they are killed, detained, maltreated or 'disappear' ", Sieghart, n.1 above, citing IACM, Third Report on Paraguay pp.86-87 (1978) and IACM, Report on Argentina p.233 (1980).

³³² See pr.10.30 above.

This matter was raised in a number of communications concerning Uruguay. For example, in Sequeira v. Uruguay³³³ it was alleged that S had no right to legal assistance while kept in detention because the right to defence is not recognised by the authorities until a prosecution has been initiated. S had been brought before a military judge on three occasions but no steps had been taken to commit him for trial. The HRC expressed the view that article 14(3) had been violated because he had no access to legal assistance.³³⁴ During the consideration of the State report of Uruguay members of the HRC took the opportunity to raise with the State representative a number of relevant matters including pre-trial access and communication with counsel.³³⁵

10.45 No decision on the merits has been concerned with legal aid aspect of article 14(3)(d). In J.S. v. Canada³³⁶ the HRC expressed the view that, notwithstanding the existence of a domestic dispute as to the appropriate remuneration authority in respect of a legal aid award to a defendant, where the defendant had in fact been represented by legal counsel of her own choosing and one of the legal aid authorities had offered to pay the counsel chosen by her, there were no grounds substantiating an alleged violation of article 14(3)(d).³³⁷

In O.F. v. Norway³³⁸ O.F. was prosecuted for two minor offences (non-compliance with a duty to fill in a

³³³ Doc.A/35/40 p.127. See also Weinberger v. Uruguay, Doc.A/36/40 p.114.

³³⁴ Ibid., pr.16.

³³⁵ See the summary in Doc.A/37/40 prs.274-275.

³³⁶ Doc.A/38/40 p.243.

³³⁷ Ibid., pr.6.

³³⁸ Doc.A/40/40 p.204.

form and exceeding the speed limit). Both charges were trivial and could in practice only lead to a small fine.³³⁹ His request for counsel to be appointed at the expense of the State was refused. The HRC expressed the view that the author had failed to show that in this particular case the "interests of justice" would have required the assignment of a lawyer at the expense of the State party.³⁴⁰

'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.'
(Art.14(3)(e)).

10.46 The HRC has expressed the view that article 14(3)(e) has been violated in a small number of cases. In Antonaccio v. Uruguay³⁴¹ A was not allowed to present witnesses in support of his case before a military tribunal. In Mbenge v. Zaire³⁴² the HRC observed that trial in absentia without due notification to the accused deprived him, inter alia, of the rights in article 14(3)(e).

'To have the free assistance of an interpreter if he cannot understand or speak the language used in court.' (Art.14(3)(f)).³⁴³

10.47 To date, no views have concerned this provision.

³³⁹ Ibid., pr.3.4.

³⁴⁰ Ibid., pr.5.6. See pr.10.5 above.

³⁴¹ Doc.A/37/114.

³⁴² Doc.A/38/40.p.134. See pr.10.40 above.

³⁴³ Cf.Fawcett, pp.198-199 on ECHR practice.

'Not to be compelled to testify against himself or to confess guilt.' (Art.14(3)(g)).

10.48 The HRC has expressed the view that article 14(3)(g) has been violated in a small number of cases. It is unfortunate that in each of these cases the State party concerned, Uruguay, made no reply to the allegations and the decisions are in effect decisions in default based simply on the allegations of the victim. For example, in Burgos v. Uruguay³⁴⁴ it was asserted by four witnesses that B and several others were forced under threats to sign false statements which were subsequently used in the legal proceedings against them. Considering that the State party had not refuted these allegations the HRC expressed the view that article 14(3)(g) had been violated.³⁴⁵ Presumably, in order to refute such allegations a State party would need to provide a transcript of the trial or the judgement of the court of tribunal to show either that the allegation was considered and rejected or that it had not been raised at all. In Burgos Uruguay had ignored the HRC's requests for copies of any court orders or decisions of relevance.

Both physical and psychological compulsion would seem to be covered. In Estrella v. Uruguay³⁴⁶ E, a concert pianist, was allegedly subject to severe physical and psychological torture, including the threat that his hands would be cut off by an electric saw, in an effort to force him to admit subversive activities. Again the State party made no reply. On the basis of these allegations the HRC expressed the view that article 14(3)(g) had been violated because of the

³⁴⁴ Doc.A/36/40 p.176.

³⁴⁵ Ibid., pr.13.

³⁴⁶ Doc.A/38/40 p.150.

attempts made to compel him to testify against himself and to confess guilt.³⁴⁷

In Conteris v. Uruguay³⁴⁸ the HRC expressed the view that there had been a violation of article 14(3)(g) as C was forced by means of torture to confess guilt. This is interesting because the HRC's view on article 7 refers only to C's severe ill-treatment rather than to torture.³⁴⁹

'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.' (Art.14(4)).

10.49 To date, no views have concerned this provision.³⁵⁰

'Everyone 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)).

10.50 In de Montejo v. Colombia³⁵¹ M was tried and sentenced to one year of imprisonment by a military tribunal on 7 November 1979 for the offence of having

³⁴⁷ Ibid., pr.10.

³⁴⁸ Doc.A/40/40 p.196.

³⁴⁹ Ibid., pr.10. Cf. Italy's reservation to article 9(5) Covenant, Human Rights -Status, n. 154 above, p.38. For the HRC's most recent view on article 14(3)(g) see Cariboni v. Uruguay, Doc.C/31/D/159/1983 (27 Oct 1987).

³⁵⁰ Cf. On permissible restrictions on the right of access to court see the decisions of the EUCT in Golder, Series A, vol.18, p.19 (1975); Winterwerp v. Netherlands, Series A, vol.33, p.29 (1980).

³⁵¹ Doc.A/37/40 p.168.

sold a gun contrary to article 10 of Decree No.1923 of 6 September 1978, also called the Statute of Security. This instrument did not make this particular type of offence (contravencion) subject to review by a higher court. M alleged that the application of the Decree violated, inter alia, article 14(5). The State party contested this allegation,

"It argued that in that provision, the phrase "according to the law" leaves it to national law to determine in which cases and circumstances application may be made to a court of higher instance and that if the meaning of this provision should be differently interpreted, it must be borne in mind that Colombia is experiencing a situation of disturbed public order, within the meaning of article 4(1) of the Covenant, and that consequently the Government may take the measures referred to.

....article 14(5) establishes the general principle of review by a higher tribunal without making such a review mandatory in all possible cases involving a criminal offence since the phrase "according to law" leaves it to national law to determine in which cases and circumstances application may be made to a higher court. It explained that under the legal regime in force in Colombia, criminal offences are divided into two categories, namely delitos and contravenciones and that convictions for all delitos and for almost all contravenciones are subject to review by a higher court".³⁵²

In her additional information and observations the author argued,

"...that article 14(5) of the Covenant provides for dual jurisdiction for judgements in criminal cases and, therefore, the Government of Colombia cannot

³⁵² Ibid., prs.3.2, 7.1.

restrict that guarantee, particularly not by emergency provisions such as the 'Security Statute'.³⁵³

With respect to article 4 the HRC expressed the view that in the specific context of the communication there was no information to show that article 14(5) was derogated from in accordance with article 4 of the Covenant.³⁵⁴ With regard to the argument advanced by the State party on the application of article 14(5).

"The Committee considers 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. It is true that the Spanish text of article 14(5), which provides for the right to review, refers only to "un delito", while the English text refers to a "crime" and the French text refers to "une infraction". Nevertheless the Committee is of the view that the sentence of imprisonment imposed on Mrs. Consuelo Salgar de Montejo, even though for an offence defined as "contravencion" in domestic law, is serious enough, in all the circumstances, to require a review by a higher tribunal as provided for in article 14(5) of the Covenant".³⁵⁵

The decision seems somewhat ambiguous. If the phrase "according to law" refers simply to the domestic modalities of the right to review the question of how

³⁵³ Ibid., pr.8.1.

³⁵⁴ Ibid., pr.10.3. See ch.7 above on article 4.

³⁵⁵ Ibid., pr.10.4.

serious the sentence imposed is in all the circumstances should be irrelevant. If the offence is a criminal one then there must be a right to review. However, the approach indicated by this decision of looking to the seriousness of the offence in all the circumstances suggests perhaps that the HRC may take the view that the exclusion of a right of review for minor offences may not be a violation of article 14(5). This approach would obviously raise difficult problems as to when an offence would be "serious enough" to require review.³⁵⁶ decision in de Montejo might be taken to indicate that where a conviction results in a sentence of imprisonment a review would be required, but would a heavy fine be sufficient, or a restriction on civil and political rights? What if the conviction had resulted in the convicted person losing his or her employment? We have already noted that in its general comment the HRC stated that, "The guarantee is not confined only to the most serious offences".³⁵⁷ That comment could be read to support the above view that minor offences might not necessarily require a right of review or that the guarantee applies in all cases and not just the "most serious".

The general comment also suggests that "domestic modalities" would include such matters as the procedures of appeal, access to and the powers of reviewing tribunals, requirements for appeals and the way in which the procedure before review tribunals takes account of

³⁵⁶ Under the ECHR the EUCT has taken the view that the expression "criminal charge" is an autonomous concept, see *Engel and Others v. Netherlands*, Series A, vol.22 (1976) and n.20 above.

³⁵⁷ See pr.10.21 above, text to n.190.

the fair and public hearing requirements of paragraph 1 of article 14.³⁵⁸

It is also interesting to note that having expressed its view that article 14(5) had been violated the HRC expressed the view that the State party was not only under an obligation to provide effective remedies for the violation but also that it should adjust its laws in order to give effect to the right set forth in article 14(5) of the Covenant.³⁵⁹

10.51 In Pinkey v. Canada³⁶⁰ there had been a two and a half year delay in the production of the transcripts of the trial for the purposes of P's appeal. The HRC observed that,

"...the right under Article 14(3)(c) to be tried without undue delay should be applied in conjunction with the right under Article 14(5) to review by a higher tribunal, and that consequently there was in case a violation of both these provisions taken together".³⁶¹

The HRC could simply have taken the approach, stated in its General Comment, that the right to be tried without undue delay extends to cover the period up to the end of a final appeal.³⁶² This is the approach taken by the E.U.C.T. under article 6(1) of the E.C.H.R.³⁶³ Such an approach would obviate the holding of a violation of article 14(5) which would perhaps be more realistic

³⁵⁸ See G.C.13/21, pr.17, cited in pr.10.21, above text to n.190.

³⁵⁹ Doc.A/37/40 p.168, pr.12.

³⁶⁰ Doc.A/37/40 p.101. See also pr.10.37 above.

³⁶¹ Ibid., pr.22.

³⁶² See pr.10.15, text to n.136.

³⁶³ Note that the ECHR does not itself guarantee a right of appeal, see the Delcourt Case, n.178 above.

since in this case P did in fact have his conviction and sentence reviewed by a higher tribunal.

10.52 Some interesting points concerning article 14(5) arose in Fanali v. Italy.³⁶⁴ F, a retired Air Force General, was convicted and sentenced in a criminal suit based on charges of corruption and abuse of public office in connection with the purchase by the Italian Government of military planes of the type Hercules C130 from the United States of America company, Lockheed. The suit also involved members of the Government for whom the 'Constitutional Court' was the only competent tribunal. Article 134 of the Italian Constitution provided that no appeal is allowed against decisions of the Constitutional Court in as far as they concern the President of the Republic and the Ministers. An 'ordinary' law No.20 of 25 January 1962 extended the constitutional provisions of "no appeal" to "other individuals" sentenced by the Constitutional Court for crimes related to those committed by the President of the Republic or Ministers. F claimed that this aspect of the Italian juridical system violated article 14(5) of the Covenant.

The State party objected to the admissibility of the communication on two grounds; a) under article 5(2)(a) of the O.P.,³⁶⁵ and b) by invoking the reservation to article 14(5) made upon ratification. The reservation reads as follows,

"Article 14, paragraph 5, shall be without prejudice to the application of existing Italian provisions which, in accordance with the Constitution of the Italian Republic, govern the

³⁶⁴ Doc.A/38/40 p.160.

³⁶⁵ On article 5 (2) (a) O.P. see ch.4, prs.4.87-4.99. For the decision of the EUCM see A.8630/79, 8722/79, 8723/79, 8729/79, Crociani et al. v. Italy, decn. of 18 Dec. 1980, 22 D.& R. P.147 (1981).

conduct, at one level only, of proceedings instituted before the Constitutional Court in respect of charges brought against the President of the Republic and its Ministers".³⁶⁶

F contested the applicability of the reservation to his case. He raised objections as to its constitutional validity and argued further that he could not be classed under either of the two categories referred to in the reservation.³⁶⁷ The State party rejected both of these objections. It referred to a decision of the Constitutional Court of 2 July 1977 upholding the Constitutionality of the law of 25 January 1962.

The HRC expressed the view that there was no doubt about the international validity of the reservation despite the alleged irregularity at the domestic level,³⁶⁸ and that it was "outside its competence to pronounce itself on the constitutionality of domestic law".³⁶⁹ On the scope of the reservation the HRC continued,

"...its applicability to the present case depends on the wording of the reservation in its context, where regard must be had to its object and purpose. Since the two parties read it differently, it is for the Committee to decide this dispute".³⁷⁰

This approach is clearly important as it gives the Committee jurisdiction to determine the applicability of a reservation and excludes any idea of a State party

³⁶⁶ Doc.A/38/40 p.160, pr.11.4.

³⁶⁷ Ibid., prs.9.2, 9.3.

³⁶⁸ Ibid., pr.11.6.

³⁶⁹ Ibid., pr.11.8.

³⁷⁰ Ibid., pr.11.6.

reserving to itself the determination of the scope of international supervision.³⁷¹

The Committee then proceeded to consider the question of the applicability of the reservation and accepted the view of the State party as the correct reading because a narrow construction would have been contrary to both its wording and its purpose.³⁷²

F had also argued that his right of appeal was not only confirmed by the inapplicability of the Italian reservation to him, but also by the provisions of article 2(3) of the Covenant to which no reservation had been made. He argued that he could not be deprived of the right to appeal provided for in article 2(3) of the Covenant even if the Italian reservation to article 14(5) were applicable.³⁷³ The HRC rejected this argument,

"The Committee is unable to share this view which seems to overlook the nature of the provisions concerned. It is true that article 2(3) provides generally that persons whose rights and freedoms, as recognized in the Covenant, are violated "shall have an effective remedy". But this general right to a remedy is an accessory one, and cannot be invoked when the purported right to which it is linked is excluded by a reservation, as in the present case. Even had this not been so, the purported right, in the case of article 14(5), consists itself of a remedy (appeal). Thus it is a

³⁷¹ If this submission is correct it would reject a view that States had some power of autointerpretation. Cf. The individual opinion of Judge Lauterpacht in the *Norwegian Loans Case*, *France v. Norway*, I.C.J. Reports (1957) p.9; J.S.Watson, *Autointerpretation, Competence And The Continuing Validity Of Article 2(7) Of The United Nations Charter*, 71 AJIL (1977) pp.60-83.

³⁷² Doc.A/38/40 p.160, pr.11.8.

³⁷³ Ibid., pr.6.3.

form of lex specialis besides which it would have no meaning to apply the general right in article 2(3)".³⁷⁴

It is submitted that this decision is correct but there are two separate arguments here which need to be distinguished. Firstly, the HRC describes the right in article 2(3) as an accessory one. This might be taken to suggest that the HRC would not hold that this article can be the subject of a violation independent of a violation of another substantive right in the Covenant. However, the HRC have found article 2(3) to be violated independently.³⁷⁵ This approach follows that of the EUCT to article 13 ECHR.³⁷⁶ The second argument in terms of article 14(5) being a lex specialis is logically sensible and the same view would probably be taken of other provisions, for example, article 9(5) ICCPR (right to compensation for unlawful arrest or detention). Again the approach of the HRC mirrors the jurisprudence under the ECHR.³⁷⁷

Compensation for miscarriage of justice. (Art. 14(6)).

10.53 In Muhonen v. Finland³⁷⁸ a Military Service Examining Board rejected M's application to do alternative service subject to civil authorities (instead of armed or unarmed service in the armed forces) on the ground that he had not proved that serious moral considerations based on ethical conviction

³⁷⁴ Ibid., pr.13. See also ch.6, pr.6.35 above.

³⁷⁵ See Ex-Philibert v. Zaire, Doc.A/38/40 p.197. See ch.6, pr.6.33 above.

³⁷⁶ On article 13 ECHR see Fawcett pp.289-294; Van Dijk and Van Hoof, pp.379-386.

³⁷⁷ Ibid.

³⁷⁸ Doc.A/40/40 p.164.

prevented him from doing armed or unarmed military service.³⁷⁹ That decision was confirmed twice on appeal by the Ministry of Justice. M refused to perform military service when called up. He was convicted for this refusal and sentenced to eleven months imprisonment. That verdict was confirmed by a higher court. While serving that sentence M applied for a new hearing before the Examining Board. The Board acceded to this request and found in favour of M. Subsequently a Presidential pardon was requested and granted and M was released. The second decision of the Examining Board was considered by the HRC to have dealt with M's allegation of a violation of article 18(1) (freedom of thought, conscience and religion). Ex officio the HRC observed that the facts of the case might raise an issue under article 14(6) which should be considered. The State party made submissions on this question but M did not.³⁸⁰

The HRC expressed the view that,

"Such a right to compensation may arise in relation to criminal proceedings if either the conviction of a person has been reversed or if he or she "has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice".³⁸¹

On the facts of the case the HRC took the view that M's conviction had never been set aside by a later judicial decision and that his pardon had been motivated by considerations of equity rather than that it had been established that his conviction rested on a miscarriage

³⁷⁹ Ibid., prs.1-2.1.

³⁸⁰ Ibid., prs.3-9.

³⁸¹ Ibid., pr.11.2.

of justice.³⁸² Accordingly, there had been no violation of article 14(6) because M had no right to compensation. The HRC's view makes it clear that the requirement of a miscarriage of justice is a strict one. It is not sufficient that the decision affecting the alleged victim is altered.

'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.'
(Art. 14(7)).

10.54 In Schweizer v. Uruguay³⁸³ S alleged that article 14(7) had been violated because he had been charged anew before the competent military tribunal for the same acts which had already been investigated by an ordinary judge between 1971 and 1974 with the addition of one new charge. The new indictment against S was issued in March 1980 and sentence was pronounced in September 1980. The HRC expressed the view that,

"...based on the authors' submission, the criminal proceedings initiated against David Campora (s) on 1971 were not formally concluded at first instance until the military tribunal pronounced its judgement on 10 September 1980. Article 14(7), however, is only violated if a person is tried again for an offence for which he has already been finally convicted or acquitted. This does not appear to have been so in the present case. Nevertheless, the fact that the Uruguayan authorities took almost a decade until the judgement at first instance was handed down indicates a serious malfunctioning of the judicial

³⁸² Ibid., prs.11.2-11.3.

³⁸³ Doc.A/38/40 p.117.

system contrary to article 14(3)(c) of the Covenant".³⁸⁴

Thus for a State party to reject an alleged violation of article 14(7) on the ground that the original proceedings are still continuing may, in the circumstances, amount to an admission that those original proceedings have not been conducted without undue delay.

10.55 In Nieto v. Uruguay³⁸⁵ N had been tried in 1972 and sentenced to ten years of imprisonment by the civil judiciary (as distinct from the military judiciary) for a series of offences. In December 1980, shortly before he was due for release, new criminal proceedings were started against N allegedly based on the same facts as those for which he had been tried and sentenced by the civil judiciary.³⁸⁶ The state party rejected this allegation on the ground that, "The proceedings concerned were brought because of the emergence of fresh evidence regarding the commission of offences" of "robbery" and "assault on the safety of transport".³⁸⁷ The State party's submission added that, "The fact that these offences had been investigated by the police authorities in no way signified that there was any repetition of proceedings; no proceedings had been instituted on that account, since the authorities did not possess the evidence now available".³⁸⁸

³⁸⁴ Ibid., pr.18.2.

³⁸⁵ Ibid., Doc.A/38/40 p.201.

³⁸⁶ It has been alleged in communications to the HRC that the institution of new proceedings towards the end of a term of imprisonment is common practice in Uruguay, see e.g. Nieto, Ibid., pr.6.

³⁸⁷ Ibid., pr.7.

³⁸⁸ Ibid.

As of 25 July 1983, the date of its final views under article 5(4) O.P, the HRC had received no information as to the outcome of those proceedings or that they had been concluded. In its views the HRC observed that,

"..the State party has not specified what the new evidence was which prompted the Uruguayan authorities to initiate new proceedings. In the absence of information as to the outcome of those proceedings, the Committee makes no finding on the question of a violation of article 14(7), but is of the view that the facts indicate a failure to comply with the requirements of article 14(3)(c) of the Covenant that an accused person should be tried 'without undue delay' ".³⁸⁹

The HRC's view implies that if a State party concludes proceedings against an accused which allegedly violate article 14(7) of the Covenant it will be obliged to specify the new evidence which constituted the basis of those proceedings. The initiation of proceedings by a State party a considerable period after the alleged events (in the case of Nieto some eight to nine years after) might well be thought to raise some acute difficulties in the securing of a fair hearing for the accused person, assuming that there is a residual aspect to the requirement of a "fair hearing" beyond the specific guarantees in article 14.³⁹⁰ It is interesting to consider whether the HRC could raise such a point ex officio and then express a view upon it, and whether they would be willing to examine the evidential problems that would inevitably be involved. The HRC might take

³⁸⁹ Ibid., pr.10.5.

³⁹⁰ See text to and n.237 above. The recent trials of war criminals raises this problem in an acute form.

the view that they could only examine this matter in respect of a trial that has in fact taken place.

10.56 In Cabreira v. Uruguay³⁹¹ it was alleged on C's behalf that a judgement of 15 February 1977 contained grave technical defects including acts for which he was allegedly punished twice. The State party informed the HRC that the Supreme Military Tribunal had sentenced C to twelve years of imprisonment and in addition to one to three years of "security measures" basically for the same offences with aggravating circumstances. In reply it was alleged that the imposition of precautionary detention measures (medidas de seguridad eliminativas) was illegal and that such measures merely served the purpose of preventing any proceedings aimed at obtaining release on parole. The submission added that military justice had often imposed such measures when dealing with political offences. No further information was received from the State party on this point. In its statement of considerations taken into account the HRC observed that,

"As to the alleged technical defects in the judgement at second instance, the Committee considers that due to lack of specific information provided by the author it cannot make a finding on the alleged violations of articles 2(3) and 14 of the Covenant".³⁹²

This view is consistent with the HRC's general approach in requiring specific information with respect to alleged violations. It might be suggested that the HRC could inform the alleged victim that unless more specific information is forthcoming in respect of any particular provision of the Covenant they will be

³⁹¹ Doc.A/38/40 p.209.

³⁹² Ibid., pr.10.3.

obliged to refrain from making any finding with regard to that particular provision.

10.57 In A.P. v. Italy,³⁹³ A.P. alleged that article 14(7) had been violated because he was prosecuted in Italy for the same currency offence for which he had already been convicted and sentenced in Switzerland. The State party rejected A.P.'s contention that, "article 14, paragraph 7, of the Covenant protects the principle of "international ne bis in idem"". In the opinion of the State party, article 14, paragraph 7, must be understood as referring exclusively to the relationships between judicial decisions of a single State and not between those of different States".³⁹⁴ The HRC accepted the view of Italy and declared the communication inadmissible,

"The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State".³⁹⁵

The HRC's decision seems to be in accordance with the literal wording of article 14(7).

³⁹³ Doc.C/31/D/204/1986 (2 Nov 1987). The decision will be published in the HRC's Annual Report for 1988 (A/43/40).

³⁹⁴ Ibid., pr.5.3. The State party also argued that A.P. was tried for two different offences in Switzerland and Italy, *ibid.*, pr.5.1.

³⁹⁵ Ibid., pr.7.3.

ARTICLE 14: APPRAISAL.

10.58 The consideration under the reporting process of the complex of rights in article 14 cries out for a consistent and systematic approach. The range and depth of the Committee's considerations of article 14 has undoubtedly been impressive. Members have adopted a very positive approach and subjected national reports to searching dissection and analysis. The extensive repertoire of questions and comments has facilitated the building up of a substantial body of information on the relevant laws and practices of States parties. Having collected most of the basic information the HRC's analysis increasingly focuses on particular problem areas, difficulties of implementation and new developments in the State concerned. During its consideration of second periodic reports the HRC has already had occasion to observe that laws and practices identified as contrary to article 14 during the consideration of initial or supplementary reports have not been repealed or removed.³⁹⁶

The HRC's considerations of article 14 again suggests that part of the usefulness of the article 40 procedure lies in its flexibility. Members can put to State representatives appropriate matters from the standard repertoire of questions and comments detailed above, look closely at particular features of the different legal regimes that come before them, for example, the operation of military or revolutionary tribunals,³⁹⁷ the denial of, or restricted access to, counsel. Members can also draw on the difficulties or inadequacies of implementation revealed through examination of individual communications under the Optional Protocol which can indicate both general and

³⁹⁶ See e.g. pr.10.21 above (on Iraq).

³⁹⁷ See pr.10.7 above.

specific defects in the operation of civil and criminal justice systems. Inevitably the two aspects of the HRC's work interrelates. Moreover, the experience of other human rights institutions can be put to the same use. For example, the practice under the ECHR may well have inspired a number of questions and comments put to State representatives.³⁹⁸

10.59 The HRC's general comment on article 14 has been analysed and, while some criticisms of it have been made, it represents a useful addition to the HRC's jurisprudence. Apart from reflecting the HRC's experience to date it states its interpretation of some of the key elements of article 14 and a response to the interpretations advanced by States parties.³⁹⁹ The general comment also now has an important input back into the reporting process. It is now common for the 'list of issues' sent to State representatives prior to the consideration of second periodic reports, or the additional questions put to State representatives, to request a response to the general comment on article 14 or to comment on any observations it has already made under article 40(5) ICCPR.⁴⁰⁰ To the extent that State representatives respond so the dialogue between the HRC and the States parties is strengthened and developed.⁴⁰¹ This survey of the HRC's considerations of article 14 has revealed some impressive work. A solid foundation has been established on which further work and development can be based. If States parties respond in a

³⁹⁸ See e.g. pr.10.15 above (on FRG).

³⁹⁹ See e.g. pr.10.23 above (on article 14(7)).

⁴⁰⁰ See e.g. Doc.A/41/40 prs.67 (Luxembourg); 129 (Sweden).

⁴⁰¹ See e.g. the replies in A/40/40 pr.492 (representative of Spain); Ibid., pr.562 (U.K. representative).

positive and constructive manner, as most have done to date, the dialogue between them and the HRC can play a constructive role in securing the implementation of the rights in article 14.

10.60 Obviously the Optional Protocol is in its early stages of development but already the HRC has dealt with a number of important aspects of article 14 and made some important pronouncements on the scope and meaning of some of its terms.⁴⁰² The HRC'S views are more explicitly interpretational than the questions and comments put under the reporting process and, therefore, provide a clearer guide to the content of article 14. That jurisprudence is complemented by the practice of the HRC under the article 40 process, including its general comments, which we have examined above. As noted the two aspects of the HRC's work interrelate.⁴⁰³ Similarly comparisons have been made to the more highly developed jurisprudence under the ECHR which can provide valuable and instructive comparisons for the HRC. The accommodation of various legal systems of civil and criminal justice inevitably poses a challenge to the consistent implementation and application of the ICCPR.⁴⁰⁴ The practice under article 6 ECHR would suggest that a great many key issues may potentially be raised under article 14 including the margin of discretion that will be afforded to States who rely on the limitations in article 14(1) to limit public hearings or public judgements, whether article 14 guarantees any right of access to courts or

⁴⁰² See e.g., the important decision in *Y.L. v. Canada*, pr.10.26-10.26.1 above.

⁴⁰³ See pr.10.58 above.

⁴⁰⁴ Obviously this process of accommodation is easier, though still difficult, under the ECHR in the more homogenous Council of Europe.

tribunals,⁴⁰⁵ the relationship between article 14 and article 9 on the liberty and security of the person.⁴⁰⁶ Although it will take longer for a clear picture to emerge it seems fair to comment that at the general level the HRC seems to have adopted a similar approach to the EUCT in looking for the practical and "effective" implementation of the rights in article 14.⁴⁰⁷ It has certainly not been content simply to note applicable laws and regulations. Similarly its approach of spelling out what a States parties in violation of article 14 must do to remedy the situation, for example, affording the victim a fair trial, or compensation, is to be commended.

10.61 Whether the views of the HRC have actually produced any practical results is more problematic. No State has actually informed the HRC that its views under article 14 have been followed as a direct consequence thereof. When the individuals concerned have been released this does not necessarily seem to have been a result of the HRC's views although they may have been a limited factor.⁴⁰⁸ One must also bear in mind the limited number of States parties to the Optional Protocol and that the vast majority of communications have concerned Uruguay during a period when the Uruguayan authorities were not co-operating with the HRC. The result is that much of the HRC's jurisprudence

⁴⁰⁵ See the Golder Case, EUCT, Series A, vol.18 (1975); Kaplan Case, EUCM, n.223 above.

⁴⁰⁶ Cf. Clovis C.Morrisson, The Dynamics Of Development In The European Human Rights Convention System, ch.6 (1981).

⁴⁰⁷ See the decisions of the EUCT in Artico v. Italy, Series A, vol.37 (1980); H v. Belgium, Series A, vol.147 (1987) on effectively avail point.

⁴⁰⁸ See generally ch.4, prs.4.127-4.133 above.

under article 14, as under other articles, is largely developed by default.

Article 19.¹11.1

(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 right 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:

¹ For similar provisions see art.19 UDHR, art.10 ECHR, art.IV ADRD, art.13 AMR, art.9 AFR. The annotated drafting history of article 19 can be found in Docs. A/2929, ch.vi, prs.119-138 (1954); A/5000, prs.5-35 (1961); Bossuyt, 'Guide', pp.373-401. See generally, U.N. Action In The Field Of Human Rights, pp.169-182; K.J.Partsch, Freedom Of Conscience And Expression, And Political Freedoms, in Henkin (ed.), The International Bill Of Rights - The ICCPR, (1981), p.210 at pp.216-226; P.Sieghart, The International Law Of Human Rights, pp.327-337; L.J.Macfarlane, The Theory And Practice Of Human Rights, ch.4; E.Barendt, Freedom Of Speech, (1985); J.P. Humphrey, Political And Related Rights, in T.Meron, (ed.), Human Rights In International Law - Legal And Policy Issues, p.170 at pp.181-188; G.Malinverni, Freedom Of Information In The European Convention On Human Rights And In The International Covenant On Civil And Political Rights, 4 HRLJ (1983) pp.443-460; Report of The VIth International Colloquy On The European Convention On Human Rights, Council of Europe Doc.H/Coll (85) 1-17; Article 19, Information, Freedom And Censorship, (1988).

On limitation provisions see A.Kiss, Permissible Limitations On Rights, in Henkin, (ed.), *ibid*, pp.229-310; O.Garibaldi, General Limitations On Human Rights: The Principle Of Legality, 17 Harv.ILJ. (1976) pp.503-557; E.I.A.Daes, The Individual's Duties To The Community And The Limitations On Human Rights And Freedoms Under Article 29 Of The UDHR, Doc.E/CN.4/Sub.2/432/Rev.2, chs.II and III, (1983); Siracusa Principles, ch.7, n.1 above.

- (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.

Introduction.

11.2 Freedom of opinion and expression have been an important concerns at the United Nations since its inception.² In 1948 the U.N. convened a Conference on Freedom Of Expression which prepared, inter alia, a draft Convention on Freedom Of Expression.³ However, despite the consistent attention given to freedom of expression at the U.N. it is an area where the U.N. has achieved very little.⁴ In recent years, and principally through the work of the United Nations Scientific And Cultural Organisation (UNESCO), the focus of the United Nations work on freedom of expression has shifted to the demands for a new world information and communication order (NWICO).⁵ The demands for a NWICO have principally

² See U.N.Action, n.1 above; J.F.Green, The United Nations And Human Rights, pp.76-88, (1956). See G.A. Resn.59(I), (Dec.14, 1946).

³ U.N. Conference On Freedom Of Information, Final Act, Doc.E/Conf.6/79 (1948). See Humphrey, ch.1, n.1 above (1984), pp.50-53; The Conference adopted a draft text which became the Convention On The International Right of Correction (1952), 453 UNTS 191.

⁴ See Green, *ibid.*, p.77.

⁵ See L.R.Sussman, Freedom Of The Press: Problems In Restructuring The Flow Of International News, in R.D.Gastil, Freedom In The World: Political Rights And Civil Liberties, pp.53-98 (1980); Many Voices, One World - Toward A New, More Just And More Efficient World Information And Communication Order, Report Of The International Commission For The Study Of Communication Problems, MacBride, (Chairman), UNESCO, (1980); K.Venkata Raman, Towards A New World Information And Communication Order: Problems Of Access And Cultural Development, in R.St.J.MacDonald and D.M.Johnston, (eds.), ch.1, n.7 above, pp.1027-1068; K.Nordenstreng, The Mass Media Declaration Of UNESCO, (1984).

come from the Third World States and are related to the more general demands for a new world economic order (NIEO).⁶ The initiatives from UNESCO have provoked a strong reaction from Western States which have viewed it as an attempt to justify increased State controls and censorship on the press and other information media.⁷ Most recently the United Nations has established a new Committee On Information.⁸ Within the context of the United Nations work on freedom of expression, the work of the HRC was going to provide a useful guide to the possibilities of further progress in respect for this right.

Article 19 Under The Reporting Process.

11.3 Article 19 is not covered by the non-derogation provision in article 4(2).⁹ It has been the subject of a general comment under article 40(4).¹⁰ In the consideration of State reports its relationship to articles 18,¹¹ 20,¹² 21,¹³ and 25¹⁴ has been noted.

⁶ For literature on the NIEO see ch.5, pr.5.4, n.10 above.

⁷ Demands within UNESCO for a NWICO were partly responsible for the withdrawal from UNESCO of the U.S. and the U.K.

⁸ See G.A.Resn.33/115C, and U.N.Doc.A/33/45 (1978). While recognizing the central role of UNESCO the Committee was assigned a degree of primacy within the U.N. system.

⁹ On derogation see ch.7 above. See SR 356 pr.18 Tarnopolsky on Uruguay).

¹⁰ G.C.10 (19), adopted by the HRC at its 461st meeting on 27 July 1983, Doc.A/38/40 pp.109. Also in Doc.CCPR/ C/21/Add.2. For the HRC's discussion see SR 449, 457 and 461.

¹¹ Concerning the right to freedom of thought, conscience and religion. See e.g. SR 742 pr.68 (Aguilar on Romania) concerning the alleged destruction and poor

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Article 19(1).

11.4 Members of the HRC have noted the clear difference between paragraphs 1 and 2 of article 19, the former being absolute, the latter being open to limited restrictions. The preparatory work on the Covenant supports the view that freedom of opinion and expression are separate freedoms.¹⁵ Apart from this, however, the HRC have had very little of substance to say on paragraph 1. The Chairman of the HRC pointed to the obvious reason for this during discussion of the draft general comment on article 19,

"It should however be pointed out that absolute protection for holding opinions ended when they were aired or manifested. At that point restrictions might start. In normal circumstances, the phraseology in paragraph 1 meant very little. Holding an opinion could not be interfered with if no one knew about it. Some phrase should perhaps be added to make clear what was being protected. Perhaps it was the right freely to form opinions without their being imposed either directly or indirectly, publicly or in private".¹⁶

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distribution of religious books.

¹² Concerning war propaganda and the advocacy of national, racial or religious hatred. Article 20 is dealt within ch.12 below. Partsch, n.1 above, comments that article 20, "is practically a fourth paragraph to Article 19", p.227.

¹³ Concerning the right to peaceful assembly..

¹⁴ Concerning the political freedoms of citizens to take part in the conduct of public affairs, to vote, to be elected and to have access to the public service.

¹⁵ See Doc.A/2929, n.1 above, ch.vi, pr.120.

¹⁶ SR 449 pr.45. For the HRC's discussion see n.10 above. Cf.Barendt, n.1 above, on the right to silence as an aspect of freedom of speech, pp.63-67. The judgements
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Partsch has commented that,

"During the discussions of this article, it was suggested that paragraph 1 should bar interference only "by a public authority". That suggestion was rejected. An individual has the right to freedom of opinion without interference by private parties as well, and the State is obliged to ensure that freedom. Thus, the danger that the State might encourage such interference from private or so-called private sources is eliminated. It is doubtful, however, whether the complex problem of protecting a persons opinion against interference by other individuals can be solved in this global and absolute manner".¹⁷

In its general comment on article 19 the HRC stated that,

"Paragraph 1 requires protection of "the right to hold opinions without interference". This is a right to which the Covenant permits no exception or restriction. The Committee would welcome information from States parties concerning paragraph 1".¹⁸

The comment is not helpful to States parties. There is no indication of the kind of information it would welcome from States parties. Allegations of mind control techniques, and brainwashing and re-education centres in certain parts of the world suggest obvious areas of

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of the EUCT in Glasenapp and Kosiek, n.48 below, could have been considered in this context as requiring a positive expression of a particular opinion.

¹⁷ Partsch, n.1 above, pp.217-218 (footnotes omitted). In fact the expression without interference "by governmental action" was not voted upon, see Bossuyt, n.1 above, pp.378-379.

¹⁸ G.C.10 (19), n.10 above, pr.1. See also SR 457 pr.21 (Tarnopolsky).

potential concern on which the HRC could seek specific information.¹⁹

Article 19 (2), (3).

11.5 Almost all of the HRC's attention has been focused on paragraphs 2 and 3 of article 19. The starting point has again been the detailed consideration of the Constitutional and legal bases of the right to freedom of expression and the limitations and restrictions thereon. The approach of members has been very practically orientated, their comments rarely being abstract or theoretical. Equally members have consistently indicated their views on the central importance of freedom of expression and how it should operate in practice.²⁰ It is interesting to note, however, that the following proposed sentence was not included in the general comment on article 19, "This is a right the effective enjoyment of which is essential to enable individuals to ensure for themselves the enjoyment of other rights protected in the Covenant".²¹

¹⁹ See K.Glasser and S.T.Possony, Victims of Politics, (1978).

²⁰ "...Article 19 of the Covenant had a central function in terms of the realization of a whole range of other rights, the development of individual countries, and the successful pursuit of international relations", SR 784 pr.38 (Mommersteeg on Rwanda). Cf. The EUCT has repeatedly stated the fundamental importance in a democratic society of freedom of expression, Handyside v. U.K., EUCT, Series A, vol.24 (1976); Sunday Times v. U.K., EUCT, Series A, vol.30 (1979); Muller and Others v. Switzerland, n.73 below; Lingens v. Austria, EUCT, Series A, vol.103 (1986). For a comment on the last of these between the opinion of the EUCM and the judgement of the EUCT see D.Elder, Freedom Of Expression And The Approach To Defamation: The American Approach To The Problems Raised By The Lingens Case, 35 ICLQ (1986) pp.891-924.

²¹ SR 457 pr.24 (proposed by Sir Vincent-Evans). Cf. The famous comment of Justice Cardoza in Palko v. (Footnote Continued)

The sentence was opposed by the Eastern European members on the basis that it purported to establish a hierarchy of rights which was not to be found in the Covenant,²² introduced a philosophical aspect, and was too "one-sided" in that it ignored the problem of "economic power".²³ The views expressed within the HRC during discussion of the general comment were reminiscent of the debates during the drafting of the Covenant.²⁴ The conclusion to be drawn from the failure to include the proposed sentence is perhaps that the approach of the HRC is that although freedom of expression is regarded as important, it is not accorded the pre-eminence given to it under American constitutional law.²⁵

11.6 The general approach of members has been to examine, comment and request clarification in respect of the different aspects of freedom of expression revealed in the State reports. This has involved, for example, matters such as general and specific banning or censorship,²⁶ registration requirements,²⁷ [for what]

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Connecticut, describing freedom of speech as, "...the matrix, the indispensable condition of nearly every other form of freedom", 302 U.S. 319, 327 (1927).

²² Cf. The HRC's stress on the importance of self-determination in its general comment on article 1 (self-determination), in ch.5, pr.5.3 above.

²³ See the discussion in SR 457 prs.24-28 and SR 461 prs.41-49.

²⁴ See n.1 above.

²⁵ See Barendt, n.1 above. See also B.Markesinis, *The Right To Freedom Of Speech Versus The Right To Be Let Alone*, [1986] P.L. pp.67-82.

²⁶ See SR 26 pr.10 (Vincent-Evans on Syria); SR 715 pr.22 (Mommersteeg on Tunisia). For a recent ECHR application concerning censorship see A.12381/86 v. U.K., 10 EHRR 158.

²⁷ See SR 98 pr.59 (Vincent-Evans on Yugoslavia); SR 715 pr.27 (Higgins on Tunisia).

governmental control and direction in its various forms,²⁸ limitations applicable to particular groups, for example, armed forces, civil servants,²⁹ prior restraints³⁰ or subsequent penal responsibility for publications,³¹ rights of reply or correction,³² the applicable limitations embodied in the criminal law or penal codes for offences³³ such as blasphemy,³⁴

²⁸ SR 89 pr.41 (Esperson on Iran).

²⁹ SR 321 pr.27 (Movchan on Netherlands). Cf. Glasenapp and Kosiek cases on West German civil servants, n.48 below.

³⁰ Cf. Article 13 (2) AMR prohibits prior censorship.

³¹ SR 54 pr.36 (Tarnopolsky on Denmark); SR 84 pr.15 (Opsahl on Madagascar).

³² See the Convention noted in n.3 above. See Doc.A/2929 pr.138.

³³ "Concerning article 19,...it appeared that many Czechoslovak citizens had been prosecuted and imprisoned simply for having exercised or attempted to exercise their right to freedom of speech, and had been convicted under articles 98, 100, 102, 103 and 112 of the Penal Code, relating to subversion, instigation to violence, violation of the laws of the Republic and anti-State activities. In her opinion, those articles of the Penal Code, defined freedom of expression too restrictively and were therefore not compatible with the provisions of the Covenant. Thus she doubted that persons could be said not to have been arrested for having expressed their opinions but for having broken the law; that type of argument lost all validity if according to the law

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sedition,³⁵ subversive propaganda,³⁶ anti-State or anti-ideological propaganda, and the effective remedies demanded by article 2(3) to an individual who claims that his rights under article 19 have been violated.³⁷

11.6.1 Varied domestic provisions have attracted the attentions and criticisms of HRC members. The Yugoslavian State representative stated before the HRC that,

"The freedom of the press and other media of information and public expression is known, at least normatively, as a more or less universal political right in contemporary constitutions. In the Constitution of the S.F.R.Y. it is dealt with separately and enriched with some new elements which, in the aggregate, enable the integration and the supercession of the classical freedom of the press in its numerous aspects by a new right of the citizen and the working man to be informed".³⁸

Members of the HRC expressed concern about such a specifically ideological conception of freedom of expression.³⁹ This concern with specific ideological conceptions of freedom of expression has been a feature

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any criticism of the state or the Government was an offence", SR 683 pr.3. Reply, *ibid.*, pr. 13.

³⁴ SR 161 pr.23 (Bouzirri on Belize, then a U.K. Dependency). Cf. A.8710/79, *Gay News Ltd. And Lemon v. U.K.*, 5 EHRR 123.

³⁵ *Ibid.*; SR 402 pr.6 (Tarnopolsky on Australia).

³⁶ See e.g. SR 222 pr.32 (Tomuschat on Colombia).

³⁷ On article 2 see ch.6 above.

³⁸ Doc.CCPR/C/1/Add.23, p.28 (1978) citing Article 168 of the Constitution of the S.F.R.Y.

³⁹ See the comments at SR 98 pr.41 (Mora-Rojas), 59 (Vincent-Evans), 62, 71 (Tomuschat), SR 99 pr.25 (Tarnopolsky). Reply at SR 102 prs.45-46.

of the HRC's practice. Similar questions and comments to those made to the Yugoslavian State representative were made, for example, to representatives from the USSR,⁴⁰ Romania,⁴¹ Hungary,⁴² Syria.⁴³ The following comments of Mr. Tomuschat concerning the Ukrainian SSR are typical of the emphasis on this issue, particularly by the western members of the HRC,

"In his view, freedom of opinion and speech could be conceived in very simple terms. It gave the individual the right to say what he thought was the truth. He would not agree, therefore, that freedom of expression should be subject to the inherent limitation of having to contribute to strengthening any general State philosophy, so that views other than socialist ones would ab initio be outside the scope of article 19. How could the prohibition of political discrimination be respected if specific substantive opinion was discriminated against. More clarification seemed required on the scope of the provisions of the Penal Code which made anti-Soviet agitation and propaganda a punishable offence. What was meant by that formula and how was interpreted and applied?".⁴⁴

⁴⁰ See SR 108 pr.39 (Prado-Vallejo), prs.56-58 (Vincent-Evans), SR 109 pr.24 (Opsahl), 63 (Tomuschat). Reply at SR 112 prs.34, 37.

⁴¹ See SR 136 pr.2 (Bouziri), 53 (Tarnopolsky), SR 137 pr.14 (Tomuschat). Reply at SR 140 pr.28. SR 742 prs.63-64 (Mommersteeg).

⁴² See SR 32 pr.45 (Vincent-Evans); reply at SR 32 pr.67. SR 687 pr.35 (N'Diaye); reply at *ibid.*, pr.41.

⁴³ See SR 26 pr.10 (Vincent-Evans). See Art 38 of Constitution cited in Doc.CCPR/C/1/Rev.1, pr.13. See Partsch, n.1 above, pp.222-226.

⁴⁴ SR 155 pr.19 The Ukrainian SSR Report is Doc.CCPR/C 1/Add.34.

The Iranian representative (pre-revolution) was questioned on the prohibition of discussion of the Constitution, the imperial Monarchy and the Revolution of the Shah and the people.⁴⁵ During consideration of the report of Sweden concern was expressed in respect of the system for registration on account of political opinion.⁴⁶ The representatives from Czechoslovakia were questioned about the "Charter 77" document.⁴⁷ During consideration of the report of the Federal Republic of Germany Mr.Movchan raised the question of the application of Berufsverbot (occupational bans).⁴⁸

11.7 Where domestic legal provisions have declared the right to freedom of expression without any express ideological restriction the HRC members have closely examined and requested definition, clarification and explanation of the applicable grounds of limitation.⁴⁹

⁴⁵ SR 89 pr.26 (Opsahl).

⁴⁶ SR 52 pr.59 (Vincent-Evans). Doc.CCPR/C/1/Add.9, p.26 (1977). See also the additional replies in Doc.CCPR/C/1/Add.42, pp.24-26 (1979). Cf. Leander v. Sweden, EUCT, Series A, vol.116 (1987).

⁴⁷ SR 65 pr.27 (Esperson), 47 (Tarnopolsky).

⁴⁸ "He wondered whether the application of Berufsverbot for the expression of one's views was consistent with liberal democracy. He also wanted to know what kinds of convictions - socialist, communist, Nazi - were used to justify Berufsverbot and what kinds of posts and professions it covered", SR 94 pr.6, reply at SR 96 prs.14-16. See Anon., ILO Inquiry's Findings On Discrimination In Public Employment In FRG, 38 Rev.ICJ (1987) pp.26-30; Glasenapp v. FRG, EUCT, Series A, vol.104, (1986); Kosiek v. FRG, EUCT, Series A, vol.105, (1986).

⁴⁹ "...any restriction on freedom of opinion required convincing proof that a clear and present danger could not otherwise be overcome. It was reasonable to ban any incitement to use violent means of overthrowing the Government, but how could peaceful criticism of Government policies or the objective exposure of governmental deficiencies amount to a threat

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Such limitations have been described as, "the defence of the national interests and social service" (Ecuador),⁴⁹ "offensive to public feelings and interests of the community as a whole" (United Kingdom),⁵⁰ "the security of the realm, the economic well-being of people" (Sweden),⁵¹ "the national economy" (Nicaragua).⁵²

11.8 A common example taken by HRC members as a guide to the practical application of article 19 has concerned the possibility of criticising the existing governmental regime at all, or only in an institutionalized manner, for example, through the 'Party' in a one party State.⁵³ Many members of the HRC have stressed the importance of allowing peaceful dissent.⁵⁴ For example, Sir Vincent Evans commented during consideration of the report of the USSR,

"Article 19 of the Covenant guaranteed the right to hold opinions without interference and the right to freedom of expression, and laid down that they should be subject to only such restrictions as were "necessary". Those freedoms which were clearly

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which could justify repressive sanctions?", SR 128 pr.21 (Tomuschat on Chile).

⁴⁹ SR 31 pr.25 (Mora-Rojas), 36 (Esperson).

⁵⁰ SR 69 pr.39 (Tarnopolsky on U.K.). Key developments in this area since the consideration of the second U.K. periodic report have been the Public Order Act 1986, the Education Act No.2 (1986) and the s.28 of the Local Government Act 1988.

⁵¹ SR 52 pr.9 (Tarnopolsky), 43 (Tomuschat), 58-59 (Vincent-Evans). Cf. Leander v. Sweden, EUCT, n.46 above.

⁵² SR 421 pr.63 (Bouziri), reply at SR 429 prs.44-53.

⁵³ See e.g. SR 116 pr.49 (Opsahl on Byelorussian SSR). SR 272 pr.30 (Dieye on Kenya). See generally, International Commission of Jurists, Human Rights In A One Party State, (1978).

⁵⁴ See e.g. SR 784 pr.40 (Mommersteeg on Rwanda).

inherent in the dignity and worth of the human being and were essential to the full development of his personality, were among the most important rights in a democratic society, applying across the whole range of human experience and not least in the political field. No regime was perfect but, in any healthy society, the individual should be free to express his views, offer his criticism and canvas his ideas for change and improvement, provided he did not seek to propagate his ideas by violent means. Yet it was well known that there had been cases in the Soviet Union in which severe measures had been taken against persons who sought to express their views, propagate their ideas and promote their rights by peaceful means. The cases had given rise to much publicity in many countries and people did not see how they could be reconciled with the Covenant.

He understood that the limitations on the freedoms guaranteed under article 50 of the Soviet Constitution were expressed in the Soviet Criminal Code in terms of anti-Soviet agitation and propaganda and defamation of the State and socialist system. Laws couched in such terms could be so interpreted and applied as to produce a seemingly low threshold, by comparison with other countries, in determining what was permissible by way of political comment and propagation of political ideas. He asked whether such limitations could really be said to be necessary for the protection of national security and public order in a great and powerful State such as the Soviet Union. Was the State not being unduly sensitive to criticism and suggestions for change?".⁵⁵

⁵⁵ SR 108 prs.56-57. Reply at SR 112 pr.34. See
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Members of the HRC have attached great significance to how legal restrictions and limitations operate in practice. How and by whom were they interpreted and enforced?⁵⁶ How was their discriminatory application avoided?⁵⁷ State representatives are often requested to provide statistical information on the availability and circulation of books, newspapers, magazines and other publications.⁵⁸ Other information commonly sought concerns the operation of licensing regimes,⁵⁹ direct or indirect support or control or authorization of the press,⁶⁰ the languages of publications, the variety of

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also SR 98 pr.62 (Tomuschat on Yugoslavia); SR 272 pr.16 (Lallah on Kenya).

⁵⁶ See SR 28 pr.51 (Tarnopolsky on Tunisia), SR 724 pr.7 (Dimitrijevic on Senegal).

⁵⁷ See SR 200 pr.8 (Tomuschat on Iran), and text to n.44 above (Tomuschat).

⁵⁸ See SR 353 pr.27 (Tomuschat on Guyana).

⁵⁹ SR 772 pr.40. Note that there is no express reference to licensing in the Covenant. See Doc.A/2929, ch.vi, prs.126, 132, which note that, "during the debate the term "public order" was interpreted as covering the rights of a State to license media of information and to regulate the importation of material"; Doc.A/5000, pr.23. Cf. Article 10 ECHR. Before the HRC the Danish representative stated that the ECHR could not be understood as excluding in any way a public television monopoly as such and that, in his opinion, that interpretation also applied to the Covenant, SR 780 prs.34-35. For the leading ECHR applications see A.6452/74, Saachi v. Italy, 5 D.& R. p.43; A.9297/81, X.Association v. Sweden, 28 D.& R. p.204.

⁶⁰ See e.g. SR 89 pr.41 (Esperson on Iran), SR 282 pr.51 (Tomuschat on Tanzania). Cf. The 5th Advisory Opinion Of The IACT, No.OC-5/85, on Compulsory

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cultural performances,⁶¹ the possibility of subscribing to foreign newspapers and periodicals,⁶² restrictions on the activities of foreign correspondents or dispatches from foreign press agencies.⁶³ During consideration of the report of Guyana Professor Tomuschat raised the question of indirect practical limitations on freedom of expression as a result of difficulties in obtaining newsprint.⁶⁴ Such information provides invaluable indications of the practical State of freedom of expression in a given country.

11.9 The HRC's General Comment on article 19 merely restated most of paragraph 2 and added,

"Not all States parties have provided information concerning all aspects of the freedom of expression. For instance, little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3.

Many State reports confine themselves to mentioning that freedom of expression is guaranteed under the

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Membership In An Association Prescribed By Law For The Practice Of Journalism, 7 HRLJ (1986) pp.74-106.

⁶¹ See generally I.Szabo, Cultural Rights, (1974).

⁶² See e.g. SR 65 pr.9 (Tomuschat on Czechoslovakia). It is interesting to note the comments of the State representative from Zambia, "There was no ban on the receipt or purchase of foreign newspapers and magazines, though economic constraints had made it difficult for booksellers and newsagents to procure them and, even when available, their prices were beyond the means of most Zambians", SR 776 pr.40.

⁶³ SR 65 pr.55 (Prado-Vallejo on Czechoslovakia), SR 784 pr.43 (Ando on Rwanda).

⁶⁴ SR 353 pr.27.

Constitution or the law. However, in order to know the precise regime of freedom of expression, in law and in practice, the Committee needs in addition pertinent information about the rules which either define the scope of freedom of expression or which set forth certain restrictions, as well as any other conditions which in practice affect the exercise of this right. It is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individuals right".⁶⁵

11.10 The only specific example given in the general comment of an aspect of freedom of expression, "the development of modern mass media", reflected an interesting discussion in the HRC.⁶⁶ That discussion concerned the question of the different forms of monopoly control and economic power problems involved and a recognition that "the situation of the media had evolved since the Covenant was drafted in 1966"⁶⁷ and that "the comments should take into account new developments and new dangers".⁶⁸

11.11 The HRC's general comment simply restates paragraph 3 of article 19 and notes that,

"..certain restrictions on the right are permitted which may relate either to the interests of other

⁶⁵ G.C.10(19), n.10 above, prs.2 and 3.

⁶⁶ See the UNESCO Mass Media Declaration, n.1 above, on which see Nordenstreng, n.5 above. The problems raised by private financial interests and monopoly control of information media were discussed during the drafting of the Covenant, see Doc.A/2929, ch.vi, pr.137; Doc.A/5000, pr.24.

⁶⁷ SR 449 pr.48 (Bouziri).

⁶⁸ SR 449 pr.50 (Dimitrijevic). A number of members voiced the concerns and complaints of Third World States of "politically oriented, unbalanced and biased" reporting, SR 449 pr.48 (Bouziri).

persons or of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself...".⁶⁹

11.12 The general comment points to the extreme limits of permissible restrictions in stating that they must not jeopardize the right itself. However, there is no indication of the nature of the "special duties and responsibilities" which exercise of the right to freedom of expression carries.⁷⁰ Similarly, no content is given to requirements that restrictions be "provided by law"⁷¹ and "necessary".⁷² There is no comment on the scope of the specified grounds of restriction in sub-paragraphs (a) and (b) of paragraph 3.⁷³ Finally, there is no reference to any doctrine of a margin of appreciation

⁶⁹ G.C.10(19), n.10 above, pr.4 in part. Meron, n.1 above, comments that, "It is doubtful whether that interpretation will limit the many restrictions on freedom of expression which may be permissible under the vague terms of Art.19(3)...", p.116.

⁷⁰ "Presumably they include the duty to present information and views truthfully, accurately and impartially". See also E.I.Daes, n.1 above, pp.53-60.

⁷¹ Cf. Van Dijk and Van Hoof, pp.424-427; 5th IACT Advisory Opinion, n.60 above; Daes, n.1 above, pp.112-115.

⁷² Cf. Van Dijk and Van Hoof, pp.427-449. See in particular Handyside v. U.K., EUCT, Series A, vol.24 (1976).

⁷³ For limitations suggested during the drafting see Bossuyt, n.1 above, pp.387-394. For the ECHR practice see Van Dijk and Van Hoof, *ibid.* For the most recent pronouncement of the EUCT see Muller and Others v. Switzerland, EUCT, Series A, vol.133 (1988), concerning the applicants fine and conviction for obscene publications and the subsequent confiscation of those paintings. HRC members effectively offer interpretations when they often make it clear in their comments that they do not consider that the requirements of article 19(3) have been observed, for example,

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even though his has been raised during the reporting procedure⁷⁴ and featured in an important view under the O.P.⁷⁵

11.13 It remains to note that there is no reference in the general comment on article 19 on the relationship between article 19 and article 20 (concerning war and racial propaganda).⁷⁶ Article 20 is dealt with in the next chapter and the general comment on article 20 does deal with this relationship.⁷⁷ The relationship between the two articles raises important questions concerning permissible restrictions of freedom of expression.⁷⁸

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"[a]dmittedly, the Covenant provided that the exercise of freedom of information could be subject to certain restrictions which might be necessary for respect of the rights or reputations of others, but he did not believe that "others" could be taken to mean a legal entity or government body, or even the State itself", SR 715 pr.18 (Mommersteeg on Tunisia).

⁷⁴ "In relation to article 19 of the Covenant....he wished clarification concerning the margin of discretion used by the State in prohibiting the expression of opinions which it considered detrimental to its own welfare. The situation under the Covenant was rather complex. Although a margin of discretion was admissible, it must be kept within strict limits", SR 610 pr.49 (Tomuschat on Ukrainian SSR).

⁷⁵ See Hertzberg v. Finland, pr.11.18 below.

⁷⁶ See Doc.A/5000, n.1 above, pr.30.

⁷⁷ See ch.12, pr.12.17 below.

⁷⁸ Ibid.

Article 19 Under The Optional Protocol.

11.14 Article 19 has been invoked in a number of communications under the Optional Protocol. The majority of them have concerned Uruguay. Uruguay has offered very little cooperation to the HRC and therefore many of the views are effectively views by default.

11.15 The views of the HRC clearly establish that punishment for the expression of views violates article 19 unless justified by reference to article 19(3). In Perdoma and De Lanza v. Uruguay⁷⁹ P was detained on a charge of "subversive association" apparently on no other basis than his political views and connections, while L was detained on a charge of "assisting a subversive association", apparently on similar grounds to those in the case of P.⁸⁰ After noting the terms of article 19(2) and (3) the HRC expressed the view that,

"The Government of Uruguay has submitted no evidence regarding the nature of the political activities in which (L) and (P) were alleged to have been engaged and which led to their arrest, detention and trial. Information that they were charged with subversive association is not in itself sufficient. The Committee is therefore unable to conclude on the information before it that the arrest, detention and trial of (L) and (P) were justified on any of the grounds mentioned in article 19 (3)".⁸¹

Clearly then freedom of opinion and expression extends to political views. Restrictions on the expression of political views could be covered by article 19 (3) (a) or (b) but general allegations of

⁷⁹ Doc.A/35/40 p.111.

⁸⁰ Ibid., pr.14.

⁸¹ Ibid., pr.16.

"subversive associations" are not sufficient to justify limitation.

11.16 The HRC has been more specific as to the information required from State parties in similar cases. In Grille Motta v. Uruguay⁸² the HRC noted that Uruguay had submitted no evidence regarding the nature of the political activities in which GM was alleged to have been engaged.⁸³ It then commented that,

"Bare information that he was charged with subversive association and an attempt to undermine the morale of the armed forces is not in itself sufficient, without details of the alleged charges and copies of the court proceedings".⁸⁴

In other cases the HRC have referred to absence of any explanation by Uruguay of the scope and meaning of "subversive activities",⁸⁵ the absence of any explanation by Uruguay of the concrete factual basis of the alleged offences,⁸⁶ and the duty on Uruguay to provide specific information if it wanted to refute

⁸² Doc.A/35/40 p.132.

⁸³ Ibid., pr.17.

⁸⁴ Ibid.

⁸⁵ "To date, the State party has never explained the scope and meaning of "subversive activities", which constitute a criminal offence under the relevant legislation. Such an explanation is particularly necessary in the present case, since the author of the communication contends that he has been prosecuted solely for his opinions", Carballal v. Uruguay, Doc.A/36/40 p.125.

⁸⁶ Pietraroia v. Uruguay, Doc.A/36/40 p.153, pr.13.2: violation of article 19(2) because P arrested, detained and tried for his political and trade union activities.

allegations that an author had been persecuted because of his involvement in trade union activities.⁸⁷

In Weinberger Weisz v. Uruguay⁸⁸ the HRC commented that, "The concrete factual basis of this offence has not been explained by the Government, although the author of the communication claims that the true reasons were that WW had contributed information on trade union activities to a newspaper opposed to the government and his membership in a political party which had lawfully existed while the membership lasted".⁸⁹

The HRC expressed the view that there had been a violation of article 19(2) because WW was detained for having disseminated information relating to trade union activities.⁹⁰ The HRC also stated that, "[I]t was aware that under the legislation of many countries criminal offenders could be deprived of certain political rights. In no case, however, may a person be subjected to such sanctions (deprivation of political rights) solely because of his or her political opinions (articles 2(1) and 26)".⁹¹ It seems clear that sanctions may be imposed in accordance with limitations on the expression of political opinion which are in accordance with article 19(3), but the limitations must not operate in a discriminatory manner contrary to articles 2(1) and 26.

11.17 In only one case has a finding of a violation of article 19 in conjunction with a related article. In

⁸⁷ Lopez Burgos v. Uruguay, Doc.A/36/40 p.176, pr.11.5.

⁸⁸ Doc.A/36/40 p.114.

⁸⁹ Ibid., pr.12.

⁹⁰ Ibid., pr.16. See also Pietraroia v. Uruguay, n.86 above.

⁹¹ Ibid., pr.15 (my emphasis).

Lopez Burgos v. Uruguay⁹² the HRC expressed the view that there had been a violation of article 22 (1) {freedom of association including the right to form and join trade unions} in conjunction with articles 19 (1) and (2) because LB had suffered persecution for his trade union activities.⁹³ There is no accompanying explanation of why article 22 is considered to have been violated in this case but not in other similar factual cases. There is no explanation of what distinguished LB's case sufficiently to constitute "persecution" but this founded the only violation to date of the right to hold opinions without interference (article 19 (1)). Similar views have only referred to article 19 (2).⁹⁴

11.18 In Waksman v. Uruguay⁹⁵ W argued, inter alia, that by refusing to renew his passport the Uruguayan authorities had restricted his ability to cross frontiers in the course of seeking, receiving and imparting information and ideas, in violation of article 19 of the Covenant. Unfortunately, the HRC did not have an opportunity to consider this aspect of article 19 because the communication was discontinued when W's passport was renewed.⁹⁶

11.19 Arguably the most important view of the HRC concerning article 19 is that in Hertzberg and Others v. Finland.⁹⁷ In Hertzberg the authors alleged that the Finish authorities, including the State controlled Finnish Broadcasting Company (FBC), had interfered with their right to freedom of expression and information by

⁹² Doc.A/36/40 p.176.

⁹³ Ibid., pr.13.

⁹⁴ See e.g., Pietraroia v. Uruguay, n.86 above.

⁹⁵ Doc.A/35/40 p.120.

⁹⁶ Ibid.

⁹⁷ Doc.A/37/40 p.161.

imposing sanctions against participants in, or censoring, radio and television programmes dealing with homosexuality. Finland argued, *inter alia*, that the purpose of the relevant prohibition in its Penal Code on the public encouragement of indecent behaviour between members of the same sex was to reflect the prevailing moral conceptions in Finland as interpreted by Parliament and by large groups of the population.⁹⁸ Finland further argued that the decisions of the FBC concerning the programmes referred to did not involve the application of censorship but were based on, "general considerations of programme policy in accordance with the internal rules of the Company".⁹⁹

In its final views the HRC accepted the contention of two of the authors that their rights under article 19 (2) had been restricted on the basis of two censored programmes. The HRC continued,

"While not every individual can be deemed to hold a right to express himself through a medium like TV, whose available time is limited, the situation may be different when a programme has been produced for transmission within the framework of a broadcasting organization with the general approval of the responsible authorities".¹⁰⁰

This approach to a right of access to media accords with common sense and is similar to that under article 10

⁹⁸ Ibid., pr.6.1. On the relevance of public support for a particular law see *Tyrer v. U.K.*, EUCT, Series A, vol.26, pr.31, (1978); *Dudgeon v. U.K.*, EUCT, Series A, vol.45, prs.57-58, (1981). See also *Bowers v. Hardwick*, 106 S.Ct. 2841 (1986), on which see J.K.Sullens, *Thus Far And No Further: The Supreme Court Draws The Outer Boundary Of The Right To Privacy*, 61 *Tulane L.R.* (1987) pp.907-929.

⁹⁹ Ibid., pr.6.4.

¹⁰⁰ Ibid., pr.10.2.

ECHR.¹⁰¹ The State party had argued that the authors were appearing to give article 19 a different content to that normally used by maintaining that it would restrict the right of the owner of a means of communication to decide what material will be published.¹⁰² The HRC's view suggests that there might be some restriction on the owners of means of communication where the material has been prepared within the framework of a broadcasting organization with the general approval of the responsible authorities.¹⁰³ After noting the terms of article 19 (2) the HRC continued,

"In the context of the present communication the Finnish Government has specifically invoked public morals as justifying the actions complained of".¹⁰⁴ Although the HRC had considered requesting the parties to submit the full text of the censored programmes so that the HRC could assess the "necessity" of the actions complained¹⁰⁵ of it decided that the information before it was sufficient for it to formulate its views as follows,

"It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a

¹⁰¹ See A.4515/70, X and Association of Y v. U.K., 18 D.& R. (1980) p.66 at p.76; 38 C.D. (1972), p.86 at p.88

¹⁰² Doc.A/37/40 p.161, pr.4.

¹⁰³ On recent U.K. controversies with respect to broadcasting decisions see A.E.Boyle, Political Broadcasting, Fairness and Administrative Law, [1986] P.L. pp.562-596; A.W.Bradley, Parliamentary Privilege, Zircon And National Security, [1987] P.L. pp.488-495.

¹⁰⁴ Ibid., pr.10.2.

¹⁰⁵ Ibid. On the interpretation of "necessity" under the ECHR see notes 20, 72 above.

certain margin of discretion must be accorded to the responsible national authorities.

The Committee finds that it cannot question the decision of the responsible organs of the Finnish Broadcasting Company that radio and TV are not appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour. According to article 19 (3), the exercise of the rights provided for in article 19 (2) carries with it special duties and responsibilities for those organs. As far as radio and TV programmes are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded".¹⁰⁶

Accordingly the HRC expressed the view that there had been no violation of the rights of the authors under article 19 (2).¹⁰⁷

11.19.1 The introduction of the "margin of discretion" is fundamental to the development of the HRC's jurisprudence. Though it has not been without its critics, it has assumed great importance in the jurisprudence under the ECHR.¹⁰⁸ Only subsequent cases will determine how wide or narrow the margin of discretion (or appreciation) will be and whether it will vary from restriction to restriction and from context to context. The approach taken determines the balance struck between national and international implementation. It is no doubt true that there is "no universally applicable moral standard" but the HRC's approach does little to suggest that it will attempt to

¹⁰⁶ Ibid., prs.10.3-10.4.

¹⁰⁷ Ibid., pr.11.

¹⁰⁸ See the literature cited in ch.4, pr.4.48, n.383 above.

establish some standards of international morality.¹⁰⁹ However, on the facts of this case the margin of discretion accorded to the responsible national authorities appears to be very wide. There was not even the most cursory consideration of the "necessity" of the restrictions imposed and the HRC felt that, "it could not question the decisions of the responsible organs of the FBC". On the alleged facts the restrictions on the presentation of any information concerning homosexuality appeared to be very wide indeed.¹¹⁰ Moreover, potentially wide ranging restrictions might be considered acceptable to the HRC under article 19 (3) on the bases that a programme could per se "be judged as encouraging homosexual behaviour"¹¹¹ that the audience for radio and TV programmes cannot be controlled and that , "[i]n particular, harmful effects on minors cannot be excluded".¹¹²

11.19.2 An interesting individual opinion was appended to the HRC's view by Mr.Opsahl and two other members of the HRC associated themselves with it.¹¹³ While agreeing with the conclusion of the HRC the opinion raised a number of important points. Firstly, it stated that,

"In my view the conception and contents of "public morals" referred to in article 19 (3) are relative and changing. State-imposed restrictions on freedom of expression must allow for this fact and should

¹⁰⁹ See the recent decision of the EUCT in Muller and Others v. Switzerland, n.20 above, prs.31-37, in which the EUCT took a similar a view on the interpretation of public morals.

¹¹⁰ See Doc.A/37/40 p.161, pr.7.

¹¹¹ Ibid., pr.10.4.

¹¹² Ibid.

¹¹³ Ibid., pp.166-167. The two members were Mr. Lallah and Mr. Tarnopolsky.

be applied so as to perpetuate prejudice or promote intolerance. It is of special importance to protect freedom of expression as regards minority views, including those that offend, shock or disturb the majority. Therefore, even if such laws as paragraph 9 (2) of chapter 20 of the Finnish Penal Code may reflect prevailing moral conceptions, this is not in itself sufficient to justify it under article 19(3). It must also be shown that the application of the restriction is 'necessary' ".¹¹⁴

The reference to the expression of minority views clearly echoes the case law under the ECHR.¹¹⁵ The reference to prevailing moral conceptions raises difficult and important questions concerning the relationship between the will of the majority and respect for minority rights which again have arisen under the ECHR.¹¹⁶ As to the question of necessity it has already been commented that the HRC's view is open to criticism for not really considering this key requirement.¹¹⁷

After noting that the communication raised the questions of whether the authors had been "indirectly affected" by the laws in question in a way which interfered with their freedom of expression, and if so, whether the grounds of interference were justifiable, the individual opinion addressed the point concerning access to the media,

"It is clear that nobody - and in particular no State - has any duty under the Covenant to promote

¹¹⁴ Ibid.

¹¹⁵ See the references in notes 20, 72 above.

¹¹⁶ See e.g., *Tyrer v. U.K.*, n.98 above; *Dudgeon v. U.K.*, n.98 above, *Rees v. U.K.*, EUCT, Series A, vol.106, (1986).

¹¹⁷ See pr.11.19.1 above.

publicity for information and ideas of all kinds. Access to the media operated by others is always and necessarily more limited than the general freedom of expression. It follows that such access may be controlled on grounds which do not have to be justified under article 19 (3).

It is true that self-imposed restrictions on publishing, or the internal programme policy of the media may threaten the spirit of freedom of expression. Nevertheless, it is a matter of common sense that such decisions either entirely escape control or must be accepted to a larger extent than externally imposed restrictions such as enforcement of criminal law or official censorship, neither of which took place in the present case. Not even media controlled by the State can under the Covenant be under an obligation to publish all that may be published. It is not possible to apply the criteria of article 19 (3) to self-imposed restrictions. Quite apart from the "public morals" issue, one cannot require that they shall be only such as are "provided by law and are necessary" for the particular purpose. Therefore I prefer not to express any opinion on the possible reasons for the decisions complained of in the present case".

The role of mass media in public debate depends on the relationship between journalists and their superiors who decide what to publish. I agree with the authors of the communication that the freedom of journalists is important, but the issues here can only be partly examined under article 19 of the Covenant".¹¹⁸

It is submitted that while purely self-imposed restrictions might well be outside article 19 (3), on

¹¹⁸ Ibid.

the facts of this case the restrictions were clearly imposed to comply with the provisions of the Penal Code. It would be a serious gap in the protection of article 19 if such restrictions could not found a violation of freedom of expression in the absence of the enforcement of the criminal law or official censorship. The approach of the majority that denial of access to the media in the context of a programme produced within the framework of a broadcasting organization with the general approval of the responsible authorities must be justified by reference to article 19 (3) is to be commended, although it is not absolutely clear that the individual opinion advocates a different view.

11.20 Finally, the relationship between article 19 and article 20 (prohibition on propaganda for war and advocacy of national, racial or religious hatred) was raised in the case of J.R.T. and W.G. Party v. Canada.¹¹⁹ The decision of the HRC is considered in the chapter on article 20.¹²⁰

¹¹⁹ Doc.A/38/40 p.231.

¹²⁰ See ch.12, prs.12.27-12.31 below.

APPRAISAL.

11.21 The practice of the HRC in respect of article 19 has again illustrated the close, detailed and critical analysis undertaken by members under the reporting process. The dialogue between the HRC and the States parties, in so far as it has developed, has been both direct and constructive. HRC members have in a diplomatic but forthright way criticised or expressed strong doubts concerning the comparability with article 19 of specific ideological conceptions of and wide restrictions on freedom of expression.¹²¹ They have built up a consistent repertoire of practice concerning the press and other media. The discussions leading to the adoption of the general comment on article 19 revealed some important differences within the HRC concerning article 19. It is interesting to note that many of the differences duplicate arguments during the drafting of article 19.¹²² In decisions under the O.P. the HRC have stressed that punishment for violation of views can only be justified by reference to the terms of article 19(3),¹²³ and specifically introduced the concept of a "margin of discretion".¹²⁴ If the experience under the ECHR provides a reliable guide that concept is likely to play a fundamental role in the jurisprudence of the HRC.¹²⁵

11.22 In a number of respects, however, the HRC's practice concerning article 19 is perhaps the most disappointing of the articles examined in this thesis. The right to hold opinions has been little dealt

¹²¹ See pr.11.6.1 above.

¹²² See e.g., notes 24, 66 above.

¹²³ See prs.11.15-11.16 above.

¹²⁴ See prs.11.19-11.19.2 above.

¹²⁵ See n.108 above.

with.¹²⁶ The considerations of the HRC and the general comment on article 19, apart from the brief reference to the "development of modern mass media",¹²⁷ have been confined to rather narrow aspects of the right to freedom of expression. Very little attention has focused on its more positive and progressive aspects¹²⁸ although one of the newer HRC members, Mr. Mommersteeg, appears to take a particular interest in this area.¹²⁹ The "freedom to seek, receive and impart information and ideas of all kinds" is open to a much more dynamic approach in terms of the openness of local and national government, the accessibility of the various forms of media to political, ideological and social groups,¹³⁰ access to official records and other public documents,¹³¹ developments concerning vital commercial information,¹³² the increasing use of computers and the consequent

¹²⁶ See pr.11.4 above.

¹²⁷ See pr.11.9 above.

¹²⁸ For a rare example see SR SR 170 pr.34 (Opsahl on Finland); SR 392 pr.7 (Graefrath on Iceland).

¹²⁹ See e.g., his comments at SR 767 pr.7 (on Trinidad and Tobago) concerning access of political parties to television.

¹³⁰ This matter has occasionally been raised, see e.g. SR 142 pr.70 (Hanga on Spain); SR 319 pr.62 (Hanga on Japan).

¹³¹ See SR 780 pr.38 (Ando on Denmark). See N.S.Marsh (ed.), Public Access To Government Held Information, (1987). For a recent ECHR application on access to official information see A.10454/83, Gaskin v. U.K., 9 EHRR 279.

¹³² See A.7805/77, X. and Church of Scientology v. Sweden, 16 D. & R. p.68 (1979); Barthold v. FRG, EUCT, Series A, vol.90, (1985); A.Lester and D.Pannick, Advertising And Freedom Of Expression In Europe, [1985] P.L. pp.349-352.

demand for personal data protection.¹³³ More generally the expression raises fundamental questions in terms of the relationship between the State and individual privacy (which is protected by article 17 of the Covenant).¹³⁴

11.23 Similarly the expression "regardless of frontiers" could well be usefully amplified by the HRC particularly when they are considering a report from a State party

¹³³ See the Council of Europe Convention For The Protection Of Individuals With Regard To Automatic Processing Of Personal Data (1981); N.Savage and C.Edwards, A Guide To The Data Protection Act, (2d, 1985); I.N.Walden and N.Savage, Data Protection and Privacy Laws: Should Organisations Be Protected? 37 ICLQ (1988) pp.337-347.

¹³⁴ In its recently adopted general comment on article 17 the HRC stated that, "The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized to receive, process and use it, and it is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination", G.C.16 (Footnote Continued)

which is also a signatory to the Helsinki Final Act¹³⁵ parts of which are clearly relevant to freedom of expression and the international free flow of information.¹³⁶

11.24 Despite a decade of analysis and consideration of the approaches and methods adopted by States parties all over the world to give effect to article 19 the HRC's general comment makes no specific references to the positive or negative aspects of those approaches or to methods used which could provide instructive parallels for other States parties. Members have not sought to assist States parties by giving content to the "special rights and duties" and the key definitional components of "prescribed by law" and "necessary" and the criteria of permissible restriction in paragraph 3 (a) and (b).¹³⁷

11.25 The opportunity to formulate general comments is an extremely valuable and important one. The comments should represent the HRC's accumulated experience of years of consideration of a particular article. On that basis they have the potential to be profoundly influential. Although the predominant purpose of the general comments to date appears to have been to provide clear guidelines for the States parties on information required by the HRC they also perform a key function of giving some substantive content to the articles

(Footnote Continued)

(32), adopted by the HRC at its 791st meeting (March, 1988), Doc.CCPR/C/21/Add.6.

¹³⁵ See ch.1, pr.1.38, n.256 above.

¹³⁶ See V.Leary, The Implementation Of The Human Rights Provisions Of The Helsinki Final Act: A Preliminary Assessment, in T.Buergenthal (ed.), Human Rights, International Law, And The Helsinki Final Accords, pp.140-148 (1977).

¹³⁷ See the literature on limitation provisions in n.1 above.

concerned. It is critical then that the comments are purposeful, positive and progressive. Unfortunately the general comment on article 19 was both weak and disappointing, being little more than a reiteration of article 19. Perhaps the comment was not considered for a long enough time, the HRC's characteristic caution was being displayed to abundance, or the limitations inherent in consensus were being evidenced.¹³⁸ It is interesting to note the following comment of Mr. Aguilar during the discussions on the draft general comment. He,

"agreed that it was important to reach a common understanding of the article. He was somewhat concerned, however, and shared Mr. Opsahl's surprise, that there was no reference to problems affecting freedom of expression seen everyday throughout the world, such as the fact that in some countries control of the mass media and means of communication by monopoly financial groups not merely restricted freedom of expression but resulted in its manipulation, while in other countries similar restrictions were imposed by the Government or the ruling party. The fact that such things were not mentioned in the general comment might be interpreted as a lack of awareness on the part of the Committee or a guilty silence. The general comment was not an attempt to advocate a philosophical or political position but to contribute to implementation of the Covenant which had, after all, been ratified by countries having very varied ideologies. He was afraid that the Committee was avoiding the issue. It asked States parties to tell of their difficulties in

¹³⁸ See ch.2, pr.2.7 above.

implementing the Covenant, but was skirting round its own difficulties".¹³⁹

That the HRC seems to be avoiding the difficulties of article 19 might suggest that there are fundamental divisions within it on the implementation of article 19. The fundamental norms within article 19 remain undefined and largely undeveloped. It appears unlikely that the work of the HRC will redress the disappointing record of the United Nations concerning freedom of expression.¹⁴⁰

¹³⁹ SR 461 pr.46.

¹⁴⁰ See pr.11.2 above.

12.1 Article 20¹

"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".

Introduction.

12.2 The inclusion of article 20 in the Covenant was controversial. Its opponents argued that the prohibition might lead to abuse and would be detrimental to freedom of opinion and expression (article 19), might encourage the establishment of governmental censorship, that the expressions used were vague and subjective, that the article did not establish any particular right or freedom and that such prohibitions would not be effective.

Those in favour of the article argued that such prohibitions could not be considered as a threat to freedom of opinion and expression, that the general limitation provision in article 19(3) were not adequate, legislative provision was necessary because of the

¹ On the drafting of article 20 see in particular Docs. A/2929, ch.vi, prs.189-194; A/5000, prs.36-50; M.Bossuyt, 'Guide', pp.403-411. See L. John Martin, *International Propaganda - Its Legal And Diplomatic Control*, (1958); K.Nordenstreng, ch.11, n.5 above, at ch.6; J.B.Whitton and A.Larson, *Propaganda Towards Disarmament In The War Of Words*, (1964); J.B. Whitton, *The United Nations Conference On Freedom Of Information And The Movement Against International Propaganda*, 43 *AJIL* (1949) pp.73-87; *Symposium on the International Control Of Propaganda*, 31 *L. & C.P.* pp.437-634 (1966). See also the following international instruments: *Declaration On The Inadmissibility Of Intervention In The Domestic Affairs Of States And The Protection Of Independence And Sovereignty*, pr.2, G.A.Resn.2131(X) (1965); *Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States In Accordance With The Charter Of The United Nations*, pr.3 of first principle; *International Convention Concerning The Use Of Broadcasting In The Cause Of Peace*, (1936), 186 *L.N.T.S.* 301 (1938), 140 *B.F.S.P.* 262.

strong influence of modern propaganda,² a specific prohibition on war propaganda would put an end to the cold war and promote peaceful co-existence and that the question of propaganda had been dealt with in national laws and constitutions as well as in international instruments and documents.³ However, substantial opposition to the article remained when it was adopted by the Third Committee of the General Assembly in 1961.⁴ Article 20 is notable in that it is the only provision of the Covenant that specifically requires that certain conduct, "shall be prohibited by law".⁵

Article 20 Under The Reporting Process.

12.3 Article 20 is not covered by the non-derogation provision in article 4(2).⁶ It has been the subject of a

² See John Martin, n.1 above, chs.1, 3.

³ See, in particular, L. John Martin, n.1 above, chs.5-7. Reference was made to the 1936 Convention noted in n.1 above. Propaganda is still a major concern for States, see Article II (10) of the Bilateral Agreement Between Afghanistan And Pakistan On Principles Of Mutual Relations, The Times, 15th April 1988, p.8.

⁴ Article 20 was adopted by 52 votes to 19 with 12 abstentions, Doc.A/5000, n.1 above, pr.49.

⁵ "The words "shall be prohibited by the law of the State" were chosen in preference to the words "constitutes a crime and shall be punished under the law of the State". It was feared by some that the words "shall be prohibited by the law of the State" might encourage the establishment of governmental censorship. Another opinion was that the article could not be interpreted as suggesting that States should impose censorship. The view was expressed that States parties would be free to enact whatever legislation they deemed appropriate to put the article into effect", Doc.A/2929, n.1 above, pr.194. On the general obligation to implement the Covenant see ch.6 above on article 2.

⁶ See ch.7 above.

general comment under article 40(4)⁷ and reference was also made to article 20 in the general comment on article 6 (right to life).⁸ In the consideration of State reports article 20 has generally been considered separately but members have often commented on the terms of its relationship with article 19 (freedom of opinion and expression)⁹ and this question again arose during the drafting of the general comment on article 20.¹⁰

12.4 In its general comment the HRC stated that,

"Not all reports submitted by States parties have provided sufficient information as to the implementation of article 20 of the Covenant. In view of the nature of article 20, States parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein. However, the reports have shown that in some States such actions are neither prohibited by law nor are appropriate efforts intended or made to prohibit them. Furthermore, many reports failed to give sufficient information concerning the relevant national legislation and practice".¹¹

⁷ G.C.11(19), adopted by the HRC at its 457th meeting (nineteenth session) on 25th July 1983, Doc.A/38/40 pp.109-110; also in Doc.CCPR/C/21/Add.2. For the HRC's discussion see SR 429, 447, 448, 450, 451, 454 and 457.

⁸ G.C.6(16), Doc.A/37/40 pp.93-94, cited in ch.8, pr.8.11 above.

⁹ See ch.11 above.

¹⁰ See pr.12.17 below.

¹¹ G.C.11(19), n.5 above, pr.1 (my emphasis). Members of the HRC have consistently stressed the immediacy of the obligation under article 20. The reference to the "nature" of article 20 would seem to be referring to the specific obligation in article 20 to "[prohibit] by law", see n.5 above.

12.5 Such deficiencies in the information supplied to the HRC has led members to point out to State representatives the general and specific ends of the prohibition in article 20 and how the measures reported to the HRC by the States parties fail to satisfy article 20 by reason of inadequacy, inapplicability, ineffectiveness or imprecision.¹² The HRC's considerations of article 20 have shown it to be a provision the implementation of which raises particularly acute problems of interpretation and conflict. Neither "war"¹³ nor "propaganda" are defined - the latter term is capable of a very expansive meaning.¹⁴ The absence of definition caused some difficulty during the drafting of the general comment on

¹² See e.g., SR 69 pr.48 (Prado-Vallejo on U.K.); SR 214 pr.31 (Koulishev on Senegal); SR 257 pr.33 (Graefrath on Italy). See also the comments of Tarnopolsky at SR 213 pr.24 concerning "regionalist propaganda" (on Senegal).

¹³ "The drafting groups [of the HRC] had been working for two years on the definition of war. At its thirteenth session, he had proposed the following definition: "The term "war" is not understood in a restrictive sense; it includes not only open conflicts between two or more countries but also any direct or indirect armed intervention in another country for any reason". The present Working Group had in the end preferred not to provide a definition of war because, unless it simply referred the reader to the definition given by the United Nations itself, that task would take the working Group too far afield", SR 429 pr.57 (Bouziri). The U.N. Charter uses the terms "threat or use of force" rather than "war". France has declared that "the term "war" appearing in article 20, paragraph 1, is to be understood to mean war in contravention of international law and considers, in any case, that French legislation in this matter is adequate", Human Rights - Status Of International Instruments, p.35, (1987).

¹⁴ See John Martin, n.1 above, ch.2.

article 20 which a number of members hoped would clarify the meaning of "war propaganda".¹⁵

12.6 Partly because of the lack of definition to article 20 there have been a number of reservations and interpretative declarations to it.¹⁶ A number of these have attracted criticism from HRC members. An instructive example of the approach of members is that taken as regards Finland. In its initial report Finland explained its reservation to article 20,

"When this provision was dealt with in the General Assembly of the United Nations, Finland voted against its adoption for the following reasons.

First of all, this provision may come into conflict with article 19, paragraph 2, of the Covenant, recognizing the right of everyone to freedom of expression. Since the concept of war propaganda is somewhat vague, it would be difficult to draw a definitive line between lawful expression of opinion and ideas, on the one hand, and forbidden propaganda on the other.

Secondly, a prohibition by law, in order to be effective should be sanctioned by penalizing the breach against it. This would cause difficulties since, according to the principles recognized in the criminal law, the characteristics of a punishable crime or offence must be accurately defined. The provision contained in article 20, paragraph 1, of the Covenant does not fulfil this requirement.

¹⁵ See prs.12.8 (Tomuschat), and 12.18 below.

¹⁶ See n.13 above (on France) and Human Rights - Status, n.13 above, pp.28-49. The States concerned are Australia, Belgium, Denmark, Finland, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Sweden, U.K. (and for the Dependent Territories).

Consequently, the reservation will be maintained for the present".¹⁷

Mr.Graefrath commented that, "Finland's reservation... would have the effect of removing the need to implement an entire (provision) of the Covenant. He was not sure that that was acceptable".¹⁸ Presumably the reference to acceptability is in terms of the legality of the reservation. Mr.Koulishev regretted the reservation and said that,

"He understood the difficulties involved but felt that they were not insurmountable, especially as propaganda for war had been condemned in the Declaration On Principles of International Law Concerning Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations (G.A.Resn.2625 (XXV)) and the Final Act of the Helsinki Conference."¹⁹

Mr.Opsahl,

"asked why Finland had found it necessary to enter a reservation to article 20, paragraph 1, which embodied an obligation imposed on States, and yet made no reservation to paragraph 2 of that article which imposes a similar obligation and was equally difficult to define and punish".²⁰

¹⁷ Doc.CCPR/C/1/Add.10, p.4 (1977). See SR 30.

¹⁸ SR 30 pr.14. (I have corrected "position" to "provision").

¹⁹ SR 30 pr.17. Note, however, that both of these international documents are only concerned with State obligations rather than individual action.

²⁰ SR 30 pr.27. The State representative replied that Finland had been able to accept article 20(2) because it had adopted provisions in its Penal code to comply With the terms of the ICERD and the Convention On The Prevention and Punishment Of The Crime Of Genocide.

Mr.Movchan stated quite simply that he could accept neither of Finland's arguments.²¹

12.7 It seems clear then that members consider themselves competent to comment on and assess the legal validity of reservations or interpretative declarations even though the HRC has not adopted any formal decision concerning its jurisdiction as regards reservations or interpretative declarations.²² Most of the members have at least understood, though not always been convinced by the difficulties and objections proffered by States parties, and accordingly their comments and criticisms have generally been temperate.

12.8 During consideration of the report of the Netherlands Mr.Tomuschat made an important observation on the difficulties occasioned by article 20,

"Noting the Netherlands' comments on article 20, he said that the concept of "propaganda for war" had never been adequately defined. Obviously, the drafters of the provisions had in mind only a war of aggression and not a war of defence or liberation, but opinions as to what constituted a war of defence or liberation differed. Again, he wondered whether the provision covered only written propaganda or could also be held to extend, for example, to public military parades involving the display of tanks or rockets. The Committee should attempt to clarify the meaning of "propaganda for war", for as long as the expression remained ill-defined, the States would, perhaps rightly,

²¹ SR 30 pr.39.

²² See ch.6, pr.6.3 text to n.8 above, in particular Shelton at n.8. See e.g. the comments of Movchan at SR 30 pr.38. Cf.The recent decision of the EUCT in Belilos v. Switzerland, EUCT, Series A, Vol.132 (1988).

remain reluctant to accept such a far-reaching obligation".²³

As noted above a number of the reservations by States have been based on the lack of definition in article 20.²⁴ Mr.Tomuschat's comment was a portent of the difficulties encountered by the HRC in drafting a general comment on article 20, which is dealt with below.²⁵

12.9 The comments in the report of Canada on article 20 (1) raised the important question of the extent of the responsibility of a State party²⁶ under article 20(1),

"There is no law prohibiting propaganda in favour of war. An individual or organisation may, therefore, legally disseminate such propaganda. The Government cannot do so, however, without breaking the commitments it made by signing the Covenant".²⁷

During consideration of Canada's report Mr.Graefrath noted that,

"this was not in conformity with the Covenant which made it quite clear that it was the responsibility of the State to prohibit propaganda for war within its area of jurisdiction".²⁸

²³ SR 322 pr.73. See also SR 322 pr.64 (Al Douri). See also the strong criticism of the Australian reservation to article 20(1) at SR 402 pr.23 (Prado-Vallejo). See Triggs, ch.6, pr.6.3, n.8 above, at p.298.

²⁴ See n.16 above.

²⁵ See prs.12.13-12.26 below.

²⁶ See A.Larson, The Present Status Of Propaganda In International Law, in Symposium, n.1 above, pp.437-451.

²⁷ Doc.CCPR/C/1/Add.43, vol.I, pp.86-87, dealing with the position in Federal Law.

²⁸ SR 206 pr.32. It is interesting to note that only occasionally have the matters of conscientious
(Footnote Continued)

It is submitted that Mr.Graefrath's view must be correct.

Article 20 (2).

12.10 The HRC's considerations of article 20(2) have extended to the existence of racist and fascist type organizations.²⁹ In reply to such questioning Mr.Cairncross, a United Kingdom State representative, commented that,

"For Government or Parliament to proscribe an organization because of its racist character would appear to confer on the authorities of the country a power that could be abused and that might be incompatible with the right of freedom of information. Proscription of any organization in ordinary times would be a very serious step for his country to contemplate".³⁰

(Footnote Continued)

objection and pacifist propaganda been raised by HRC members, see e.g., SR 320 pr.4 (Ermacora on Japan).

²⁹ "During a session of the Committee on the elimination of Racial Discrimination the existence of a Fascist party in the Netherlands had been found to constitute a violation of the International Convention on the Elimination of Racial Discrimination. Did not a violation of that Convention automatically mean a violation of the Covenant?", SR 321 pr.26 (Movchan). See also SR 148 prs.46, (Hanga), 60 (Graefrath on U.K.). Article 4 ICERD condemns propaganda and organizations based on racial superiority or which attempt to justify or promote racial hatred and discrimination in any form. See T.Meron, Human Rights Law-Making In The United Nations, pp.23-35 (1986).

³⁰ SR 148 pr.75. The U.K. has reserved the right not to introduce any further legislation, see Human Rights - Status, n.13 above, p.48. Cf. The proscription by the U.K. of organizations under the Prevention of Terrorism (Temporary Provisions) Act 1984. See also the U.K.'s stated understanding of article 4 ICERD, n.29 above, in Human Rights - Status, ibid., pp.116-117.

Note though that article 20 proscribes certain propaganda rather than the organizations engaging in such propaganda.³¹

12.11 Members of the HRC have not refrained from direct questions and comments on some of the potentially sensitive matters covered by article 20(2). For example during consideration of the report of the U.S.S.R.³²

Mr.Opsahl asked,

"Was it true, as it was sometimes alleged, that Soviet authorities had in recent years authorised what would seem to constitute anti-Semitic propaganda".³³

The State representative did not reply to this specific point.³⁴

Similarly Mr.Movchan commented during consideration of the report of the F.R.G.,³⁵

"The report also stated that the acts described in article 20, paragraph 2, were punishable under the penal provisions relating to demagoguery, incitement to racial hatred and disturbance of religious peace. Article 20 of the Covenant was not, however, covered by Federal German Legislation, for paragraph 2 of that article stated that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence should be prohibited by law, and the report indicated no suppression of racial hatred and mentioned no legislation prohibiting the

³¹ Cf. Article 4 ICERD, n.29 above.

³² Doc.CCPR/C/1/Add.22.

³³ SR 109 pr.25. Recent reports suggest that such propaganda continues, see The Times, June 1988.

³⁴ See SR 112 pr.34.

³⁵ Doc.CCPR/C/1/Add.18.

advocacy of national hatred. Propaganda fomenting national hatred and the organization of fifth columns had paved the way for German imperialism in the Second World War and the suppression of national hatred included the prohibition of Nazi propaganda and SS-type organizations, was therefore extremely important. He wondered how the activities of Radio Free Europe in Munich could be reconciled with the...provision of the Basic Law regarding acts tending to and undertaken with intent to disturb peaceful relations between nations".³⁶

Again, however, there was no reply from the State representative.³⁷

12.12 The HRC's considerations of article 20 have been of more limited scope than the other articles examined in this thesis. However, the drafting of the General Comment on article 20 occasioned strong divisions within the HRC and threatened to break the practice of consensus decision making which has operated since the HRC's inception.³⁸

The General Comment On Article 20.

12.13 The Working Group on General Comments³⁹ undertook consideration of article 20 at the HRC's thirteenth session (July, 1981) and produced a working document drafted by Mr.Bouziri. Subsequently texts were introduced by Mr.Movchan (fifteenth session (March-April, 1982), Mr.Opsahl (1982) and a joint text by Mr.Tomuschat and Mr.Graefrath (eighteenth session, 1983). The latter text was introduced to the HRC at its

³⁶ SR 94 pr.4. The "provision" referred to is article 26 of the Basic Law of the F.R.G.

³⁷ SR 96.

³⁸ See ch.2, pr.2.7 above.

³⁹ See ch.2, pr.2.6, n.145 above, and ch.3, pr.3.34 above.

eighteenth session.⁴⁰ After substantial discussion and some important amendments the General Comment on article 20 was adopted on 25 July 1983, some three years after its initial consideration.

12.14 The text introduced at the eighteenth session included the following,

"The obligation in article 20 is of a peremptory nature. States parties have the duty to adopt appropriate legislative acts prohibiting the acts referred to in article 20".⁴¹

A number of objections were raised to the use of the term "peremptory". It was argued that the term was used in a very different sense in the Vienna Convention on the Law of Treaties, namely in the sense that a norm was "jus cogens" and could not be challenged by a treaty.⁴² It was suggested that the term should be replaced by "mandatory" but it was objected that the meaning of that term was almost identical.⁴³ Some members thought that the whole sentence should be deleted because it was "superfluous",⁴⁴ "meaningless",⁴⁵ and "those interpreting that comment might reach the conclusion that certain articles of the Covenant were not mandatory".⁴⁶

12.15 Those in favour of retaining the sentence argued that while all of the articles were mandatory some were

⁴⁰ See SR 429 pr.36.

⁴¹ SR 429 pr.36, draft pr.3.

⁴² SR 447 pr.3 (Opsahl). The relevant provision is article 53 V.C.L.T. (1969).

⁴³ Ibid., and pr.13 (Cooray).

⁴⁴ SR 448 pr.18 (Ermacora).

⁴⁵ Ibid., pr.10 (Vincent-Evans).

⁴⁶ Ibid., pr.19 (Dimitrijevic).

more so than others,⁴⁷ article 20 was the only one which stipulated the adoption of domestic legislation,⁴⁸ the term "peremptory" corresponded to a concept of law,⁴⁹ the authors had stressed the mandatory nature of article 20,⁵⁰ and that the sentence met a real need because many countries believed that they were not obliged to promulgate an act in accordance with article 20.⁵¹

12.16 Ultimately the solution adopted was to delete the second sentence and combine the essential point of the immediacy of the obligation under article 20 with the necessity for States to take appropriate measures,

"In view of the nature of article 20, States parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to therein".⁵²

12.17 After stating the terms of the prohibition in article 20 the draft comment continued,

"In the opinion of the Committee these prohibitions (constitute a necessary corollary to article 19)⁵³ [cannot be considered as being in contradiction with article 19]".⁵⁴

⁴⁷ Ibid., pr.22 (Prado-Vallejo).

⁴⁸ Ibid. See pr.12.2, text to n.5 above, and pr.12.4 above.

⁴⁹ Ibid., pr.17 (Hanga).

⁵⁰ Ibid., pr.24 (Graefrath).

⁵¹ Ibid., pr.25 (Bouziri).

⁵² G.C.11(19), n.5 above, pr.1. See pr.12.4 above for the full text.

⁵³ SR 429 pr.36, draft pr.2.

⁵⁴ SR 447 pr.2, draft pr.2. This second draft text is produced here to facilitate understanding of the HRC's discussions.

Some difficulty was occasioned by this reference to article 19. There was some debate on the correct relationship between articles 19 and 20 in terms of whether article 20 was a restriction or limitation on article 19⁵⁵ on the bases of "respect for the rights or reputations of others" and the "protection of national security",⁵⁶ part of the "special duties and responsibilities" which the exercise of the rights in article 19 (2) carries with it, or not a case of the application of article 19 at all,

"...propaganda for war had no more relation to freedom of expression than crime or theft to freedom of action".⁵⁷

Above all members were anxious to meet some of the declarations and reservations of States parties concerning the relationship between article 19 and 20 and assure them of the consistency of the two provisions.⁵⁸ The formula finally adopted clearly states this element of consistency,

"In the opinion of the Committee, these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19 the exercise of which carries with it special duties and responsibilities".⁵⁹

⁵⁵ SR 429 pr.49 (Errera); SR 321 pr.50 (Errera). Partsch, n.1 above, suggests that, "a State may do under article 20 only what is strictly required by that article and is also compatible with article 19(3)", p.230.

⁵⁶ SR 448 pr.52 (Cooray).

⁵⁷ SR 450 pr.10 (Bouziri).

⁵⁸ See pr.12.6 above (on Finland), pr.12.10 above (on U.K.) and n.16 above.

⁵⁹ G.C.11(19), n.5 above, pr.2.

It is submitted that this must be correct. If possible a treaty must be interpreted in a way that its provisions are consistent with one another.

12.18 The draft text continued,

"The prohibition under paragraph 1 extends to all forms of propaganda made with a view to, or resulting in, a breach of peace or act of aggression, while paragraph 2 is directed against advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, in particular when such propaganda aims at destabilizing another country".⁶⁰

Various doubts, suggestions and amendments were raised to this sentence.⁶¹ "Destabilizing" was a broad term with no precise legal meaning;⁶² "propaganda" at the end of the sentence should be replaced with "advocacy" so as to maintain the subtle distinction made by the drafters.⁶³ One member wanted an express reference to propaganda by States and governments as distinct from individuals and organizations and to forms other than the written or spoken word, for example, threatening demonstrations of armed force.⁶⁴ Another member was "not happy with the phrase "in particular when such propaganda aims at destabilizing another country" which introduced an element aimed more at inter-State

⁶⁰ SR 429 pr.36, draft pr.2.

⁶¹ The HRC had accepted the view of Mr.Tarnopolsky that both articles 20(1) and 20(2) were intended to cover domestic and international cases, see SR 429 pr.41, SR 447 pr.42, SR 447 pr.49.

⁶² SR 447 pr.9 (Dimitrijevic).

⁶³ Ibid., pr.14 (Cooray).

⁶⁴ Ibid., pr.21 (Vincent-Evans).

relations".⁶⁵ There was some debate on the attempted definition of the propagandas covered by paragraph 1, which extended to the need to take account of all forms of propaganda and all forms of war,⁶⁶ the desirability of a reference to the threat or use of force in a manner inconsistent with the Charter of the United Nations, (reference was made to articles 2(4) and 39 of the Charter,⁶⁷ the Friendly Relations Declaration 1970⁶⁸ and the United Nations Resolution on the Definition of Aggression,⁶⁹ and the concerns of small countries sensitive to threats or acts of aggression, undeclared wars and the use of force.⁷⁰ Finally the HRC reached a consensus on the following text,

"The prohibition under paragraph 1 extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations, while paragraph 2 is directed against advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence,^{*} whether such propaganda or advocacy

⁶⁵ Ibid., pr.34 (Tomuschat).

⁶⁶ SR 450 pr.38 (Movchan); and see SR 447 pr.49 (Tarnopolsky).

⁶⁷ SR 447 pr.16 (Mavrommatis).

⁶⁸ See n.1 above. The 1970 Declaration states that, "A war of aggression constitutes a crime against the peace for which there is responsibility under international law" (paragraph 2 of principle 1). A similar provision appears in the U.N. Definition of Aggression, n.69 below.

⁶⁹ G.A.Resn.3314 (XXIX) of 14 Nov. 1974.

⁷⁰ SR 450 prs.37, 40 (Bouzirri), 41 (Dimitrijevic).

has aims which are internal or external to the State concerned".⁶²

12.19 The most divisive of the difficulties encountered by the HRC was perhaps that which arose in respect of the following draft sentence,

"The provisions of article 20 do not form an obstacle to self-defence [or to the struggle of peoples for self-determination and independence]."⁶³

Mr.Ermacora thought that the provision should be amended,

"because the provisions of article 20 did not form an obstacle to self-defence or the struggle of peoples for self-determination in themselves but could form an obstacle to propaganda for such actions".⁶⁴

Strong opposition emerged to the last phrase of the sentence, "or to the struggle of peoples for self-determination and independence". The independent expert from the United Kingdom, Sir Vincent-Evans, led this opposition,

"He knew that that was a generally accepted phrase in United Nations parlance and understood the reasons for it in the earlier history of the decolonization process. However, at a time when very few countries were under colonial domination, such a wording might be taken as an invitation to

⁶² G.C.11(19), n.5 above, pr.2. Just before this sentence was adopted Mr.Tomuschat, "observed that the concept of breach of the peace had never been defined in the United Nations system. In so far, however, as it was to be understood as the result of an act of aggression, he could endorse the proposed text, but it should not extend to all forms of interference covered by the non-intervention provisions", SR 450 pr.57. Note also pr.2 of the Declaration on the Inadmissibility of Intervention, n.1 above, and article 23(2) A.F.R.

⁶³ SR 429 pr.36, draft pr.2.

⁶⁴ SR 447 pr.5.

minorities to use armed force and civil war to attain self-determination and independence. Such an approach should not be encouraged by the Human Rights Committee. Any form of war was a threat to lives of individuals and peaceful means of achieving the same ends should be sought".⁶⁵

Professor Tomuschat commented that,

"It was his conviction that disputes and struggles for independence should be settled by peaceful means although he admitted that there might be recourse to violence in extreme circumstances, but the Committee must not appear to be urging the Kurds, Armenians or the people of the Sahara, for example, to take up arms. The Committee's text must be consistent with the philosophy of the United Nations as set out in article 2(4) of the Charter".⁶⁶

12.20 Consultations with members of the working group led to a proposal to replace the words "do not from an obstacle to self-defence or to the struggle of peoples for" with "do not prohibit advocacy of the sovereign right of self-defence or of the right of peoples to" (self-determination and independence).⁶⁷ Again this proposal attracted strong opposition, from Sir Vincent-Evans in particular,

"That wording meant that a people had the right not only to resort to propaganda but also to advocate national and racial hatred in order to achieve self-determination and independence. That was a

⁶⁵ Ibid., pr.20. Mr.Errera also expressly agreed with Sir Vincent-Evans, *ibid.*, pr.41.

⁶⁶ Ibid., pr.35. See also *Military And Paramilitary Activities In And Against Nicaragua*, (Nicaragua v. United States), Merits, I.C.J. Reports, 1986, p. 14 at pr.290.

⁶⁷ SR 448 prs.8-9 (Tarnopolsky).

monstrous idea and contrary to everything the Covenant was intended to achieve".⁶⁸

12.21 It was suggested by Professor Ermacora that the insertion of the word "peaceful" might solve the difficulties encountered by a small minority of the members.⁶⁹ However, this suggestion itself encountered fierce opposition which revealed some interesting perspectives on the view of members of the relationship between articles 20 and 1 (self-determination),⁷⁰

"It was desirable that the exercise of the right to self-determination should be peaceful and not violent. Unfortunately, that was not always possible so the word, "peaceful" should not be included".⁷¹

"He could not believe that someone who defended the right of peoples to self-determination was thereby promoting violence or national, racial or religious hatred. The right of peoples to self-determination was enshrined in the Charter and the Covenant but the way in which the right was exercised depended upon the conditions in which a particular people found itself".⁷²

"To include the word "peaceful"...would be beyond the Committee's competence, since it was for peoples themselves to decide how to conduct their struggle for self-determination, using violence if

⁶⁸ SR 450 pr.59. Sir Vincent-Evans referred to the situation in the Lebanon to, "show that a people could not be encouraged to resort to violence and engage in terrorist activities in order to exercise its right to self-determination and independence".

⁶⁹ SR 451 pr.2.

⁷⁰ On self-determination under article 1 of the Covenant see ch.5 above.

⁷¹ Ibid., pr.5 (Prado-Vallejo).

⁷² Ibid., pr.21 (Prado-Vallejo).

necessary. It was equally essential to retain the word "independence" since some independent States were fighting for their survival".⁷³

Professor Tomuschat explained the problem lucidly,

"Nobody was challenging the right to self-determination. Nevertheless, a distinction had to be made between the recognition of the right and its enforcement. The question was whether the prohibition contained in article 20 of the Covenant was to be attenuated when the attainment of certain ends was being sought. Did the Committee wish to affirm that propaganda for war was permissible with a view to obtaining independence and that, for the same purpose, the advocacy of national, racial or religious hatred was also lawful and legitimate? Some members of the Committee were afraid that those were the logical implications of including a reference to the right of self-determination and independence in the context of article 20.

The sentence as it stood was extremely ambiguous. Mr. Al Douri had apparently drawn the conclusion that it legitimized the armed struggle for independence. However, article 20 of the Covenant referred to "any propaganda for war". What kind of propaganda for war was meant? Had the General Assembly created a rule of customary law whereby it was permissible to resort to armed struggle in order to attain independence? Everything depended on how the Committee interpreted the sentence before it".⁷⁴

12.22 Professor Tarnopolsky argued that the objectors had missed the point of the draft paragraph 2. After

⁷³ Ibid., pr.20 (Al Douri).

⁷⁴ Ibid., prs.11-12.

referring to articles 55 and 56 of the U.N. Charter and article 1 of the Covenant⁷⁵ he continued,

" In the text before it the Committee was stating that, if States were asked to provide for laws prohibiting propaganda for war and the advocacy of national, racial and religious hatred, such laws were not interpreted as meaning that someone who advocated the sovereign right of self-defence or the right of self-determination and independence was thereby advocating national, racial or religious hatred. Surely that was acceptable to all members of the Committee?"

He personally would go further. In his opinion a right to self-determination which was not granted would lead to a right to take up arms. That was not, however, what the sentence under consideration meant. He preferred the words "The provisions of article 20 do not prohibit advocacy of ..." to the words "The provisions of article 20 do not in any way prejudice the sovereign right...". What was at issue was the interpretation to be given to the laws which the Committee claimed were necessary. In his opinion, someone who immediately advocated the taking up of arms or national, racial or religious hatred did not fall within the exemption provided for in the sentence now under discussion, which meant only that persons advocating self-defence and self-determination and independence should not be considered to be advocating war or national, racial or religious hatred. The original wording should therefore be retained".⁷⁶

⁷⁵ See ch.5 above.

⁷⁶ Ibid., prs.17-18. Mr.Tomuschat was prepared to accept this interpretation of the text, *ibid.*, pr.22, but Sir Vincent-Evans, "could not share the view that
(Footnote Continued)

12.23 Professor Tomuschat suggested amending the sentence to read,

"Advocacy of the sovereign right of self-defence or of the right of all peoples to self-determination cannot as such be interpreted as being prohibited by the provisions of article 20".⁷⁷

However, it was objected that the wording was,

"unacceptable and illogical because it was obvious that the authors of the Covenant had not drafted an article which would be incompatible with others".⁷⁸

Mr. Bouziri suggested that the words "paragraph 1" should be inserted after the words "article 20" so as to avoid any misunderstanding.⁷⁹ Sir Vincent-Evans argued that the proposal only solved half of the difficulties because the continued reference to article 20, paragraph 1, still rendered the sentence unacceptable.⁸⁰ It is important to note, however, that the text finally adopted does refer only to article 20, paragraph 1.⁸¹

12.24 In the light of the protracted discussions over the proposed draft sentence it was suggested that the final solution might have to be recourse to a footnote in which the minority could express its position or a

(Footnote Continued)

the sentence should be adopted on the basis of an interpretation of its meaning expressed in the course of the meeting. General comments were formulated for the benefit of those who were not members of the Committee and it was therefore essential to clarify the text", *ibid.*, pr.25.

⁷⁷ *Ibid.*, pr.36.

⁷⁸ *Ibid.*, pr.39 (Aguilar).

⁷⁹ SR 454 pr.12.

⁸⁰ *Ibid.*, pr.17.

⁸¹ See pr.12.25 below.

summary of the Committee's discussions.⁸² However, the members continued to search for a text which would command a consensus because resort to a footnote would represent a "confus[ing]"⁸³ and "unfortunate"⁸⁴ precedent and

"would put the Committee in a difficult position, since it implied, a contrario, that the sentence to which it referred endorsed violence and terrorism. If it was published as it stood, it would have to be accompanied by a counter-reservation, which would be ridiculous".⁸⁵

Ultimately an acceptable text was achieved by adopting the suggestion of the Chairman that,

"the latter half of the sentence was qualified by adding, at the end of the sentence, the time-honoured phrase "in accordance with the Charter of the United Nations", the Charter of the United Nations being the primary document in international law, which had been universally accepted. That still left the phrase in the United Nations Charter open to interpretation, but would keep the Committee's comments within the language of the United Nations".⁸⁶

12.25 The text finally adopted then reads,

"The provisions of article 20, paragraph 1, do not prohibit advocacy of the sovereign right to

⁸² See SR 451 pr.46 (Vincent-Evans), SR 454 prs.38 (Vincent-Evans), 39 (Bouziri).

⁸³ SR 451 pr.49 (Hanga).

⁸⁴ Ibid., pr.52 (Bouziri).

⁸⁵ SR 454 pr.43 (Aguilar). See also SR 454 pr.58 (Movchan).

⁸⁶ SR 457 pr.1. Both the 1970 Declaration and the 1974 Resolution on Aggression, n.1 above, also confirm the supremacy of the U.N. Charter.

self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations".⁸⁷

We have already noted in chapter five that there is disagreement between States on the permissibility of using force to assist in the attaining of self-determination.⁸⁸

12.26 The General Comment on article 20 concludes by joining two draft sentences, slightly amended,

"For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation. The Committee therefore believes that States parties which have not yet done so should take the measures necessary to fulfil the obligations contained in article 20, (and should themselves refrain from any such propaganda or advocacy)".⁸⁹

The Committee's discussion of the first sentence above raised one point of interest. Mr. Ermacora objected to the reference to "sanctions" because the Committee was exceeding its powers and was not authorized by the Covenant to appeal to States as it was doing.⁹⁰ He commented that the question of something declared unlawful being free from sanction,

"raised the whole position of the Covenant in domestic law. The draft comment represented merely an intellectual exercise undertaken by the Committee and, in his country's case at any rate, a

⁸⁷ G.C.11(19), n.5 above, pr.2.

⁸⁸ See ch.5, pr.5.19 above.

⁸⁹ Ibid.

⁹⁰ SR 451 prs.70, 76.

government was entirely free to adopt it or not do so".⁹¹

Mr. Opsahl had agreed that the choice of sanctions was at the discretion of the State party but he posited the role of the Committee in more positive terms,

"Even an imperfect law would be in accordance with the Covenant. The Committee was, however, fully entitled to express its opinion that for "effective" implementation of the article some kind of sanctions were necessary. There were other types of sanction in addition to those Mr. Errera mentioned,⁹² such as censorship or prohibition of the publication of certain newspapers. He was not himself advocating such methods, but indicating that they were possible. The Committee should not specify the type of sanctions in its text but should state that countries' reports should indicate that some did exist".⁹³

The final text adopted retained the reference to "an appropriate sanction". The final phrase of the last sentence, in parenthesis above, was added to the draft text introduces at the eighteenth session and adopted without any discussion in the plenary Committee.

⁹¹ Ibid., pr.85.

⁹² "Mr. Errera pointed out that in most countries if conduct was prohibited by law those engaging in such conduct were normally liable to sanctions. The latter might take the form of a fine or the obligation to recompense the victim", SR 451 pr.65.

⁹³ Ibid., pr.71 (my emphasis). On imperfect laws see Albert v. Lavin [1982] A.C. 546 (H.L.).

Article 20 Under The Optional Protocol.

12.27 Article 20 has only been dealt with in one admissibility decision, J.R.T. and W.G. Party v. Canada.⁹⁴ Mr.T and the Party has used tape-recorded messages linked to the Bell Telephone system in Toronto to attract membership and promote the Party's policies. A member of the public could listen to the messages by dialling the relevant telephone number. The basic content of the recorded messages was to warn, "of the dangers of international finance and international Jewry leading the world into wars, unemployment and inflation and the collapse of world values and principles".⁹⁵

12.28 By application of sections 3 and 13 (1) of the Canadian Human Rights Act 1978 the telephone service of the Party and Mr.T were severely curtailed. The Party and Mr.T claimed to be victims of the right to hold and maintain their opinions without interference in violation of article 19 (1) of the Covenant, and the right to freedom of expression and of the right to seek, receive and impart information and ideas of all kinds through the media of their choice, in violation of article 19 (2) of the Covenant.⁹⁶

12.29 Pursuant to section 7 of the Post Office Act (Canada), which forbids the transmission of "scurrilous material", Mr.T has also, since May 1965, been proscribed from receiving or sending any mail in Canada. Mr.T claimed that this violated article 19.⁹⁷ The State party submitted, inter alia, that the impugned

⁹⁴ Doc.A/38/40 p.231.

⁹⁵ Ibid., pr.2.1.

⁹⁶ Ibid., pr.1.

⁹⁷ In its objections to the admissibility of the communication the State party noted the possible relevance of article 17 of the Covenant, *ibid.*, pr.6.3. See the General Comment on article 17, Doc.CCPR/C/21/Add.6, pr.8.

provisions did not contravene the Covenant but in fact gave effect to article 20(2).⁹⁸

12.30 In respect of the alleged violations of article 19 (1) and (2) by application of the Canadian Human Rights Act the HRC was of the opinion that,

"[T]he opinions which Mr.T seeks to disseminate through the telephone system clearly constitute the advocacy of racial or religious hatred which Canada has an obligation under article 20 (2) of the Covenant to prohibit. In the Committee's opinion, therefore, the communication is, in respect of this claim, incompatible with the provisions of the Covenant, within the meaning of article 3 of the Optional Protocol".⁹⁹

The HRC's decision appears to be a logical one. As submitted above articles 19 and 20 must be interpreted consistently with each other.¹⁰⁰ A prohibition established in accordance with the terms of article 20 cannot found a violation of article 19.

12.31 In respect of the possible violations of article 17 and 19 by application of the Post Office Act (Canada) the HRC accepted that,

"[T]he broad scope of the prohibitory order, extending as it does to all mail, whether sent or received, raises a question of compatibility with articles 17 and 19 of the Covenant".¹⁰¹

⁹⁸ Ibid., pr.6.2.

⁹⁹ Ibid., pr.8 at (b). On article 3 of the O.P. see ch.4, prs.4.44-4.86 above. On the subsequent proceedings in Canada see Re Taylor et al. And Canadian Human Rights Commission et al, 37 DLR (4th) 577 (1987): s.13(1) of the Canadian Human Rights Act a reasonable limit on the freedom of expression guaranteed in section 2(b) of the Canadian Charter of Human Rights And Freedoms.

¹⁰⁰ See pr.12.17 above. See also pr.12.9 above on war propaganda (Canada).

¹⁰¹ Ibid., pr.8 at (c).

However, this claim was held inadmissible for failure to comply with domestic remedies (article 5(2)(b) O.P.).¹⁰²

102 Ibid.

Article 20: APPRAISAL.

12.32 This examination of the HRC's work under article 20, in particular on its general comment, has revealed a number of interesting aspects of the workings of the HRC. The drawing up of general comments under article 40(4) ICCPR represents important opportunities for the HRC to consider the general and specific principles applicable in respect of each of the articles of the ICCPR, the problems and difficulties that have arisen during the consideration of State reports, and the relationship between the different rights in the ICCPR. The general comments produced form an important reference point both during the consideration of State reports under article 40¹⁰³ and the consideration of communications under the Optional Protocol.¹⁰⁴

12.33 The general comment under article 20 took over three years of discussion to produce. Relatively little of that discussion took place in the plenary Committee in public. Publication of the summary records of the Working Group meetings and the various draft texts could usefully aid the understanding of how the final version developed and is to be interpreted. The discussion in the HRC displayed interesting and often conflicting perspectives on article 20. The HRC also exhibited a strong desire to maintain the practice of consensus decision making.¹⁰⁵ Members have recognised the importance of the general comments being clear, purposive and of assistance to States parties in implementing the ICCPR. The standard by which general comments must be judged has thus been established by the HRC and an assessment is possible of whether consensus

¹⁰³ See ch.3 above.

¹⁰⁴ See ch.4 above.

¹⁰⁵ See ch.2, pr.2.7 above.

has served to increase or diminish the usefulness of the general comment on article 20.

12.34 The general comment on article 20 does contain a number of positive and noteworthy aspects including the stress on the immediacy of the obligation,¹⁰⁶ the compatibility of articles 19 and 20,¹⁰⁷ the reference to "all forms of propaganda",¹⁰⁸ the "internal" and "external" application of article 20¹⁰⁹ and the need for an "appropriate sanction" before article 20 can become "fully effective".¹¹⁰ However, a number of difficulties remain. The meaning of "war" and "propaganda" remain ambiguous and uncertain and it may well be that article 20 will eventually need some added definition.¹¹¹ The difficulties raised concerning the relationship between propaganda, the use of violence or force, and self-determination and independence were ultimately avoided only by an ambiguous reference to the United Nations Charter.¹¹² Members anticipated that their subsequent consideration of a general comment on article 1 (self-determination) would resurrect some of these problems. In fact, as we have seen, the comment on article 1 was adopted with relatively little difficulty.¹¹³

¹⁰⁶ See pr.12.4 above.

¹⁰⁷ See pr.12.17 above. That compatibility is also evident in the HRC's only decision on article 20 under the O.P., see prs.12.27-12.31 above.

¹⁰⁸ See pr.12.18 above.

¹⁰⁹ See pr.12.18 above.

¹¹⁰ See pr.12.26 above.

¹¹¹ See prs.12.5, 12.8 and 12.18 above.

¹¹² See prs.12.19-12.25 above.

¹¹³ See ch.5 above.

CHAPTER 13: APPRAISAL AND PROSPECTUS.

13.1 A little more than a decade is too short a period in which to fully evaluate the activities of the HRC under the Covenant. It is long enough, however, to permit an interim evaluation of the effectiveness of the HRC's work. On the basis of that evaluation it is possible to offer some general observations and assess the prospects for the work of the HRC. This assessment must be read in conjunction with the comments and appraisals contained in the foregoing chapters.

13.2 In chapter 1 we traced the development of the International Bill Of Rights from the vision of its role in a new post-war world order through the reality of the confrontations of the Cold War.¹ The long gestation period permitted a more universal input in the international Covenants as the community of States expanded in the era of decolonization. In appraising the significance of the Covenant it was submitted that the signally important feature of the Covenant is that it is a universal instrument which contains binding legal obligations for the States parties to it.² Further significant features of the Covenant to which attention was drawn are that it clearly protects aliens and stateless persons as well as nationals;³ that some of its provisions may reflect, or contribute significantly to the development of, customary international law;⁴ the use of the Covenant in domestic law;⁵ its adoption as a basic standard of international human rights by

¹ See ch.1, prs.1.1-1.15 above.

² Ibid., pr.1.34.

³ Ibid., pr.1.35.

⁴ Ibid., pr.1.36.

⁵ Ibid., pr.1.37.

international, regional and national institutions; and its role as a stimulus or model for new international instruments.⁶ In the long term this last feature may prove to be the most enduring achievement and the Covenant (together with the Covenant on economic, social and cultural rights) may come to replace the Universal Declaration Of Human Rights as the "common standard of achievement for all peoples and all nations".⁷

13.3 The Human Rights Committee had survived the drafting process to become the central international implementation body for the Covenant.⁸ In chapter 2 we examined its basic institutional characteristics. It was submitted that its independent nature was of fundamental importance and that in practice members of the HRC have appeared to operate as independent experts.⁹ The HRC has managed to establish itself as an impartial and highly respected human rights organ, despite a dearth of publicity, and developed a constructive consensus practice.¹⁰ Attention was also drawn to the increasingly important role of the Secretariat in the work of the HRC¹¹, and the strong administrative and financial links between the HRC and the United Nations.¹²

⁶ Ibid., pr.1.38.

⁷ Preamble to the Universal Declaration of Human Rights (1948).

⁸ See ch.1, pr.1.12.

⁹ See ch.2, prs.2.2-2.4, 2.18-2.19 above.

¹⁰ See ch.2, pr.2.7-2.8 and ch.3, pr.3.40 above. It was also noted that the HRC has provided a model for the new United Nations Committee On Economic, Social And Cultural Rights on which see ch.2, n.38 above.

¹¹ Ibid., prs.2.16-2.17.

¹² Ibid., prs.2.18-2.19.

It was further submitted that the nature of the HRC alters in accordance with its exercise of the various functions and roles it performs or could perform.¹³

13.4 Chapter 3 examined the practices and procedures under the reporting system. Attention was drawn to its limitations and the difficulties encountered. These included inadequate guidelines for the preparation of reports;¹⁴ inadequate and incomplete reports which do not deal with the realities of the human rights situations in the States concerned;¹⁵ the absence of procedures to determine the adequacy of the reports submitted; delays in the submission of State reports;¹⁶ the absence of agreement on procedures for requesting reports under article 40(1)(b) "whenever the Committee so requests";¹⁷ the absence of any formal role for specialized agencies or non-governmental organizations in the reporting procedure;¹⁸ the duplication of questions and the pressures placed on State representatives;¹⁹ the absence of any clear "Committee view" of the human rights performance in a particular State;²⁰ the disagreement within the HRC on the interpretation of the HRC's jurisdiction under article 40 which has resulted in no country specific reports or

¹³ Ibid., pr.2.22.

¹⁴ Ibid.

¹⁵ See ch.3, prs.3.4, 3.11 above.

¹⁶ Ibid., prs.3.7, 3.9, 3.10.

¹⁷ Ibid., prs.3.8-3.8.1.

¹⁸ Ibid., prs.3.12-3.18.

¹⁹ Ibid., pr.3.23.

²⁰ Ibid., pr.3.24.

country specific general comments;²¹ and the limited roles played by ECOSOC,²² and the General Assembly.²³

13.5 However, it was also possible to point to some successes. These include the establishment of a procedure applicable to 87 States (as of 1 May 1988) from all geographical regions of the world, the "constructive dialogue" with each State party with regard to the practical and effective implementation of the Covenant,²⁴ the maintaining of consensus in the application of those procedures,²⁵ the establishment of a realistic five year reporting period,²⁶ the establishment of a possible precedent for action on article 40 (1)(b) in the request for specific information from El Salvador,²⁷ the establishment of a series of gradual responses aimed at securing the submission of reports,²⁸ that most of the State reports are eventually submitted,²⁹ the consistent use by a substantial number of the members of the HRC of information outside that contained in the State reports,³⁰ that the HRC has eventually obtaining the presence of a State representative (and usually a small

²¹ Ibid., prs.3.29-3.38.

²² Ibid., pr.3.39.

²³ Ibid., pr.3.40.

²⁴ See ch.3, prs.3.3, 3.19-3.21 above.

²⁵ See ch.2, pr.2.7 on consensus and ch.3, pr.3.5 on the HRC's "Consensus Statement".

²⁶ See ch.3, prs.3.6, 3.46 above.

²⁷ See ch.3, prs.3.8.1, 3.47 above.

²⁸ Ibid., prs.3.9, 3.10.

²⁹ Ibid.

³⁰ Ibid., prs.3.17-3.18.

number of high quality) from every State party,³¹ the development of a more rationalized and efficient procedure for the consideration of second periodic reports,³² and the adoption of sixteen general comments (as of 1 July 1988) of varying quality and usefulness.³³ On balance it was submitted that, "the reporting procedure has been developed into a much more useful procedure of international implementation (in the broad sense) than could confidently have been predicted when the Covenant was adopted in 1966".³⁴ That appraisal is given further support in chapters 5-12 which examine the approach of the HRC to selected articles of the Covenant.³⁵

13.6 Overall, despite its acknowledged limitations, the reporting system presents a serious and formidable challenge to States parties and many of them have responded positively. No State or geographical region has been excepted from a detailed critique and appraisal and it is evident from the summary records that all States have been found wanting in various degrees. In effect the procedure obliges States to systematically and periodically appraise and explain their human rights performance. Such appraisal and examination can only be healthy even for States with an acknowledged record of respect for human rights.

13.7 Chapter 4 examined the practices and procedures of the HRC under the Optional Protocol. It was submitted that the O.P. represents another important advance in

³¹ Ibid., prs.3.19, 3.22.

³² Ibid., prs.3.25-3.28.

³³ Ibid., pr.3.35. The specific terms of the general comments are analyzed in chs.3-12 above.

³⁴ Ibid., pr.3.52 above.

³⁵ See also prs.13.9-13.17 below.

terms of the status of the individual in international law.³⁶ Attention was drawn to some of the advantageous characteristics of the O.P. procedure. These include the independent nature of the HRC, the secure treaty basis of the O.P., the defined legal norms established by the Covenant, the avoidance of "pre-judging" resolutions, political selectivity and alleged double standards.³⁷ Subsequent sections analysed the practices and procedures developed by the HRC and many aspects of its work were commented upon favourably.³⁸ It was noted that compliance with the HRC's views has been disappointing although some States have shown both a willingness to cooperate with the HRC and give effect to its views.³⁹ The most disappointing feature of the practice under the O.P. has perhaps been the limited number of communications.⁴⁰ Although other procedures of international investigation and settlement undoubtedly siphon off a substantial number of potential communications the most probable explanation is simply that the Optional Protocol procedure is not known to national lawyers and advisors in the States parties concerned. There is clearly a need for much better and wider publicity for the Optional Protocol procedure.

13.8 In the appraisal it was submitted that the HRC have fashioned a practicable and functional procedure that has the potential to develop into an effective counterpart on the universal level to the established regional systems.⁴¹ It was also submitted that a long

³⁶ See ch.4, pr.4.119 above.

³⁷ Ibid., pr.4.120.

³⁸ Ibid., prs.4.9-4.118.

³⁹ Ibid., prs.4.127-4.133.

⁴⁰ Ibid., pr.4.8.

⁴¹ Ibid., pr.4.126 above.

term view must be taken and in that perspective it is important to keep the Protocol alive and functioning.⁴²

13.9 Chapters 5-12 reviewed the work of the HRC by examining its approach to selected rights under the reporting and individual communications systems respectively. Each of those chapters contains specific comments and criticisms on the various approaches taken and issues dealt with by the HRC and concludes with a general appraisal. However, it is useful to highlight some of the key features noted and some of the principal submissions made.

13.10 Chapter 5 (article 1 - Self-Determination): Although the inclusion of article 1 in the Covenant was controversial⁴³ the HRC recognized that self-determination is an, "essential condition for the effective guarantee and observance of individual rights and for the promotion and strengthening of those rights".⁴⁴ In their questions and comments HRC members have been very direct and forceful even in the context of national sensitivities, e.g., over secession,⁴⁵ or major current international disputes.⁴⁶ However, the general comment on article 1 was criticised as being vague and uninformative.⁴⁷

13.11 Chapter 6 (article 2 - General obligation): The HRC clearly established that it was for each State party to determine exactly how it implemented the terms of the

⁴² Ibid., pr.4.133.

⁴³ See ch.1, prs.1.22-1.24 and ch.5, pr.5.2 above.

⁴⁴ See ch.5, prs.5.3, 5.5 above.

⁴⁵ Ibid., prs.5.6-5.7.

⁴⁶ Ibid., pr.5.15.

⁴⁷ Ibid., pr.5.24.

Covenant,⁴⁸ that the primary focus of its attention was on the "national implementation" of the provisions of the Covenant,⁴⁹ and that the obligation to implement was essentially an immediate one although the HRC have taken a realistic approach and been sympathetic to States with genuine difficulties in implementing the provisions of the Covenant.⁵⁰ In the general comment on article 2 the HRC also clearly stated that the Covenant places positive obligations on States parties that call for "specific activities" and "affirmative action".⁵¹ The statement of positive obligations is also repeated in a number of the general comments adopted by the HRC.⁵² The HRC also stressed the fundamental importance of "effective remedies" for alleged victims of violations of the Covenant,⁵³ a theme echoed in the subsequent chapters,⁵⁴ and the importance of publicizing the terms of the Covenant.⁵⁵

13.12 Chapter 7 (article 4 - Derogation Provision): It was observed that the HRC has refused to simply accept the sovereign determinations of States parties in the context of public emergencies and has assumed some degree of international supervision over compliance with the requirements of article 4 with the onus of proof being placed heavily on the derogating State.⁵⁶ The

⁴⁸ See ch.6, pr.6.3 above.

⁴⁹ Ibid., pr.6.9.

⁵⁰ Ibid., pr.6.11.

⁵¹ Ibid., pr.6.12.

⁵² See e.g., ch.8, prs.8.3-8.4 above on article 6.

⁵³ See ch.6, prs.6.21-6.22 above.

⁵⁴ See e.g., text to n.65 below (on article 7).

⁵⁵ Ibid., pr.6.23.

⁵⁶ See in particular ch.7, prs.7.35-7.43 above.

importance attached by the HRC to the notification requirements in article 4(3) eventually drew more response from the States parties concerned.⁵⁷ Chapter 7 was also used to present a review of the workings of the reporting procedure through a country specific analysis on the United Kingdom.⁵⁸ The absence of a decision by the HRC on its jurisdiction under article 40(1)(b) to request a report is particularly acute in the derogation context.⁵⁹

13.13 Chapter 8 (article 6 - The Right To Life): The HRC stated that the right to life is the "supreme right".⁶⁰ A much wider interpretation has been given to the right to life than might have been expected including such matters as infant mortality, malnutrition and public health schemes.⁶¹ The importance attached by the HRC to the right to life is also attested to by the fact that it has been the subject of two general comments. The second of those aroused controversy by its statement that, "[t]he production, testing, possession, deployment and use of nuclear weapons should be prohibited as crimes against humanity".⁶² Chapter 8 also served as an excellent example of the way in which decisions and views under the Optional Protocol can offer authoritative interpretations of the terms of the Covenant.⁶³

⁵⁷ Ibid., prs.7.19-7.22.

⁵⁸ Ibid., prs.7.23-7.34.

⁵⁹ See ch.3, prs.3.8-3.8.1 and ch.7, pr.7.48 above.

⁶⁰ See ch.8, pr.8.2 above.

⁶¹ Ibid., pr.8.3-8.4, 8.27-8.28.

⁶² Ibid., pr.8.12.

⁶³ Ibid., prs.8.14-8.26.

13.14 Chapter 9 (articles 7 and 10(1) - Ill Treatment, Deprivation Of Liberty): The HRC stated that it was of vital importance to establishing some "domestic machinery of control" through procedural safeguards and stressed the need for effective remedies.⁶⁴ The chapter also served to illustrate the deficiencies in the presentation of the decisions and views of the HRC under the Optional Protocol.⁶⁵ For the future it will be interesting to watch the development of the relationship between the work of the HRC in this area and that of the institutions established under the new regional and universal conventions on torture and other ill-treatment, in particular the work of the new United Nations Committee Against Torture.⁶⁶

13.15 Chapter 10 (article 14 - Fair Trial): The extensive coverage of article 14 attracted a great deal of attention from HRC members and a lengthy general comment. Again that chapter serves as an excellent illustration of the searching dissection and analysis under the reporting procedure of the laws and practices of States parties and how the reporting and communications procedures can interact and feed off each other.⁶⁷ Similarly, it illustrates how key interpretations in views under the O.P., for example, on the expression "suit at law", will inevitably have implications for the reporting procedure.⁶⁸

13.16 Chapter 11 (article 19 - Freedom Of Opinion And Expression): We noted the concern expressed at specific

⁶⁴ See ch.9, prs.9.4-9.4.1 above.

⁶⁵ Ibid., prs.9.12-9.12.3.

⁶⁶ Ibid., prs.9.30-9.31.

⁶⁷ See ch.10, prs.10.58-10.60 above.

⁶⁸ Ibid., prs.10.26-10.26.1.

ideological conceptions of freedom of expression,⁶⁹ and the introduction of the doctrine of the "margin of discretion" which has played an important role in the jurisprudence under the European Convention on Human Rights.⁷⁰ It was submitted that the HRC's general comment on article 19 was somewhat disappointing.⁷¹

13.17 Chapter 12 (Article 20 - War Propaganda, Advocacy Of National, Racial Or Religious Hatred): It was observed that the inclusion of article 20 was controversial and it has been the subject of a number of reservations.⁷² The statement of the HRC on the compatibility of articles 19 and 20 may go some way to relieving the fears of the States making such reservations.⁷³ In chapter 12 we also took the opportunity to examine the development of a general comment. This served to demonstrate the importance attached by the HRC to its general comments and the compromises and accommodations necessary to reach a consensus text.⁷⁴ The general comment produced was accorded a mixed reception.⁷⁵

13.18 Having evaluated and appraised the work of the HRC it is appropriate to make some general recommendations for its future work. First and foremost, more States should ratify or accede to the Covenant and the Protocol. The rate of new States parties has substantially declined. In particular strong pressure

⁶⁹ See ch.11, pr.11.6.1 above.

⁷⁰ Ibid., prs.11.19-11.19.2.

⁷¹ Ibid., pr.11.22.

⁷² See ch.12, prs.12.2, 12.6 above.

⁷³ Ibid., prs.12.6-12.8.

⁷⁴ Ibid., prs.12.13-12.26.

⁷⁵ Ibid., prs.12.33-12.34.

should be exerted on the United States and China to become parties.⁷⁶ States parties should improve the publicity given to the Covenant and the Protocol and their national reports under the Covenant. They should also provide a full account of the examination of their reports by the HRC.⁷⁷ When States reports are being considered the presence of ministers or senior representatives from the key domestic departments concerned would substantially assist the proper examination of State reports and practice. Similarly national and international non-governmental organizations, education institutions and specific interest bodies have an important role to play in publicizing the terms and procedures of the Covenant and the Protocol.⁷⁸ The general comments adopted by the HRC have contained some useful elements. The HRC must continue to develop them so as to produce comments that are practically relevant and comprehensible to national administrators, executives and other authorities. Recent work by non-governmental bodies has produced excellent texts on various aspects of the HRC's work, for example, the Siracusa Principles.⁷⁹ Those texts provide a precedent for how the general comments could be developed.

⁷⁶ On the U.S. position see ch.1, pr.1.25 above. It is understood that the question of ratification of the Covenant has the lowest level of priority in the United States. It is known that Chinese representatives have observed the work of the HRC.

⁷⁷ See Tomushcat, ch.6, n.1 above, (1984-85), p.60.

⁷⁸ When the reports of Sri Lanka were being considered by the HRC a collection of artwork by Sri Lankan schoolchildren on the theme of human rights was displayed outside the HRC's meeting room. A number of HRC members commended such educational initiatives by States.

⁷⁹ See ch.7, n.1 above (1985).

13.19 Discussion of general comments inevitably raises the controversy over whether the HRC has jurisdiction under article 40(4) to issue general comments addressed to specific countries and, in turn, specific reports on the human rights performance of States parties. It is undoubtedly the case that such country specific comments and reports would be more potent weapons in securing the implementation of the Covenant. However, there is a strong argument that the HRC was sensible in its early years to move cautiously and develop and refine its procedures. Such an approach has allowed it to gain the confidence and respect of States parties. Country specific comments and reports which alienated the States parties, divided the HRC and politicized its proceedings would have achieved little in the long term. So, for the present, the balance of the case is probably in favour of the approach taken to date but it must be accompanied by increased publicity and far greater non-governmental involvement at the national and international level. It should also be borne in mind that that HRC have not closed the door on country specific comments and reports.⁸⁰ Such a development could prove possible if the HRC ultimately found that even with continued development and refinement its present procedures and general comments were not proving effective.⁸¹ More generally there is a strong case for rationalization of the international reporting obligations of States. In any such rationalization the positive achievements of

⁸⁰ See ch.3, prs.3.29-3.38 above.

⁸¹ Cf. The fascinating development of the procedures by the Human Rights Commission for considering complaints of human rights violations, see H.Tolley, *The United Nations Human Rights Commission*, chs.2-4, (1987).

the HRC's work should not be undermined,⁸² provision should be made for more substantial remuneration for the HRC members,⁸³ and the United Nations Human Rights Secretariat must be properly funded to provide an effective and more wide-ranging support service.⁸⁴

13.20 It is very difficult to provide positive evidence that the existence of the Covenant and the work of the HRC is having any concrete and positive effect on the human rights position in the States parties. However, many of the State representatives that have appeared before the HRC have stated that the Covenant and the work of the HRC have played an important role at the national level. It would be immensely helpful if the HRC could catalogue and reproduce those claims together with any more specific evidence of wholesale or partial national reviews of the implementation of the Covenant and of account being taken of the Covenant and the HRC, for example, in legislative assemblies, executive decision making, judicial or administrative decisions.⁸⁵

⁸² See generally L.Sohn, Human Rights: Their Implementation And Supervision By The United Nations, in T.Meron, ed., Human Rights In International Law - Legal and Policy Issues, pp.369-40, (1984).

⁸³ See ch.2, pr.2.2 above.

⁸⁴ On the HRC and the Secretariat see ch.2, prs.2.16-217 above. The failure of the U.N. to renew the contract of Mr. Van Boven as Director of then Human Rights Division and the cancellation of sessions of human rights organs suggest that human rights are still not accorded the necessary priority within the United Nations system. The commitment of the individual members of the Secretariat is evident to any observer but resources are not made available to match that commitment

⁸⁵ For example the Iraqi State representative stated that the Covenant was taken into account in rejecting a draft bill and that numerous cases could be noted where provisions of Covenant had been invoked before Iraqi courts, SR 744 pr.37. In his concluding
(Footnote Continued)

13.21 In the words of Louis Henkin, "Human rights is the idea of our time".⁸⁶ From a different perspective Richard Ulman has commented that, "No time is ever really good for human rights...But some times are worse than others".⁸⁷ Human rights are being subjected to increasingly sophisticated analysis from various disciplines including lawyers,⁸⁸ philosophers,⁸⁹ political scientists and international relations experts,⁹⁰ and social scientists concerned with

(Footnote Continued)

comments the U.K. state representative stated that, "he had noted the suggestion that his Government might attempt a detailed analysis of the covenant and how the various articles were being implemented in law and practice in the United Kingdom. Such a study had in fact been undertaken at the time the Covenant had been signed. Since then circumstances had changed, as also had ideas regarding the interpretation of the Covenant itself. The time might therefore have arrived to make a further study", SR 598 pr.35.

⁸⁶ L.Henkin, Introduction, to L.Henkin, ed., The International Bill Of Rights - The Covenant On Civil And Political Rights, p.1, (1981).

⁸⁷ R.H.Ulman, Introduction: Human Rights - Toward International Action, in J.Dominguez et al, Enhancing Global Human Rights, p.1, (1979).

⁸⁸ See P.Sieghart, The International Law Of Human Rights, (1983); M.McDougal, H.Lasswell and L.C.Chen, Human Rights And World Public Order, (1980)

⁸⁹ For recent contributions see J.Donnelly, The Concept Of Human Rights, (1985); J.W.Nickel, Making Sense Of Human Rights, (1987).

⁹⁰ For notable recent contributions see H.Shue, Basic Rights: Subsistence, Affluence And United States
(Footnote Continued)

evaluating human rights performance.⁹¹ The function of the HRC has been much less esoteric but of no less importance. The HRC was charged with giving life to the structures and mechanisms of the Covenant and the Protocol and meaning to its language. The primary purposes of this thesis have been to determine and evaluate the nature of the HRC and assess its contribution to the development of the "idea of our time" and to bringing closer a time of improved respect for human rights.⁹² It is submitted that, on the basis of the evidence presented in the foregoing chapters, its contribution has been substantial, positive and constructive.⁹³

(Footnote Continued)

Foreign Policy, (1980); R.J.Vincent, Human Rights And International Relations, (1987).

⁹¹ See J.Dominguez et al, n.88 above; McDougal, Lasswell and Chen, n.89 above; Symposium, Stastical Issues In The Field Of Human Rights, 8 HRQ (1985) Part I; J.Donnelly and R.E.Howard, eds., International Handbook Of Human Rights, (1987).

⁹² See notes 87-88 above.

⁹³ For similarly positive assessments of the HRC see Brar, ch.1, n.1 above, 229-232; Ahmed, ch.4, n.1 above, pp.204-208; Fischer, ch.3, n.1 above, (1982), p.153; Nowak, ch.3, n.1 above, (1980), pp.169-170; Jhabvala, ch.3, n.1 above, (1984), pp.104-106.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.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 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 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 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 only be imposed 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 shall 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 sentence. Amnesty, pardon or commutation 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.

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 to 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 sub-paragraph (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 civic 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 the 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 the 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 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 a 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 recognised 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 this 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 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 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 Organise to take legislative

measures which would prejudice, or 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 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.

PART IV

Article 28.

1. There shall be established a Human Rights Committee (hereinafter 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 State 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 the 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 recognises 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 recognising in regard of 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 to 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 State Parties concerned within six months after the receipt of 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 sub-paragraph (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 sub-paragraph (b), to supply any relevant information.

(g) The States Parties concerned, referred to in sub-paragraph (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 sub-paragraph (b), submit a report:

(i) If a solution within the terms of sub-paragraph (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 sub-paragraph (e) is not reached, the Committee shall confine its reports 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 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 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 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 of 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 recognised 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 sub-paragraph (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 sub-paragraph (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 specialised 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 or 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 State 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 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 1 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.

APPENDIX II.THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS.

The States Parties to the present Protocol,

Considering that in order further to achieve the purposes of the 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 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 have 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 specialised 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 accessions 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 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 1, 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.

Model Communication Under The Optional Protocol.

Communication To:

The Human Rights Committee
c/o Centre For Human Rights
United Nations Office,
Geneva (Switzerland).

Date:

Submitted for consideration under the Optional
Protocol to the International Covenant on civil and
Political Rights.

I. Information Concerning The Author Of The
Communication.

Name

First Name(s)

Nationality

Profession

Date and place of birth

Present Address

Address for exchange of confidential correspondence (if
other than present address):

Submitting the communication as:

- (a) victim of the violation or violations set
forth below 1
—
(b) representative of the alleged victim(s) —
(c) other —

If the author is submitting the communication as a
representative of the alleged victims(s) he should
clearly indicate in what capacity he is doing so:

If the author is neither the victim nor his/their
representative, he should clearly indicate:

- (a) his reasons for acting on behalf of the alleged
victim(s)
(b) his reasons for believing that the victim(s) is
(are) unable to submit a communication himself
(themselves):

¹ Mark the appropriate box or boxes.

(c) his reason for believing that the victim(s) would approve the author's acting on his (their) behalf:

II. Information Concerning The Alleged Victim(s).
(If other than Author).²

Name	First Name(s)
Nationality	Profession.
Date and place of birth	
Present address or whereabouts	
Name	First Name(s)
Nationality	Profession.
Date and place of birth	
Present address or whereabouts	
Name	First Name(s)
Nationality	Profession.
Date and place of birth	
Present address or whereabouts	
Name	First Name(s)
Nationality	Profession.
Date and place of birth	
Present address or whereabouts	

III. State Concerned/Articles Violated/Dcmestic Remedies/ Other International Procedures.

Name of the State party (country) to the International Covenant and the Optional Protocol against which the communication is directed.:

Articles of the International Covenant on Civil and Political Rights allegedly violated:

Steps taken by or on behalf of the alleged victim(s) to exhaust domestic remedies (recourse to the courts or other public authorities, when and with what results - if possible, enclose copies of all relevant judicial and administrative decisions:

² List each victim individually and add as many pages as necessary to complete the list of victims.

If domestic remedies have not been exhausted, explain why:

Has the same matter been submitted for examination under another procedure of international investigation or settlement? If so, when and with what results?

IV. Facts of the Claim.

Detailed description of the facts of the alleged violation or violations (including relevant dates).³

³ Add as many pages as needed for this description.

General Comment 15 (27): The Position Of Aliens Under The Covenant.

1. Reports from States parties have often failed to take into account that each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art.2, pr.1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.
2. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art.25), while article 13 applies only to aliens. However, the Committee's experience examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant.
3. A few constitutions provide for equality of aliens with citizens. Some constitutions adopted more recently carefully distinguish fundamental rights that apply to all and those granted to citizens only, and deal with each in detail. In many States, however, the constitutions are drafted in terms of citizens only when granting relevant rights. Legislation and case law may also play an important part in providing for the rights of aliens. The Committee has been informed that in some States fundamental rights, though not guaranteed to aliens by the Constitution or other legislation, will also be extended to them as required by the Covenant. In certain cases, however, there has clearly been a failure to implement the Covenant rights without discrimination in respect of aliens.
4. The Committee considers that in their reports States parties should give attention to the position of aliens, both under their law and in actual practice. The Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate. The position of aliens would thus be considerably improved. States parties should ensure that the provisions of the Covenant and the rights under it are made known to aliens within their jurisdiction.
5. The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arises.
6. Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions

upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the right set out in the Covenant.

7. Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They may not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They shall have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language. Aliens are entitled to equal protection by the law, there shall be no discrimination between aliens and citizens in the application of these rights. These right of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.

8. Once an alien is lawfully within a territory, his freedom of movement within the territory and his right to leave that territory may only be restricted in accordance with article 12, paragraph 3. Differences in treatment in this regard between aliens and nationals, or between different categories of aliens, need to be justified under article 12, paragraph 3. Since such restrictions must, inter alia, be consistent with the other rights recognized in the Covenant, a State party cannot, by restraining an alien or deporting him to a third country, arbitrarily prevent his return to his own country (art.12, pr.4).

9. Many reports have given insufficient information on matters relevant to article 13. That article is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise. If such procedures entail arrest, the safeguards of the Covenant relating to the deprivation of liberty (arts.9 and 10) may also be applicable. If the arrest is for the particular purpose of extradition, other provisions of national law may

apply. Normally an alien who is expelled must be allowed to leave for any country that agrees to take him. The particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permits allow, in particular, are not covered by its provisions. However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13. It is for the competent authorities of the State party, in good faith and in the exercise of their powers, to apply and interpret the domestic law, observing, however, such requirements under the Covenant as equality before the law (art.26).

10. Article 13 directly regulates only the procedures and not the substantive grounds for expulsion. However, by allowing only those carried out "in pursuance of a decision reached in accordance with the law", its purpose is clearly to prevent arbitrary expulsions. On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions. This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when "compelling reasons of national security" so require. Discrimination may not be made between different categories of aliens in the application of article 13.

General Comment 16 (32): Article 17.

1. Article 17 provides for the right of every person to be protected against arbitrary or unlawful interferences with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.

2. In this connection, the Committee wishes to point out that in the reports of States parties to the Covenant the necessary attention is not being given to information concerning the manner in which respect for this right is guaranteed by legislative, administrative or judicial authorities, and in general by the competent organs established by the State. In particular, insufficient attention is paid to the fact that article 17 of the Covenant deals with protection against both unlawful and arbitrary interference. This means that it is precisely in State legislation above all that provision must be made for the protection of the right set forth in that article. At present the reports either say nothing about such legislation or provide insufficient information on the subject.

3. The term "unlawful" means that no interference can take place except in cases envisaged by law. Interference authorized by States can only take place on the basis of law, which must itself comply with the provisions, aims and objectives of the Covenant.

4. The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.

5. Regarding the term "family", the objectives of the Covenant require that for (the) purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned. The term "home" in English, "manzel" in Arabic, "zhuzhai" in Chinese, "domicile" in French, "zhilische" in Russian and "domicilio" in Spanish, as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation. In this connection, the Committee invites States to indicate in their reports the meaning given in their society to the terms "family" and "home".

6. The Committee considers that the reports should include information on the authorities and organs set up within the legal system of the State which are competent to authorize interference allowed by law. It is also indispensable to have information on the authorities

which are entitled to exercise control over such interference with strict regard for the law, and to know in what manner and through which organs persons concerned may complain of a violation of the rights provided for in article 17 of the Covenant. States should in their reports make clear the extent to which actual practice conforms to the law. State party reports should also contain information on complaints lodged in respect of arbitrary or unlawful interference, and the number of any findings in that regard, as well as the remedies provided in such cases.

7. As all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant. Accordingly, the Committee recommends that States should indicate in their reports the laws and regulations that govern authorized interferences with private life.

8. Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, and on a case-by-case basis. Compliance with article 17 requires that the integrity and confidentiality of correspondence should be guaranteed de jure and de facto. Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations should be prohibited. Searches of a person's home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment. So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to a body search by State officials, or medical personnel acting at the request of the state, should only be examined by persons of the same sex.

9. States parties are under a duty themselves not to engage in interferences inconsistent with article 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons.

10. The gathering and holding of personal information on computers, databanks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures must be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to

ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personnel data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination.

11. Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible. States parties should indicate in their reports to what extent the honour or reputation of individuals is protected by law and how this protection is achieved according to their legal system.

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